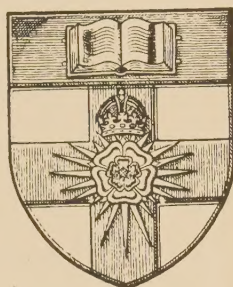


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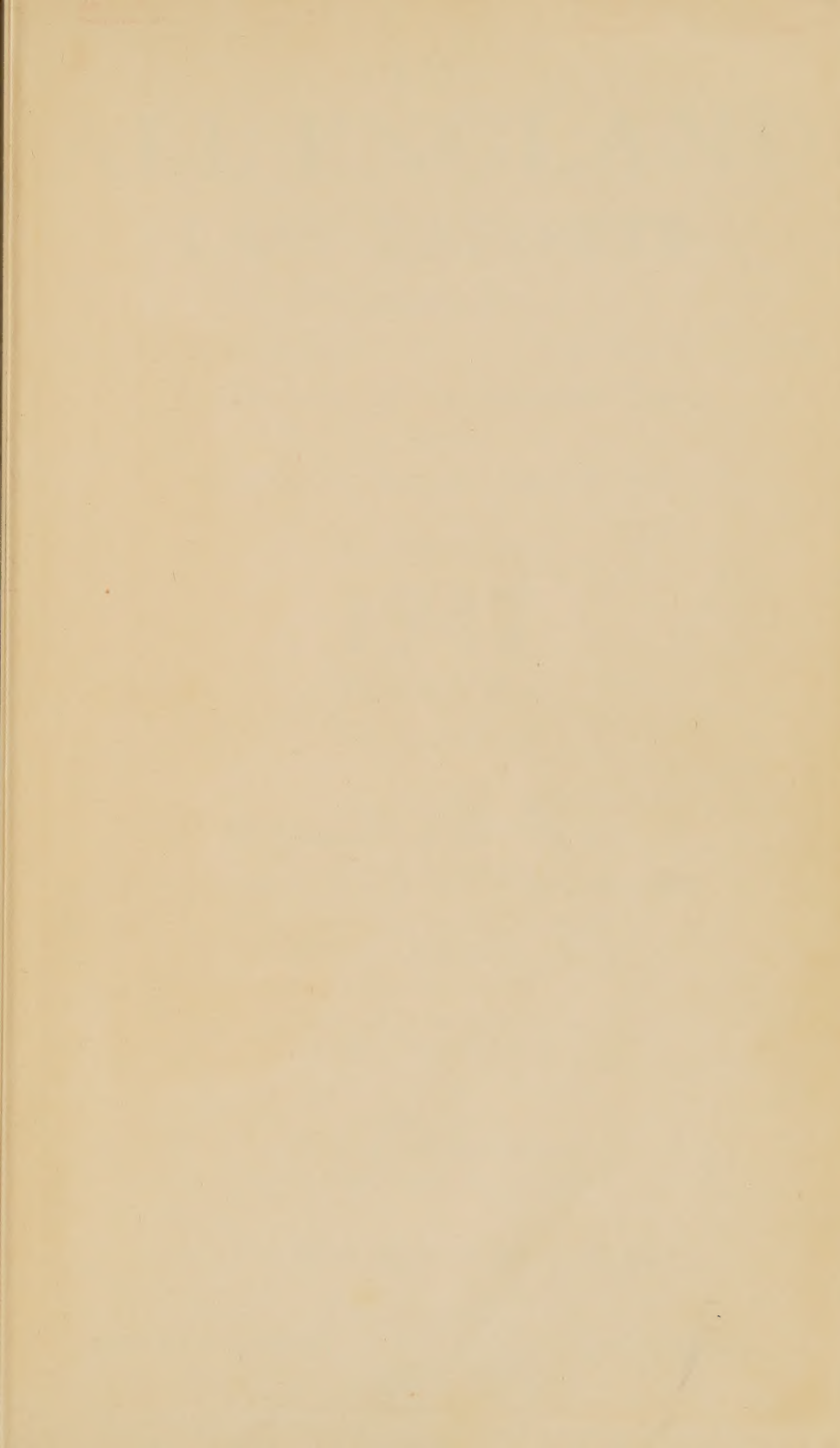
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THE HOUSE OF LORDS THE PRIVY COUNCIL
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AND
COURTS OF SPECIAL JURISDICTION

1947
VOLUME 2

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Published by the Proprietors of
THE LAW JOURNAL, 11 & 12 BELL YARD, TEMPLE BAR,
LONDON, W.C.2.



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CORRIGENDA

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- P. 62. HILL v. HILL. Line E.7: for "[1925] Ch. 120" read "[1925] Ch. 220."
- P. 337. JOHN T. ELLIS v. HINDS. Line C.7: for "aged 17" read "aged *under* 17."
- P. 486. A.-G. v. NORTHWOOD ELECTRIC Co. Line H.1: for the sentence beginning "It is said . . ." as printed read "It is said that it is given notwithstanding the fact that the customer has no right to keep it as against the company, and that there is a waiver of what" etc., as printed.
- P. 613. FRANKLIN v. MINISTER OF TOWN AND COUNTRY PLANNING. Line A.2; for "affirmed" read "*reversed*."
- P. 622. APT v. APT. Line 7: for "transaction" read "*translation*."
- P. 784. MARTIN v. LONDON COUNTY COUNCIL. Line D.3: for "As gratuitous bailee . . ." read "A gratuitous bailee . . ."
- P. 801. INLAND REVENUE COMRS. v. ISLES. Running heading: for "Tucker" read "*Atkinson*."

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- P. 59. BIONDI v. KIRKINGTON AND PICCADILLY ESTATES, LTD. Line G.6: for "plaintiff" read "*defendants*." Line H.2: for "defendants" read "*plaintiff*."
- P. 103. BRANCA v. COBARRO. Line C.5: for "argument" read "*agreement*."
- P. 344. WINTER GARDEN THEATRE (LONDON), LTD. v. MILLENIUM PRODUCTIONS, LTD. Line D.2 and 3: for "the circumstances of the contract" read "the circumstances *or* the contract."
- P. 347. GLASGOW CORPN. v. NEILSON. Line A.1: for "Lord Maclean" read "Lord *Mackay*." P. 349, line H.5: for "who are their fellow servants" read "who are *not* their fellow servants."
- P. 378. MORRIS v. MORRIS, MORRIS AND MANNING. Counsel: for "Petrie" read "*J. H. Moss*."
- P. 438. GINESI v. GINESI. Line G.5: for "probably" read "*properly*."
- P. 655. WOOLFENDEN v. WOOLFENDEN. Solicitors: *Haslewood, Hare & Co.* were agents for *Aston, Harwood & San Garde & Green*, Manchester.
- P. 720. LONDON COUNTY COUNCIL v. SHELLEY. Line G.1: for "ss. 82 (1) . . ." read "ss. *83* (1) . . ."
- P. 745. HASTING v. HASTING. Line D.3: for "under s. 190 (1) to make an order 'on any decree,'" read "under s. 190 (1) to make an order *is* 'on any decree.'"

THE ALL ENGLAND LAW REPORTS

Principle applied. CARTER v. GREEN.
[1950] 1 All E.R. 627.

OAK PROPERTY CO., LTD. v. CHAPMAN AND ANOTHER.

[COURT OF APPEAL (Somervell and Evershed, L.JJ., and Wynn-Parry, J.),
April 29, 30, May 1, 16, 1947.]

Landlord and Tenant—Rent restriction—Possession—Sub-tenancy—Whether premises “lawfully sub-let”—Date of institution of proceedings material date—Breach of tenancy—Waiver by landlord—Acceptance of rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (3).

Before Mar. 1, 1946, the statutory tenant of certain premises sub-let part of them furnished to Mrs. J., and, on Mar. 1, 1946, she sub-let to a sub-tenant the rest of the premises unfurnished without having obtained the landlord's consent as was required under her original lease. It appeared from the evidence that both sub-lettings were intended to be temporary as the tenant expected later to re-occupy the premises. Mrs. J. left the premises sub-let to her on Aug. 1, 1946, and the tenant's furniture was still there on Aug. 20, 1946, when the landlords started proceedings for possession against the tenant and the sub-tenant of the unfurnished letting. The tenant submitted to an order for possession, but the sub-tenant claimed the benefit of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), and contended that the absence of consent to the sub-letting had been waived by the landlords since they had accepted two instalments of rent from the tenant after they had full knowledge of the sub-letting :—

HELD : (i) in determining whether premises were lawfully sub-let for the purposes of s. 15 (3) of the Act of 1920, the relevant facts must be determined at the date of the institution of proceedings; even if the sub-tenancy was ineffectual in law on Mar. 1, 1946, it became effective on Aug. 1, 1946, when the tenant regained actual possession of the remainder of the premises, and it remained effective so long as those conditions existed; and, therefore, on Aug. 20, 1946, the sub-tenant was entitled to the benefit of s. 15 (3), as a person to whom part of the premises had been lawfully sub-let.

Roe v. Russell ([1928] 2 K.B. 117) and *Norman v. Simpson* ([1946] 1 All E.R. 74) applied.

(ii) in the case of a statutory tenancy, the question whether the acceptance of rent by the landlord is an unequivocal act of affirmance of the tenancy is a question of fact for the judge.

Semle : the strict common law rule in regard to a qualified acceptance of rent by a landlord after knowledge of a non-continuing breach of covenant by the tenant entitling him to go to the court is not applicable to a statutory tenancy, and a qualified acceptance of rent from a statutory tenant is not necessarily fatal to a landlord's right to seek an order for possession.

[AS TO POSITION OF SUB-TENANT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 333, 334, para. 399; and FOR CASES, see DIGEST, Vol. 31, p. 576, Nos. 7251-7253.

AS TO WAIVER OF FORFEITURE, see HALSBURY, Hailsham Edn., Vol. 20 pp. 254-257, paras. 287-289; and FOR CASES, see DIGEST, Vol. 31, pp. 497-502, Nos. 6427-6487.]

Cases referred to :

- (1) *Keeves v. Dean, Nunn v. Pellegrini*, [1924] 1 K.B. 685 ; 93 L.J.K.B. 203 ; 130 L.T. 593 ; 31 Digest 576, 7254.
- (2) *Lovibond (John) & Sons, Ltd. v. Vincent*, [1929] 1 K.B. 687 ; 98 L.J.K.B. 402 ; 141 L.T. 116 ; 93 J.P. 161 ; Digest Supp.
- (3) *Sutton v. Dorf*, [1932] 2 K.B. 304 ; 101 L.J.K.B. 536 ; 47 L.T. 171 ; 96 J.P. 259 ; Digest Supp.
- (4) *Roe v. Russell*, [1928] 2 K.B. 117 ; 97 L.J.K.B. 290 ; 138 L.T. 253 ; 92 J.P. 81 ; Digest Supp.
- (5) *Haskins v. Lewis*, [1931] 2 K.B. 1 ; 100 L.J.K.B. 180 ; 144 L.T. 378 ; 95 J.P. 57 ; Digest Supp.
- (6) *Norman v. Simpson*, [1946] 1 All E.R. 74 ; [1946] 1 K.B. 158 ; 115 L.J.K.B. 107 ; 174 L.T. 279.
- (7) *Matthews v. Smallwood*, [1910] 1 Ch. 777 ; 79 L.J.Ch. 322 ; 102 L.T. 228 ; 31 Digest 379, 5251.
- (8) *Dumpon's Case* (1603), 4 Co. Rep. 119 b ; *sub nom. Dumper v Syms*, Cro. Eliz. 815 ; 31 Digest, 393, 5393.
- (9) *Elliott v. Boynton*, [1924] 1 Ch. 236 ; 93 L.J.Ch. 122 ; 130 L.T. 497 ; 31 Digest 553, 7003.

APPEAL by the landlords from an order of His Honour JUDGE DAVIES, K.C., at Bloomsbury County Court, dated Nov. 1, 1946.

The landlords claimed possession of premises within the Rent Restrictions Acts against the tenant and a sub-tenant of part of the premises. The tenant (the first defendant) submitted to the order, but the sub-tenant (the second defendant) resisted it and the county court judge decided in his favour. The facts appear in the judgment of the court delivered by SOMERVELL, L.J.

Safford, K.C., and *Neligan* for the landlords.

Heathcote-Williams for the sub-tenant.

Cur. adv. vult.

May 16. SOMERVELL, L.J., read the following judgment of the court. In this case the plaintiffs sued, as landlords, for possession and for arrears of rent and mesne profits against the first defendant, who was, at material times, a statutory tenant of the whole premises known as 5, Arkwright Mansions, London, and the second defendant, who was, or claimed to be, a sub-tenant of part of such premises. The tenant submitted to an order for possession, but the sub-tenant claimed the benefit of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), which is as follows :—

Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued.

The county court judge decided in favour of the sub-tenant. The point with which he dealt may be summarised as follows.

Under the original lease to the tenant there was a provision against sub-letting without the consent of the landlords and a right of re-entry if this covenant was broken. On Mar. 1, 1946, when the tenant sub-let to the sub-tenant, no such consent had been obtained. The sub-tenant submitted that this fact could not be relied on, the absence of consent having been waived in circumstances which I will set out more fully later. Counsel for the landlords took, as his first point, one which, in our view, is not dealt with in the judgment of the county court judge and which does not appear, we think, on the judge's note. Junior counsel for the landlords, who appeared before the county court judge for the landlords, told us that he referred to the point, but we have come to the conclusion that it was not effectively taken within the familiar principles which have been laid down. Counsel for the sub-tenant, however, was anxious that the point should be dealt with if the court felt itself in a position to deal with it, and full argument was, therefore, heard on both sides. In the circumstances, counsel for the landlords conceded that, as regards the facts, the court must make, consistently with the findings of the county court judge and the evidence, all necessary assumptions most favourably to the sub-tenant. On this basis the facts which the court must take as found or proved were that prior to Mar. 1, 1946, the tenant had sub-let to a Mrs. Jacobson all the

premises other than the part which became the subject-matter of the sub-letting to the sub-tenant. The letting to Mrs. Jacobson was a furnished letting and the circumstances were such as to raise clearly the inference that the tenant intended and expected to reoccupy the premises herself and to negative the conclusion that she had abandoned the idea of making the house or any part thereof her home. The sub-letting to the sub-tenant was an unfurnished letting, and, from the evidence, it appeared that this letting also was intended to be of a temporary nature, namely, pending the marriage of the sub-tenant, then thought to be imminent. On or about Aug. 1, 1946, Mrs. Jacobson left the premises sub-let to her and on Aug. 20, 1946, the date of the commencement of the present action, such premises were vacant, save that the tenant's furniture remained thereon. During the period from Aug. 1 to 20 it must be assumed that rent was paid by the sub-tenant to the tenant and accepted in the ordinary way.

The argument of counsel for the landlords was that, since, at the date of the so-called "sub-letting" to the sub-tenant, the tenant had already sub-let the remainder of the premises, the sub-letting to the sub-tenant, as a matter of law and notwithstanding the intention of either party to the contract, involved necessarily an abandonment by her of all possession or right to possession of the whole premises, so that, never having had any other interest, in the eye of the law, in the premises than the right of possession, she could, at the date of the sub-letting, confer on the sub-tenant no estate right or interest of any kind in the part which she purported to sub-let. The contract of Mar. 1, 1946, was, accordingly, (as counsel for the landlords says) a nullity *ab initio*, and, as such, incapable of being animated or enlarged by anything which occurred since the date of the contract.

On this part of the landlords' case there is, in our view, only one question with which we are concerned, namely, does the sub-tenant come within the ambit of s. 15 (3) of the Act of 1920 as a sub-tenant to whom part of the premises have been lawfully sub-let? The answer to the question depends on the proper interpretation of the sub-section and particularly of the words "sub-tenant" and "sub-let," for on this part of the argument it must be assumed that the contract of "sub-letting" did not involve any breach of the contractual terms imported by the statutes into the statutory tenancy. As regards the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (d), (to which further reference is made presently), though it is, no doubt, true that the absence of the landlords' consent at the time of the alleged sub-letting would then have given to the landlords the right to invoke the jurisdiction of this court, the terms of the paragraph cannot, in our judgment, be held to produce the result, for the purposes of this part of the landlords' argument, that any sub-letting of part of the premises, the remainder being already sub-let, made at the time without the landlords' consent, must be regarded altogether as a nullity.

In our judgment, it is neither necessary nor profitable to consider what right or interest in the property the tenant created or was capable of creating by the "sub-tenancy" under discussion. The question, and the only question, is whether the sub-tenant, however spectral her interest in the property by virtue of this contract of sub-tenancy, can properly be described as a sub-tenant to whom the premises had been lawfully sub-let within the meaning—the somewhat artificial meaning—of s. 15 (3) of the Act of 1920. It is to be noted that the sub-section makes in its terms no distinction between one kind of sub-letting and another.

It must now be taken as well settled by decisions of this court that the nature of the right or interest of a statutory tenant is that of a personal right of possession on the terms partly of the original contract of tenancy and partly derived from the statutes. The words "tenant," "sub-tenant," "tenancy," etc., are, therefore, used so as to comprehend such an interest involving no estate in the land recognised by the common law. The interest of the statutory tenant is not, therefore, capable of assignment, bequest or devolution to a trustee in bankruptcy: see, for example, *Keeves v. Dean* (1), *Lovibond & Sons, Ltd. v. Vincent* (2) and *Sutton v. Dorf* (3). As a matter of principle and logic it would appear, at first sight, necessarily to follow that a sub-tenancy, whether of the whole or of any part of the premises in question,

must equally fail to confer on the grantee any such estate in the property. It is, however, plain from the terms of s. 15 (3) of the Act of 1920 that persons to whom a statutory tenant has purported to grant a sub-tenancy may thereby acquire at least a personal right to continue in possession, good against the landlord after the statutory tenancy has come to an end.

The effect of sub-lettings by statutory tenants of parts of dwelling-houses within the scope of the Rent Restrictions Acts had to be considered by this court in *Roe v. Russell* (4), and *Haskins v. Lewis* (5), but in neither of these cases was it necessary for the court to decide on the validity of a sub-letting, *uno flatu*, of the whole premises, or of part of the premises, the remainder having already been sub-let. In these cases, and particularly in the former, the court had to consider, in the light of the earlier decisions relating to assignment and devolution, whether, as a matter of principle, a sub-letting of part of the premises by a statutory tenant could have any force or validity. In *Roe v. Russell* (4), the Divisional Court had been faithful to logic and decided adversely to the sub-tenant. The Court of Appeal, reversing the Divisional Court, resolved the difficulty by concluding that a statutory tenant who had sub-let only part of the premises had not, *quoad* the premises as a whole, so renounced his personal right of irremovability as to disqualify him from retaining any interest in the premises and so from effectually conferring on his sub-tenant a valid right. It must, therefore, be taken as established by decision of this court that a sub-letting by a statutory tenant of part of his premises will be effectual to confer on the sub-tenant the rights specified in s. 15 (3) of the Act of 1920 if, at whatever be the material date or dates, the statutory tenant retained a sufficient possession of, or interest in, the remainder of the premises to preserve his own rights as statutory tenant.

Applying this principle to the facts of this case, we are of opinion that the landlords must fail, for, in our judgment, the material date on which to determine whether the principle applies is that of the issue of proceedings. On that date in the present case, namely, Aug. 20, 1946, Mrs. Jacobson, the sub-tenant of the part of the premises first sub-let, had gone out of possession. The remainder of the premises were not, therefore, on Aug. 20, in fact, sub-let. These premises were, as we have stated, then vacant, but the statutory tenant's furniture was on them, and, on the evidence, it seems reasonably clear that the statutory tenant had at no time abandoned the premises as her home. *Norman v. Simpson* (6), decided that, in determining whether a tenant (in that case a contractual tenant) had "lawfully sub-let" premises for the purposes of s. 15 (3) of the Act of 1920, it was sufficient, though the sub-letting had been originally "unlawful" in the sense that it had involved a breach of the tenant's obligations under the tenancy, that such breach had been waived and the "unlawfulness" thereby remedied at the date of the determination of the tenancy. From this case and others which have since followed it, the principle must now, in our judgment, be taken as established that in a case arising under s. 15 (3) of the Act of 1920 the relevant facts must be determined at the date of the institution of proceedings. We do not accept the view that the sub-tenancy to the sub-tenant in the present case, if ineffectual in law on Mar. 1, 1946, was thereafter incapable of being rendered effective. The contract, which was one of weekly tenancy, continued, *inter partes*, and was given effect to, in fact, by the possession thereunder of the sub-tenant. If, at the date when it was originally made, it was legally ineffectual to confer on the sub-tenant any right under the Acts, we can see no reason why thereafter, when the statutory tenant had regained actual possession of the remainder of the premises, it should not have become and remained effective so long as those conditions existed.

In our view, therefore, the sub-tenant was, on Aug. 20, 1946, a person falling within the definition of a sub-tenant to whom the premises had been sub-let, and (for the purposes of this part of the argument of counsel for the plaintiffs) it must be assumed lawfully sub-let, within s. 15 (3) of the Act of 1920. It becomes, accordingly, unnecessary for us to express any opinion on the questions (i) what was the effect of the sub-letting on its date, Mar. 1, 1946, and (ii) what would have been the position had Mrs. Jacobson remained in occupation of the part of the premises sub-let to her on Aug. 20, 1946, or (iii) on the more general question left undecided by *Roe v. Russell* (4) and

Haskins v. Lewis (5), whether a sub-letting by a statutory tenant, either of the whole premises or of part of the premises, the remainder being already sub-let, in each case in circumstances from which it could be inferred that there had been an abandonment by the statutory tenant of the whole premises or any part thereof as his home, would or could be effective to confer on the sub-tenant any right under s. 15 (3). On these matters we reserve our judgment. Should the last of them come before the courts and fall at any time to be considered by the highest tribunal, the House may consider whether the grounds stated by this court in *Roe v. Russell* (4), were necessary for its decision—whether, in other words, having regard to the characteristics of a statutory tenancy, the tenant's inability to pass to a third party by assignment or otherwise any right or interest in the property recognised by the law is a material or necessary consideration in determining whether a third party who is in actual occupation under a contract of "sub-tenancy" can claim the benefit of s. 15 (3) of the Act of 1920. It is also unnecessary, in the circumstances, for us to express any view on the argument, much relied on by counsel for the landlords, based on sched. I, para. (d), to the Act of 1933, which entitles a landlord to invoke the jurisdiction of the court if

... the tenant without the consent of the landlord has ... assigned or sub-let the whole of the dwelling-house or sub-let part of the dwelling-house, the remainder being already sub-let.

It is true that sub-lettings of the kind specified are treated, for the purposes of the paragraph, as being *in pari materia* with an assignment. On the other hand—particularly having regard to the reference to the landlord's consent—we are by no means satisfied, having regard to the express provisions of s. 15 (3) of the Act of 1920, that the language of the paragraph should be treated as supporting the view that such a "sub-letting" can have no more force and effect for any purpose than an "assignment." As we have already stated, at the material date in the present case the remainder of the premises were not, in fact, sub-let, and had not been for more than two weeks. In our judgment, therefore, the landlords are not entitled to succeed on the first part of their argument, assuming it to be open to them.

It, therefore, becomes necessary to consider their second point, which was argued before the county court judge and decided by him adversely to the landlords. It is common ground that the grant of the sub-tenancy to the sub-tenant was in breach of the contractual terms imported into the statutory tenancy, as it was also without the landlords' consent within sched. I, para. (d), to the Act of 1933. The county court judge held, however, that the acceptance by the landlords of two instalments of rent from the statutory tenant after they had full knowledge of the sub-letting waived the absence of consent—applying, in this respect, to the case of a statutory tenancy the well-established principles as to waiver appropriate to a common law lease. The argument of the landlords is that this analogy is false. In the case of a common law lease, the doctrine of waiver by acceptance of rent after knowledge of breach of covenant (other than continuing breach) proceeds, as they argue, from the premises that acceptance of rent in such circumstances is consistent, and consistent only, with an affirmation of the tenancy, whereas, in the case of a statutory tenancy, since such tenancy continues by virtue of the statute until the tenant dies or delivers up possession either voluntarily or under an order of the court and since the obligation to pay rent continues as an incident of the tenancy until its determination, receipt of rent after notice of an act by the statutory tenant which entitles the landlord to invoke the jurisdiction of the court to order possession is equivocal at best and cannot, therefore, operate *per se* as a waiver of the landlord's right to assert the "unlawfulness" of the sub-letting.

There is, we think, force in this argument. By the common law, which tended to construe forfeiture provisions as effective to render leases voidable and not void, a landlord was bound, as soon as he was fully aware of a non-continuing breach of covenant by the tenant entitling the landlord to avoid the lease, to elect at once for or against avoidance and to notify the tenant if he elected for the former. On this principle, acceptance of any rent accrued due after the landlord's knowledge of the tenant's breach was regarded necessarily as inconsistent with an election to avoid the lease and consistent

only with its affirmance. The acceptance of the rent being, in the circumstances, an unequivocal act, waiver of the breach followed as a matter of law, according to PARKER, J. ([1910] 1 Ch. 786, 787) in *Matthews-v. Smallwood* (7). And so unequivocal was the act of acceptance of rent that the landlord was held disentitled to get the best of both worlds by attempts to qualify the acceptance by stating that he accepted the rent without prejudice to his rights of forfeiture: see the notes to *Dumpor's Case* (8) in SMITH'S LEADING CASES, 13th ed., vol. 1, p. 38, *et seq.* Nor do we think that these principles have been in any way qualified by the decision of this court in *Elliott v. Boynton* (9), relied on by the sub-tenant. That case only decided that the obligation to pay rent under a contractual tenancy continues until the tenancy is determined in fact by re-entry, namely, the issue of the writ for possession.

It must, in our judgment, be conceded that the principles of the common law above stated cannot apply, or cannot wholly apply, to a statutory tenancy. In the first place, the landlord of a statutory tenant has no right to avoid the tenancy. His only right is to invoke the jurisdiction of the court to make an order for possession and the tenancy continues until at least the date of the order. Secondly—and consequentially—the obligation of the tenant to pay rent and the right of the landlord to accept it continues notwithstanding the breach of covenant and notwithstanding the landlord's election to invoke the court's jurisdiction and the issue by him of his summons pursuant to his election. In our judgment, therefore, it may fairly be said that the acceptance of rent by a landlord after knowledge of a non-continuing breach of covenant by a tenant entitling the landlord to go to the court is not so unequivocal an act of affirmance of the tenancy as is acceptance of rent in like circumstances from a contractual tenant. On the other hand, it is, we think, important to bear in mind that under the scheme of the Rent Acts the incidents of tenancy as understood by our law continue to apply to a statutory tenancy so far as they are consistent with the provisions of the Acts. From long usage the acceptance of rent by a landlord after knowledge of circumstances giving rise to a claim for possession have come to be regarded by landlords and tenants alike as evidence of an intention to affirm the tenancy. Moreover, the landlord has, in the case of a statutory tenancy, a choice—he may either rely on the breach and go to the courts, or he may waive it—though his choice is not the same as that presented to the common law landlord. Finally, (and to this extent *Elliott v. Boynton* (9), in our view, assists the sub-tenant) the continuance of the obligation to pay rent under a contractual tenancy accruing after the breach for some period is not itself inconsistent with the landlord's election to forfeit.

If, therefore, it is not justifiable to treat the common law rule as entirely applicable to a statutory tenancy (as the county court judge implied), we think that the question whether in any case the acceptance of rent by the landlord is an unequivocal act of affirmance of the tenancy is a question of fact for the judge to determine in the circumstances of the case, and, if he decides that question of fact affirmatively, then the ordinary legal consequences would *prima facie* follow. Thus, we are strongly inclined to think that the strict common law rule in regard to a qualified acceptance of rent is not applicable to a statutory tenancy and that a qualified acceptance of rent from a statutory tenant is not necessarily fatal to the landlord's rights to seek an order for possession. As at present advised, we think that the fair rule is that a landlord who has acquired full knowledge of a non-continuing breach of covenant by a statutory tenant entitling him to invoke the court's jurisdiction should be entitled thereafter to receive rent and should not by reason of such receipt be held to have waived the breach, provided he makes it clear to the tenant at the time of or prior to the receipt that his receipt is without prejudice to his right to go to the court and provided he issues his summons for possession within such time as, having regard to all the circumstances of the case, the court hearing the summons regards as reasonable.

In the present case, the facts as regards waiver do not appear to have been very closely examined. It is, however, clear from the evidence that the tenant assumed from the acceptance of her rent after the fact of her sub-letting was known that her position had been secured. She, accordingly, took no step, as she might have done, to try to remedy her position. It is also clear from the

evidence that the landlords' agents assumed that acceptance of rent after knowledge of the sub-letting would be fatal to any claim founded on the sub-letting and gave instructions accordingly to the collector of the rent—instructions which were, unfortunately for the landlords, disregarded on two occasions. In the circumstances, therefore, and bearing in mind the general background to which we have alluded, we come to the conclusion that, as a question of fact, the act of the landlords amounted, and were understood by the sub-tenant to amount, to such an unequivocal affirmation of the tenancy that they must be taken to have waived their statutory rights and condoned the absence of consent. For these reasons we think that the plaintiffs' second point also fails and that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Leslie A. Fawke* (for the appellant); *Woolley, Tyler & Bury* (for the respondents).

[*Reported by R. L. ZIAR, Esq., Barrister-at-Law.*]

BIRD v. HILDAGE.

[COURT OF APPEAL (Cohen and Evershed, L.JJ., and Lynskey, J.), April 23, 24, May 15, 1947.]

Landlord and Tenant—Rent restriction—Possession—Non-payment of rent—Waiver of past irregularities in payment—Rent “lawfully due”—Tender by tenant before proceedings commenced—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, para. (a).

The statutory tenant of a dwelling-house had held as tenant from year to year of the landlord on the terms, except as to rent, of an expired lease. The rent was payable quarterly on the usual quarter days, but the landlord had been in the habit of allowing the tenant to make the payments a month or so after the due dates. The tenant failed to pay the rent due on Mar. 25, 1946, but tendered it to the landlord's solicitors on May 16, on which day the landlord sent the particulars of claim to the county court. The solicitors, on instructions, refused to accept the payment, and on May 21, 1946, the plaint was entered in the county court books. It was conceded that May 21 was the date of the commencement of the proceedings. The tenant paid the rent into court.

HELD: (i) where an act has to be done periodically, the fact that it has been done irregularly in the past does not, unless a variation of the agreement can be inferred, justify the assumption that the irregularity will be waived in the future, and, therefore, the landlord was entitled to take advantage of the non-payment of rent by the tenant although he had not given the tenant notice that he was going to insist in the future on the punctual fulfilment of the contract.

Panoutsos v. Raymond Hadley Corpn. of New York ([1917] 1 K.B. 767) explained.

(ii) even if, as a result of his forbearance in permitting irregularities, a landlord were disabled from terminating a contractual tenancy without first giving notice of his intention so to do, it did not follow that such forbearance ousted the jurisdiction of the court to give possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (a), unless the circumstances amounted to a variation of the terms of the tenancy.

(iii) where a tender of rent is made after the due date but before the commencement of proceedings for possession, such tender prevents rent being “lawfully due” from the tenant to the landlord within the meaning of para. (a) of sched. I to the Act of 1933, unless time has been made the essence of the contract.

(iv) if the words “lawfully due” must be taken to mean that the obligation to pay rent has arisen and not been discharged in fact, and if the offer made by the tenant was to be taken not to have discharged the debt, the words in para. (a) “and has not been paid” would, on the facts, be fatal to the landlord.

Per cur.: Although tender can never amount to payment, where time

is not made the essence of the contract either expressly or impliedly it can always be made after the due date, and the creditor refuses at his peril.

[AS TO ORDERS FOR POSSESSION FOR BREACH OF TENANCY OBLIGATION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329, 330, paras. 392, 393; and FOR CASES see DIGEST, Vol. 31, pp. 578, 579, Nos. 7270-7275.]

Cases referred to:

- (1) *Panoutsos v. Raymond Hadley Corporation of New York*, [1917] 1 K.B. 767; (C.A.) [1917] 2 K.B. 473; 86 L.J.K.B. 1325; 117 L.T. 330; 12 Digest 434, 3516. A
- (2) *Re Tyrer & Co. and Hessler & Co.* (1902), 86 L.T. 697; 9 Asp. M.L.C. 292; 7 Com. Cas. 166; 12 Digest 349, 2899.
- (3) *Cape Asbestos Co. v. Lloyds Bank, Ltd.*, [1921] W.N. 274; Digest Supp.
- (4) *Briggs v. Calverly* (1800), 8 Term Rep. 629; 12 Digest 320, 2651.
- (5) *Polglass v. Oliver* (1831), 2 Cr. & J. 15; 2 Tyr. 89; 1 L.J. Ex. 5; 3 Digest 198, 431.
- (6) *Beavis v. Carman*, [1920] W.N. 159; 84 J.P. Jo. 197; 31 Digest 578, 7271.
- (7) *Johnson v. Upham* (1859), 2 E. & E. 250; 28 L.J.Q.B. 252; 33 L.T.O.S. 327; 18 Digest 326, 605. B
- (8) *Johnson v. Clay* (1817), 7 Taunt. 486; 1 Moore, C.P. 200; 12 Digest 319, 2634.
- (9) *James v. Vane (Lord)* (1860), 2 E. & E. 883; 29 L.J.Q.B. 169; 2 L.T. 281; 12 Digest 327, 2726.

APPEAL of the landlord from an order of His Honour JUDGE WILLES at Bakewell County Court, dated Sept. 10, 1946, dismissing the landlord's claim for possession of an unfurnished dwelling-house. C

The county court judge held that, in view of the previous conduct of the parties in relation to the payment and acceptance of rent after the due date, he had no jurisdiction, under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 and sched. I, para. (a), to make an order for possession. The facts appear in the judgment.

H. A. Hill for the landlord. D

Charles Russell for the tenant.

Cur. adv. vult.

May 15. COHEN, L.J., read the following judgment of the court. When possession was based (a) on non-payment of rent and (b) on alleged breaches of covenant. The judge decided against the landlord on both grounds. On appeal to us the landlord did not seek to disturb the judge's findings as regards the other breaches of covenant, but he contended that the judge had erred in law in coming to the conclusion that there was no default in payment of the rent due by the tenant within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (a). E

The tenant, who was a statutory tenant, had held as tenant to the landlord from year to year on the terms, except as to rent, of an expired lease dated Mar. 9, 1934, made between the landlord's predecessors in title and the tenant. The rent reserved under the expired lease had been £50 per annum payable half-yearly on Mar. 25, and Sept. 29, but when the lease expired the rent was increased to £65 per annum payable quarterly on the usual quarter days. The judge found as a fact that the former landlord and the landlord had been in the habit of allowing the tenant to make the quarterly payment of rent a month, or sometimes less or sometimes a little more than a month, in arrear, and had never asserted the right to complain of the delay in payment. The tenant failed to pay the rent due on Mar. 25, 1946, and on May 21, 1946, the plaintiff in this matter was entered in the county court books. There could be no doubt that the rent had not been paid on the due date, but the judge held that, in view of the previous conduct of the parties in relation to the payment and acceptance of rent after the due date, he had no jurisdiction under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 and sched. I, to make an order for possession. The reasons for this conclusion are to be found in a passage in his judgment where he says: F

A landlord cannot suffer periodic defaults and then without warning suddenly terminate the contract on the ground that the rent is not paid punctually. He has the right to punctual payment, but if he wants to get back to that right, after suffering a continual series of delays, he must give the tenant notice he is going to insist on the future fulfilment of his contract. I think that is the right view having regard to the judgment of BAILLACHE, J., in *Panoutsos v. Raymond Hadley Corpn.* G H

(1), which counsel was good enough to read to me. In view of the principle underlying that decision, I find it impossible to hold that there was, within the meaning of para. (a) of the schedule to the Act, a default in payment of the rent by the tenant to the landlord which justifies me in saying that there was a breach of contract and gives me power to enforce this contract.

A In our view, the decision cited does not justify the conclusion which the judge reached nor is that conclusion well-founded in principle. In *Panoutsos v. Raymond Hadley Corpn.* (1), there was a contract for delivery of 4,000 tons of flour to be dispatched by steamer or steamers not later than Nov. 7, 1915. The contract provided that each shipment was to be deemed a separate contract, but there was a provision: "Payment by confirmed credit." As we understand the statement of facts in the case, this provision was interpreted as meaning that before deliveries commenced the buyer was to open a confirmed credit for the whole amount due under the contract. He did open a credit for the full amount, but it was not irrevocable, and was, therefore, not a "confirmed credit" within the meaning of the contract. None the less, the sellers made some shipments for which they were duly paid. When they made these shipments, they were aware that the credit was not irrevocable. The sellers then purported to cancel the balance of the contract on the ground (among others) that the buyer had failed to open a "confirmed credit." The buyer refused to accept this cancellation, and it was held that, by waiving for a time the breach of the condition precedent as to a confirmed credit, the sellers were not bound to act on the existing credit up to the end of the contract, but that they were not entitled to cancel the contract on that ground without giving to the buyer reasonable notice of their intention so to do, thereby enabling the buyer to remedy the default. In the course of his judgment BAILHACHE, J., said ([1917] 1 K.B. 770):

D If they desire to cancel the contract in circumstances such as these I think that they must give some reasonable notice to the other party of their intention so to do. The sellers have not given any such reasonable notice. In my opinion, therefore, the sellers struck too soon, and a cancellation of the contract on the ground that the credit was not in order ought to have been preceded, in the circumstances of this case, by a reasonable notice to the buyer that they would cancel the contract.

E The case went to the Court of Appeal, who affirmed the decision of BAILHACHE, J., but in the course of his judgment, in which LORD COZENS-HARDY, M.R. and SCRUTTON, L.J. concurred, VISCOUNT READING, C.J., pointed out the distinction between the case with which the court was dealing and a case such as *Re Tyrer & Co. and Hessler & Co.* (2), saying ([1917] 2 K.B. 478):

F The case of *In re Tyrer & Co., and Hessler & Co.* (2), was cited as an authority for the proposition that the moment the sellers chose to avail themselves of the failure to perform the condition precedent they could put an end to the contract without giving the buyer an opportunity of remedying the default which had hitherto been waived. That case is not an authority for that proposition. It shows that, where there are stipulated times in a charterparty for payment of the hire of a ship and a power to withdraw the ship if the payment is not made at the stipulated time, the mere fact that there has been default in payment at one or more stipulated times, of which advantage has not been taken, does not entitle the party in default at a subsequent time to a notice so as to enable him to comply with the condition before the right to withdraw arises. That is a totally different case from the present.

G The true basis of the decision of BAILHACHE, J., in *Panoutsos v. Raymond Hadley Corpn.* (1), is made still more plain by that judge himself in *Cape Asbestos Co. v. Lloyds Bank, Ltd.* (3), where he said ([1921] W.N. 275):

H That case [i.e., *Panoutsos v. Raymond Hadley Corpn.* (1)] was an authority for the proposition that where an act had to be done by the buyer of goods, such, for instance, as the opening of a confirmed banker's credit, and he did not perform that act, and the seller nevertheless went on delivering the goods with knowledge that the act had not been performed, the seller could not suddenly cancel the contract and refuse to make further deliveries without giving the buyer reasonable notice of his intention so as to give the buyer an opportunity of putting himself right. That case was no authority for the proposition, that where an act had to be done periodically, as, for instance, the delivery of a bill of lading in such a case as the present, the fact that it had been done irregularly in the past justified the assumption that the irregularity would be waived in the future. The *Panoutsos* (1) case had only reference to an act which had to be done once for all, and not to an act which had to be done periodically.

In the present case, the quarterly instalments of rent are plainly periodical acts and we respectfully agree with the observations made by BAILHACHE, J., in the passage last cited. Indeed, it would be most unfortunate if, in such a case, mere forbearance by a landlord to exercise his rights of distress or re-entry on one or more occasions was held to bind him for the future, since landlords would then tend to be more harsh in the enforcement of their legal rights. There may, no doubt, be cases where the court can properly infer from the conduct of the parties a variation of the original agreement. LYNSEY, J., gave an illustration of such a case in the course of the argument, when he put to counsel the case where the tenancy agreement provided for the payment of weekly rent on a Monday, but for the convenience of the landlord the rent was always collected on a Wednesday. We can find here no evidence of any such variation of the contract, and, in our opinion, the reasons given by the judge do not justify the conclusion which he reached.

There is, moreover, this further reason for our conclusion. We are concerned in this case, not with the question whether, by reason of a breach by the tenant of one of his obligations, the landlord can determine the contract of tenancy, but with the question whether, by the terms of the statute, the court has jurisdiction to entertain the suit. Parliament has provided that such jurisdiction arises if "any rent lawfully due from the tenant has not been paid." Even if, as a result of his forbearance, a landlord were disabled from terminating a contractual tenancy without first giving notice of an intention so to do, it by no means follows that such forbearance ousts the jurisdiction of the court. As a matter of construction of the statute, unless the circumstances amounted to a variation of the terms of the tenancy or (as counsel for the tenant concedes they would not) estopped the landlord from averring that any rent was, in fact, due or unpaid, it is, in our opinion, impossible to say that the conditions of the statute are not satisfied.

Counsel for the tenant sought, however, to support the judge's judgment on another ground. He said that, the rent having been tendered before the plaint was entered and such tender having been refused, no part was, at the date of the institution of proceedings, lawfully due and unpaid. The relevant facts to enable us to decide this point are as follows: (1) Payment of rent had always been made by cheque sent to the landlord's solicitors. (2) On May 15 the tenant sent by post to the landlord's solicitors a cheque for £16 5s. 0d., the amount of rent due on Mar. 25. (3) This letter was received on May 16 and on the same day the landlord sent the particulars of claim by post to the county court. (4) On May 17 the landlord's solicitors replied to the letter of May 15. The first paragraph of their letter is in the following terms:

We are in receipt of your letter of the 15th inst. but are obliged to return your cheque in accordance with instructions. The matter has now been entered in the Bakewell County Court.

(5) Owing to some defect in the particulars of claim the plaint was not, in fact, entered in the county court books until May 21. Counsel for the landlord conceded that, despite the dispatch of the particulars of claim to the county court on May 16, May 21 must be taken as the date of commencement of these proceedings: see *Briggs v. Calverly* (4). He also admitted that, having regard to the terms of the letters which have been read, he could not dispute that, although tender had been by cheque, the rent due on Mar. 25 had been tendered before action brought: see *Polglass v. Oliver* (5); and that the landlord had refused to accept that rent. It was also agreed that the tenant had paid the amount of the rent into court. In these circumstances, counsel for the tenant argued that no rent lawfully due was unpaid. His argument depended in part on the construction of the Act, and we must, therefore, refer to the relevant provisions which are to be found in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, and sched. I thereto. Section 3, provides:

(1) No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and (a) the court has power so to do under the provisions set out in sched. I to this Act . . .

Schedule I provides :

A A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if (a) any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy (whether under the contract of tenancy or under the principal Acts), so far as the obligation is consistent with the provisions of the principal Acts, has been broken or not performed . . .

B The first question that arises is of the date on which we have to determine whether the rent had been paid or not. Counsel for the landlord argued that that date was the date fixed by the contract for the payment thereof. He pointed out that under the second branch of para. (a) of the schedule, in determining whether an obligation had been broken, the court had merely to
C look at the terms of the obligation and see whether it had, in fact, been broken. The fact that the breach had been made good would not deprive the court of jurisdiction though it would, of course, be relevant in determining whether it was reasonable to make an order for possession. So, he said, in the case of rent, events subsequent to the due date fixed by the terms of the tenancy for the payment of rent are relevant only on the question of reasonableness. We are unable to accede to this argument. It requires, as
D it seems to us, the word "punctually" to be read into the language of the paragraph before the word "paid." Alternatively, had the argument been well-founded, the paragraph would, we think, have read somewhat as follows : "if—(a) any obligation of the tenancy (whether as regards rent or otherwise and whether under the contract of tenancy or under the principal Acts), so far as the obligation is consistent with the provisions of the principal Acts, has been broken or not performed." Section 3 and sched. I lay down the
E circumstances in which the court may make an order or give a judgment for recovery of possession, and we think that, in reaching a conclusion whether any rent is lawfully due and has not been paid, the court must look at the date of commencement of the proceedings by which the landlord is seeking to recover possession. The rights of the parties crystallised at that date, and nothing happening thereafter could, in our opinion, deprive the court of jurisdiction to make an order for recovery of possession, if the court thought it reasonable to do so : see *Beavis v. Carmen* (6). In that case the plaintiff sought to recover possession from the defendant and the defendant relied on the Rent and Mortgage Interest (War Restrictions) Act, 1915, s. 1 (3), which provided :

F No order for the recovery of possession of a dwelling-house to which this Act applies or for the ejectment of a tenant therefrom shall be made so long as the tenant continues to pay rent at the agreed rate as modified by this Act and performs the other conditions of the tenancy.

G The tenant had failed to pay the rent up to the date of commencement of the proceedings, but tendered the rent after he had been served with the writ in the action. He contended that he had thus put himself in the position of a tenant who had paid rent at the agreed rate as modified by the Act. The judge rejected the contention saying : "to give effect to that contention would be to disregard the true meaning of the enactment. The plaintiff had a right to recover possession of the premises when the writ was served, and nothing had happened since to deprive her of that right." The case deals only with tender of rent after proceedings brought and does not deal with the case of tender before the institution of the proceedings, which, in our view, is the material date.

H Before the court can have jurisdiction the landlord must prove two things, namely, (1) that some rent was lawfully due from the tenant at the date of the institution of the proceedings, and (2) that such rent was unpaid. The question, therefore, arises in the present case : Was any rent lawfully due from the tenant on May 21, 1946, to the landlord ? In our view, rent is not lawfully due unless it can be recovered by process at law. A landlord may recover rent lawfully due in two ways, *i.e.*, either by distress or by judgment in an action. In this case it is admitted that a valid tender was made of the rent due on Mar. 25, 1946, amounting to £16 5s. 0d., on May 16, 1946. As a

result of that tender, the landlord could not thereafter distrain for his rent : *Johnson v. Upham* (7), and see HILL & REDMAN: LAW OF LANDLORD AND TENANT, 10th ed., p. 323. Equally, in view of that tender and the payment into court which the tenant was entitled to make and did make as the result of that tender, the landlord could not obtain judgment for his rent, and, in fact, did not do so : see *Johnson v. Clay* (8), and *James v. Vane* (9), per COCKBURN, C.J. (29 L.J.Q.B. 171).

The result is, in our view, that where tender of rent is made, even after the due date where time is not made the essence of the contract, such tender prevents rent being lawfully due from the tenant to the landlord within the meaning of the schedule. It would be a very curious construction of the schedule if the result was that, although a landlord could not succeed in an action to recover judgment for his rent, he could nevertheless require the court to exercise its jurisdiction on the ground that rent was lawfully due to him and unpaid. Although tender can never amount to payment, where time is not made the essence of the contract, either expressly or impliedly, it can always be made after the due date, and the creditor refuses at his peril. If the creditor does refuse it and subsequently brings proceedings to recover the debt and a payment into court is made, he cannot recover judgment. Judgment will be given against him for the costs of the proceedings as a plea of tender is a defence to a claim that the defendant is indebted to him. Where the debtor has a defence in law to a claim for money, whether it be rent or otherwise, it seems to us impossible to say that the money claimed is lawfully due from the debtor to the creditor or the tenant to the landlord.

We add that, in our judgment, if the words "lawfully due" must be taken to mean that the obligation to pay rent has arisen and not been discharged in fact, and if the offer made by the tenant in the present case is to be taken not to have discharged the debt, the words "has not been paid" would in the circumstances of this case be fatal to the landlord. As a matter of English law the words "pay" and "paid" do not necessarily import both the act of offering the money and the act of its acceptance. If rent is taken to be lawfully due so long as the debt is undischarged, it would have been sufficient for the paragraph to have said "if any rent is lawfully due," and a landlord could always invoke the jurisdiction of the court by declining to accept rent a day after the due date for its payment. For these reasons, which differ from those given by the county court judge, we think his decision was right and that the appeal must be dismissed accordingly.

Appeal dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *H. Shelley Barker & Son*, Sheffield (for the landlord); *Cree & Son*, agents for *Brooke Taylor & Co.*, Sheffield (for the tenant).

Explained. R. v. PADDINGTON AND ST. MARLBORNE RENT TRIBUNAL. [1949] 1 All E.R. 720. *Reported by* R. L. ZIAR, ESQ., Barrister-at-Law.]

R. v. HAMPSTEAD AND ST. PANCRAS RENT TRIBUNAL, *Ex parte* ASCOT LODGE, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), May 8, 1947.]

Landlord and Tenant—Rent control—"Rent which includes payment for use of furniture or for services"—Need of contractual obligation of landlord—Breach of contract—Jurisdiction of tribunal—Furnished Houses (Rent Control) Act, 1946 (c. 34), ss. 2 (1), 12 (1).

In the absence of any contractual obligation on the landlord to provide furniture or services the rent of premises cannot be said to include "payment for the use of furniture or for services" within s. 2 (1) of the *Furnished Houses (Rent Control) Act, 1946*, and, consequently, a rent tribunal has no jurisdiction to hear and determine a case referred to it by the lessee of such premises.

Per curiam : Where there is a provision for the supply of furniture or services, or both, the tribunal must see what the lease provides and consider whether the rent reserved is a fair rent for the use of the premises with those services, but the Act gives the tribunal no power to decide questions

of breach of contract or to award compensation to tenants for breaches of contract by way of reduction of rent. Where, therefore, a tribunal has jurisdiction to hear a case it is not entitled to reduce the rent merely because the landlord is not providing that which he has contracted to provide.

[FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, ss. 2 (1), 12 (1), see HALSBURY'S STATUTES, Vol. 39, pp. 230, 234.]

A Cases referred to :

- (1) *Gray v. Fidler*, [1943] 2 All E.R. 289 ; [1943] 1 K.B. 694 ; 112 L.J.K.B. 627 ; 169 L.T. 193 ; Digest Supp.
- (2) *Property Holdings Co., Ltd. v. Mischeff*, [1946] 2 All E.R. 294 ; [1946] 1 K.B. 645 ; 175 L.T. 192.

B MOTION on behalf of the landlords for an order of prohibition addressed to the Hampstead and St. Pancras Rent Tribunal on the ground that, the premises having been let unfurnished, the tribunal had no jurisdiction to entertain an application by the tenant under s. 2 (1) of the Furnished Houses (Rent Control) Act, 1946.

Paull, K.C., Percy Lamb and Denis Purcell for the landlords.

H. L. Parker for the tribunal.

C *C. L. Hawser* for the tenants.

LORD GODDARD, C.J. : The Furnished Houses (Rent Control) Act, 1946, s. 2 (1) provides :

Where a contract has, whether before or after the passing of this Act, been entered into whereby one person (hereinafter referred to as the "lessor") grants to another person (hereinafter referred to as the "lessee") the right to occupy as a residence a house or part of a house situated in a district in which this Act is in force in consideration of a rent which includes payment for the use of furniture or for services, whether or not, in the case of such a contract with regard to part of a house, the lessee is entitled, in addition to exclusive occupation thereof, to the use in common with any other person of other rooms or accommodation in the house, it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district . . .

Then the tribunal may call upon the lessor to provide certain information, to answer certain questions. If he fails to do so, he is liable to a penalty.

E By s. 12 :

(1) . . . "services" includes attendance, the provision of heating or lighting, the supply of hot water and any other privilege or facility connected with the occupancy of a house or part of a house, not being a privilege or facility requisite for the purposes of access, cold water supply or sanitary accommodation . . . (2) Where separate sums are payable by the lessee of any premises to the lessor for any two or more of the following, namely :—(a) occupation of the premises ; (b) use of furniture ; and (c) services ; the expression "rent" shall, in relation to those premises, mean the aggregate of those sums, and where such sums are payable under separate contracts, those contracts shall be deemed to be one contract.

F The object of sub-s. (2) was probably to deal with the common case of service flats, where one pays separate sums for the rent and for the services rendered by the servants of the landlord, and to prevent a landlord getting out of the provisions of the Act by inserting in his lease merely a sum for the rent of the flat or rooms and having a separate agreement for the furniture, which he might put in at an extravagant figure.

G In the present case prohibition is moved on behalf of the owners of a block of flats on the ground that the tribunal has no jurisdiction to inquire into the rent or to entertain an application by the tenants because this is an unfurnished letting under which the landlords do not agree to supply furniture or to supply services. To see whether that is right or not, one has to look at the lease which makes the matter perfectly clear. The landlords let the premises for a sum of £240, and there is not a word in the lease about furniture or providing services as is found in some leases. It is said that, in fact, there was furniture, but the only pretence for saying there was furniture is that, instead of there being ordinary fireplaces, there was what is called panel heating, an electric fire which becomes part of the wall of the flat, and a part of the fittings generally called, I think, an electric immersion heater. It was made clear to the tenants that they had to pay for the electricity. I do not think anybody, by any

stretch of imagination, could describe as furniture a panel electric fire which is just as much part of the structure as an ordinary fireplace. We have the authority of the Court of Appeal in *Gray v. Fidler* (1)—and it is also common sense—that, in considering the word “furniture” in these Acts, one has to give it its ordinary, every-day meaning. I am sure no one would speak of an immersion heater or a panel fireplace as furniture.

With regard to services, we are told that there are on the premises porters who do this, that and the other things for the tenants. But it was decided in *Property Holdings Co., Ltd. v. Mischeff* (2) that, for a purpose so similar to the present that there is no distinction to be drawn, “attendance” means attendance to which the tenant is contractually entitled. The tenant is not contractually entitled to any service in the present case. In *Property Holdings Co., Ltd. v. Mischeff* (2) the Court of Appeal ([1946] 2 All E.R. 296) cited with approval a passage from the judgment of HENN COLLINS, J., in the court below, in which he said :

Taking next the presence of the hall porters, the plaintiffs undertake to use every precaution to employ no one but a competent and trustworthy person as resident porter, but beyond that their obligation does not go.

In this case there is not even that provision. Then he goes on :

Though the porter may, and no doubt does, make himself obliging to the tenants, he has no duty to perform for them, and I do not think that such attendance as he chooses to give can be said to be any part of that for which the tenant pays his rent. Much the same considerations apply to the removal of refuse. The receptacles are in practice removed from the back doors of the flats, by someone employed by the plaintiffs, to the point of collection by the local authority, but this service is not stipulated for in the lease and the tenant would have no valid ground of complaint if he was left to make his own arrangements for this to be done. I do not think “attendance” can be extended to anything to which the tenant is not contractually entitled.

Whether one agrees with that, or not—and I assuredly do—that is an opinion binding on this court. Accordingly, I can find nothing here which enables the tenant to say that the rent which he is paying is in respect of either furniture or services. That he may expect to get, and that it is highly probable that he will get, a certain amount of attendance, is another thing. There is no contractual obligation on the landlord to provide it, and the rent reserved by the lease is, therefore, nothing to do with the attendance or the furniture.

That is enough to dispose of this case, but I wish to say one other word. If the lease had contained a provision that the landlord was to provide furniture or services, then, no doubt, the rent tribunal would have had jurisdiction to entertain the case, but I desire to say for the guidance of these rent tribunals, that because they have jurisdiction to entertain the case, it does not mean that they can reduce the rent merely because the landlord is not providing that which he has contracted to provide. The Act gives no power to the rent tribunal to decide questions of breach of contract or to award compensation to tenants for breaches of contract by way of reduction of rent. In a case where there is a provision for the supply of services or furniture, or both, the only way, in my judgment, in which the tribunal can approach the case is for them to see what the lease provides and consider whether the rent reserved is a fair rent for the use of the premises with those services. If it is, then it seems to me the rent tribunal can do nothing. If they come to the conclusion, say, that £250 a year is a fair rent for the flat with services which the landlord has undertaken to provide, there is an end of the matter. The fact that the landlord has not provided them means that the landlord is in breach of his covenant, and for the breach of covenant the law gives a remedy in damages. These damages have to be sued for and assessed in a court of law, either the county court or the High Court, according to the amount of the damage which has been sustained, but it is important to say, and I say it for the guidance of the tribunals, that the Act does not, in my judgment, give them any power to reduce the rent because they find that the landlord has not provided services stipulated for in the lease. They would then be abrogating to themselves the right of deciding a question of breach of covenant, which they have no power to decide, and assessing damages which they have no power to assess, because the law does not allow the rent to be reduced as a result of the landlord not having performed his covenant. In my opinion, the order for prohibition must go.

ATKINSON, J. : I agree. Reading the affidavits filed on behalf of the tenant it seems to me plain that his real complaint is that the landlord made certain promises which were never carried out, and he (the tenant) thinks he has a claim for damages for breach of those promises. That is a case with which the tribunal has no power to deal.

OLIVER, J. : I agree.

Order accordingly.

A Solicitors : *Thompson & Co.* (for the landlords); *Solicitor, Ministry of Health* (for the tribunal); *Lesser, Garber & Selby* (for the tenants).
[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

irmed. C.A. [1948] 2 All E.R. 528.

B R. v. PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL,
Ex parte BEDROCK INVESTMENTS, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.),
May 8, 12, 13, 1947.]

C Landlord and Tenant—Rent control—Furnished house—Reduction of rent—Reduction below amount of standard rent—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 7.

There is no jurisdiction in a rent tribunal set up under the Furnished Houses (Rent Control) Act, 1946, to reduce the rent of any premises below the standard rent for those premises. The tribunal is, in effect, forbidden to do so by s. 7 of the Act which preserves, *inter alia*, the standard rent and all rights in respect of it, whether of the landlord or the tenant.

D The provision by a landlord of services cannot, in the absence of contractual obligation to supply such services, operate to bring a letting within the jurisdiction of a rent tribunal under the Furnished Houses (Rent Control) Act, 1946.

R. v. Hampstead and St. Pancras Rent Tribunal, Ex p. Ascot Lodge, Ltd. (ante p. 12), followed.

E [FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 7, see HALSBURY'S STATUTES, Vol. 39, p. 233.]

Cases referred to :

- (1) *R. v. Hampstead and St. Pancras Rent Tribunal, Ex p. Ascot Lodge, Ltd.*, [1947] 2 All E.R. 12.
- (2) *Phillips v. Copping*, [1935] 1 K.B. 15; 104 L.J.K.B. 78; 152 L.T. 175; Digest Supp.
- (3) *Regional Properties, Ltd. v. Oxley*, [1945] 2 All E.R. 418; [1945] A.C. 347; 114 L.J.K.B. 473; 173 L.T. 201; Digest Supp.
- (4) *Michael v. Phillips*, [1924] 1 K.B. 16; 93 L.J.K.B. 21; 130 L.T. 142; 31 Digest 568, 7155.
- (5) *Property Holdings Co., Ltd. v. Mischeff*, [1946] 2 All E.R. 294; [1946] 1 K.B. 645; 175 L.T. 192.

G MOTIONS for orders of *certiorari* to bring up to be quashed orders made under the Furnished Houses (Rent Control) Act, 1946, by the Paddington and St. Marylebone Rent Tribunal, whereby they reduced the rent of certain flats. The facts appear in the judgment of LORD GODDARD, C.J.

Paull, K.C., *P. Lamb* and *J. D. Purcell* for the applicants (the landlords).
H. L. Parker for the Paddington and St. Marylebone Rent Tribunal.
Bernstein for the tenants.

H LORD GODDARD, C.J. : The applications were made on two grounds. First, it is said that the tribunal had no jurisdiction to hear the cases in question, because the houses all fell within the provisions of the Rent Restrictions Acts and so outside the scope of the Furnished Houses (Rent Control) Act, 1946. Secondly, it was said that, as the leases contained no provision whereby the landlords were bound to render services, there was no question but that they were let unfurnished and the tribunal had no jurisdiction, following the decision of this court in *R. v. Hampstead and St. Pancras Rent Tribunal, Ex p. Ascot Lodge, Ltd.* (1).

Explained. R. v. PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL.

It was agreed that all these flats come within the Rent Restrictions Acts, and the question turns on the provisions of the Furnished Houses (Rent Control) Act, 1946, s. 7. We are not concerned with the policy of the Act of 1946 except, of course, in so far as it throws light on its interpretation, and it is a sound rule that we have to look at the mischief intended to be cured as well as to the remedy provided. The mischief was the letting of property at an excessive rent where furniture or services were provided, either or both of which might be of little value. It cannot be contended that no house or flat which was controlled by the Rent Acts could come within the jurisdiction of the tribunal. That would often be exactly the sort of property which it would be most proper should be dealt with by such tribunals. A landlord with a flat with a controlled rent of, say, £80 a year might put in a few sticks of furniture or provide a service of some trifling nature and then charge an excessive rent. What is contended here is that while, where a house is within the Rent Acts, there may be jurisdiction to hear the case and give certain relief, the tribunal has no right to reduce the rent below the standard rent.

The Furnished Houses (Rent Control) Act, 1946, s. 7, provides :

Sections 9 and 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (which relate respectively to limitation on rent of houses let furnished and to penalty for excessive charges for furnished lettings) shall not apply as regards the rent charged for any house or part of a house entered in the register under the provisions of this Act in respect of any period subsequent to such registration, but save as aforesaid nothing in this Act shall affect any provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939.

It is not disputed that the rents fixed by the tribunal in this case are below the standard rent. It is true that the rents are those of a first letting of these flats after the houses were converted, so that the rents in the actual leases before the court are the standard rents, but that is fortuitous, and makes no difference. If the tribunal had jurisdiction to do what they have done here, they could act in the same way if the standard rent was one that had been fixed since the Rent Acts first came into force, even if the first letting had been 50 years ago and the rent then fixed had become the standard. It would, indeed, be a curious result if a landlord who lets a flat at the standard rent, which incontestably is the rent recoverable under the Rent Acts, should be liable to have that rent reduced merely because he agrees to give his tenant something in addition, such as hot water or central heating, or puts in some furniture and still charges only the standard rent. It is, of course, in the highest degree unlikely that a new letting would ever be made at or under the standard rent, with something given in addition. It is not at all unlikely that a landlord might let a flat or rooms at the standard rent and give something in addition for a further consideration. If that is done, the additional consideration has to be regarded as part of the rent under s. 12 (2) of the Act of 1946, and I have no doubt the tribunal can then take the matter into consideration, and if they see fit, give a reduction, so, however, that they do not reduce the total sum payable below the standard rent. If they can reduce the standard rent, I do not see how it can be said that they are not affecting the provisions of the Rent Acts by using the provisions of the Furnished Houses (Rent Control) Act. Jurisdiction to fix standard rents and to apportion rents is given to the county court judge without appeal, and I should expect very clear words in the present Act if it were intended that these tribunals could deal with rents determined by the courts. Here the language of s. 7 seems to me to contemplate the exact opposite. If the tribunal can reduce the standard rent, I can attach no meaning to the concluding words of s. 7. Whatever else they can do, it seems to me clear they cannot affect the standard rent. If they could, the resulting situation would be startling indeed. In the case of, say, a weekly or monthly tenancy, where the contractual rent is less than the standard rent, a landlord can determine the tenancy by notice, and let again to the tenant at the standard rent, but under this Act he would, apparently, be deprived of this right because the registered rent becomes the rent for all purposes.

Counsel for the rent tribunal agreed that a difficulty might arise in the case of a statutory tenant, and suggested that, as there was in that case no contract, the provisions of the Act of 1946 might not apply, but take the case of a house

let at £x, and reduced to £x-£y so that it is under the standard rent. The tenant dies, and a member of his family asserts his right to remain as a statutory tenant. It has been decided by the Court of Appeal in *Phillips v. Copping* (2), approved in the House of Lords in *Regional Properties, Ltd. v. Oxley* (3), that the statutory tenant could then be charged the standard rent, yet the landlord might find himself faced with an order fixing the rent until the expiration of the Furnished Houses (Rent Control) Act, as in the present case, though possibly it might be for a shorter period, prohibiting him from demanding the higher rent except by exposing himself to fine and imprisonment.

In my opinion, there is no jurisdiction in these tribunals to reduce the rent below the standard rent. They are forbidden to do so by s. 7, which preserves, among other things, the standard rent, and leaves untouched all rights in respect of it, whether of the landlord or the tenant. If they find a house, the standard rent of which is £x, and it is let for £x plus £y, £y representing the use of furniture or services, they can deal with £y as they like, so long as the total is not reduced below £x. This is enough to dispose of all the cases, but the further point is taken that the landlords have not covenanted to supply anything, and, therefore, the case is covered by the recent decision of this court in *R. v. Hampstead and St. Pancras Rent Tribunal, Ex p. Ascot Lodge, Ltd.* (1). It is said in answer that the tenants are given the right to use a bathroom in common with others, and, therefore, the landlord impliedly covenanted to supply hot water. Further, it is said that he supplies electricity for lighting, because he makes no charge for it, though he does for power, the power current being supplied through slot meters from which the money is collected. The answer to that, I think, is the same as in *R. v. Hampstead and St. Pancras Rent Tribunal* (1). The lease imposes no obligation on the landlord to supply hot water, any more than it imposes an obligation on the tenant to use the bathroom. There is no ground, in my opinion, for implying any covenant, and none ought ever to be implied unless there is such a necessary implication that the court can have no doubt what covenant or undertaking they ought to write into the agreement. So far as the supply of electricity is concerned, here again there is no promise to supply it.

I think it is desirable to add one word, again for the guidance of these tribunals. We have already pointed out in *R. v. Hampstead and St. Pancras Rent Tribunal* (1) that they cannot try breaches of contract and reduce rents because a landlord has not given something which he undertook by his contract to provide. Still less can they reduce rents because the landlord may have represented that he would provide something as to which the lease is silent. In some of these cases it is clear that what the tenants are really saying is that the lease does not give them that for which they bargained. If that be so, their remedy is rectification, which can be decreed only by a court of equity and not by a Furnished Houses Rent Tribunal. In my opinion, the orders for *certiorari* must go.

ATKINSON, J. : I agree. These applications concern a number of leases and lettings relating to three blocks of flats in Craven Hill Gardens. The leases or tenancy agreements are all in precisely the same form. The flats are let, along with the right in common with others, to use the "water closets, lavatory accommodation and bathrooms situate in the said building." It is not suggested that there is any furniture in any of the rooms, and the contract provides for no services whatever. It is plain that they are not contracts within the Furnished Houses (Rent Control) Act, 1946, but, it is said, electricity is supplied for lighting purposes and hot water is supplied to the different flats, and it is argued that the rendering of these services brings the lettings within the Act. However, I adhere to the view which this court expressed in *R. v. Hampstead and St. Pancras Rent Tribunal* (1), that services voluntarily rendered do not bring lettings within the Act which otherwise would not be within the Act. It is the contract that has to be considered. This seems to me to be perfectly plain if one looks at ss. 2 and 3 of the Act. Section 2 provides :

(1) where a contract has . . . been entered into whereby one person (hereinafter referred to as the "lessor") grants to another person (hereinafter referred to as the "lessee") the right to occupy as a residence a house or part of a house situated in a district in which this Act is in force in consideration of a rent which includes payment for the use of furniture or for services, . . . it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district,

... (2) Where any contract to which this Act applies is referred to a tribunal ... the tribunal shall consider it, and, after making such inquiry as they think fit ... shall approve the rent payable under the contract or reduce it ...

It seems clear that it is the contract, and nothing else, that can be referred to the tribunal. A similar question arose with regard to the Rent Restrictions Acts in *Michael v. Phillips* (4). There it was argued that, if there was a letting and certain furniture was included, although not provided for in the letting, that ought to be enough to take the house out of the Acts, but **BANKES, L.J.**, **A** said :

Mr. Matthews argued strenuously that the facts of the case must be considered without regard to the obligations in the lease and that if the rent of the tenement in fact covered attendance then it ought to be held that the case came within proviso (i) to s. 12 (2). I cannot agree. On the plain construction of the proviso it applies only to board, attendance and use of furniture which as between the landlord and tenant the landlord has contracted to provide. **B**

SCRUTTON, L.J., said the same thing. The same view was taken in *Property Holdings Co., Ltd. v. Mischeff* (5), where the headnote says :

Held (1) that since there was no contractual right on the part of the tenant to such attendance as was in fact provided, the flat was not let at a rent which included payments in respect of attendance. **C**

It seems to me that the forms which are sent to the lessee by the tribunal for him to fill in are framed on the wrong basis. There is no question asking what services are contracted for. Question No. 5 is : " Services provided for you by the lessor," and, of course, services which are, in fact, provided may be filled in although they have no relation to the contract. That indicates that the tribunal is approaching these questions from a totally wrong point of view. If the tenant contends that the lease does not contain the real terms agreed on, he may or may not have a case for rectification, but, if he has, he must seek that rectification in the appropriate courts. These tribunals have no power to rectify contracts or to treat them as rectified without even going through the process of rectifying. It was argued that, at any rate, the facts here indicate an implied obligation to provide hot water. My Lord has dealt with that, but I would add that it is clear that, if the question had been raised, the landlord might well have said : " I am not going to enter into any contractual obligation to supply hot water. I may not be able to get coal. I am not going to promise, because, if I do, I shall bring the letting within the Act, and I do not intend to do that. If I supply hot water, it will be on a voluntary basis, and I will do my best, but I am not going to enter into any contract with regard to it." There is nothing wrong about an attitude of that sort, and, to my mind, the tribunal is not entitled to consider services which are voluntarily rendered. **D**

There is another point with which we have to deal. The landlords rely on a further contention that these lettings are plainly within the Rent Restrictions Acts—that is not in dispute—and that a Furnished Houses Rent Tribunal has no power to reduce a rent below the standard rent which can be charged in the case of the premises in question. Lettings seem to fall into three classes. There are lettings in which there is no furniture and no attendance included ; **E** secondly, lettings in which a substantial portion of the rent is fairly attributable to the use of furniture or to attendance ; thirdly, lettings in which part of the rent not amounting to a substantial portion is attributable to the use of furniture or to attendance. As to the first, the Act of 1946 can have no application ; as to the second, the Rent Restrictions Acts can have no application ; as to the third, on the face of it they may be within both Acts. Then the question arises : Which set of provisions is to prevail ? The 1946 Act seems clear about that. **F**

Section 7 provides : **G**

Sections 9 and 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (which relate respectively to limitation on rent of houses let furnished and to penalty for excessive charges for furnished lettings) shall not apply as regards the rent charged for any house or part of a house entered in the register under the provisions of this Act in respect of any period subsequent to such registration, but save as aforesaid nothing in this Act shall affect any provisions of the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939. **H**

Sections 9 and 10 were entirely outside the scheme of the Rent Restrictions Act. They relate to furnished houses, and furnished houses only. Therefore, I do not think the fact that ss. 9 and 10 up to a point still have some application notwithstanding the Act of 1946, throws any light on the meaning of the last three lines of s. 7, which seem to me to express quite clearly that, if there is a conflict between the two Acts, it is the Rent Restrictions Act which must govern the contract.

- A There is one consideration which, to my mind, settles this beyond argument. It is clear under the Rent Restrictions Act that a landlord is entitled to charge the standard rent. He cannot increase the rent during the life of a tenancy or lease because he is bound by his contract, but when the existing tenancy or lease expires, he is entitled under that Act to charge the standard rent, plus two permitted increases—one is the 8 per cent. on any money which has been spent on structural improvements, and the other is an increase in respect of an increase of rates.
- B Of the tenancies in the present case, one expired on Mar. 31, 1947, another expires in November, two expire in March, 1948, and one in January, 1949. Under the Rent Restrictions Act, when these tenancies come to an end, the landlords are expressly permitted when a new agreement is entered into, to charge the standard rent plus those increases. That is the position if they are governed by the Rent Restrictions Act. What happens if they are within the Furnished Houses (Rent Control) Act, if these reductions are good? Under s. 3, the reduced rents have got to be registered, and under s. 4, at no time can those rents be exceeded:

(1) Where the rent payable for any premises is entered in the register under the provisions of this Act, it shall not be lawful to require or receive (a) on account of rent for those premises in respect of any period subsequent to the date of such entry . . . payment of any sum in excess of the rent so entered; . . .

- D It would be absurd to say that that would not be depriving the lessors of rights, expressly given to them by the Rent Restrictions Act, on any new letting to charge the standard rent *plus* the permitted increases. Those lines in s. 7:

. . . save as aforesaid nothing in this Act shall affect any provisions of the Rent and Mortgage Interest Restrictions Acts . . .

- E seem to me to make it clear that there can be no power in these rent tribunals to do anything to interfere with that right. It may be that, even if a letting is controlled by the Rent Acts, for some purposes the tribunal can still deal with the letting. We have not considered that, but I am satisfied that they have no power to do anything which interferes with the right of the landlord to charge the standard rent plus permitted increases. That is sufficient in itself for holding that all these decisions are *ultra vires*, and that these orders ought to go.

- F OLIVER, J. : I agree. Counsel for the rent tribunal argued on the concluding words of s. 7 of the Furnished Houses (Rent Control) Act, 1946, that the Rent Restrictions Acts do not authorise the charging of the standard rent. It is quite true the Rent Restrictions Acts do not in terms authorise charging the standard rent, but implicitly they do. They say, in effect, that a contract between the parties, up to the amount of the standard rent is enforceable, and
- G I cannot attribute any other meaning to them.

Orders accordingly.

Solicitors: *Thompson & Co.* (for the applicants); *Solicitor, Ministry of Health* (for the rent tribunal); *Barnett Janner* (for certain tenants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

CARR v. DECCA GRAMOPHONE CO., LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), April 23, May 12, 1947.]

Factories and Shops—Dangerous machinery—Circular saw—Not properly fenced—Responsibility of operator—Liability of factory occupier—Burden of proof—Factories Act, 1937 (c. 67), s. 130 (2)—Woodworking Machinery Special Regulations, 1922-1945, regs. 10 (b) (ii), (c).

A circular saw at a factory occupied by the respondents was fitted with a proper riving knife and an adequate guard, but neither was adjusted in accordance with the Woodworking Machinery Special Regulations, 1922-1945, and, therefore, the saw was not properly fenced. The operator of the machine, who had been first employed by the employers five days earlier, had told them that he was a sawyer of 18 years' experience and was conversant with the regulations. The employers "took him at his own valuation," giving him no instructions with regard to the working or adjustment of the machine and there was no supervision of such matters by them.

Held: a contravention by the workman of the regulations would be "a contravention by an employed person . . . with respect to duties of [the person] employed" or "a contravention by [him] of [a] regulation . . . which expressly imposes [a] duty upon him" within the Factories Act, 1937, s. 130 (2), and the employers were entitled to take advantage of the defence afforded by that sub-section (although they had not taken the steps specified by s. 137 (2) to bring the workman before the court) unless the prosecution proved that they had failed to take reasonable steps to prevent the contravention.

Smith v. A. Baveystock & Co. Ltd. ([1945] 1 All E.R. 535) distinguished.

[AS TO FENCING DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, paras. 1130, 1131; and FOR CASES, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

Case referred to:

(1) *Smith v. Baveystock & Co., Ltd.*, [1945] 1 All E.R. 531; Digest Supp.

CASE STATED by a metropolitan magistrate.

On July 11, 1946, the respondents were charged at a court of summary jurisdiction at Lambeth on two informations preferred by the appellant, an inspector of factories, with offences against the Woodworking Machinery Special Regulations, 1922 to 1945. The offences charged were that, being occupiers of a factory at Lambeth within the meaning of the Factories Act, 1937, they: (1) contravened reg. 10 (b) (ii) in that at a circular saw the distance between the front edge of the riving knife and the teeth of the saw exceeded a half inch at the level of the bench table, whereby the respondents were guilty of an offence under s. 130 (1) of the Act; (2) contravened reg. 10 (c) in that the guard for the top of a circular saw, being provided with a flange at the side of the saw farthest from the fence, was not kept so adjusted that the said flange extended below the roots of the teeth of the saw, whereby the respondents were guilty of an offence under s. 130 (1). The magistrates dismissed the informations. The inspector of factories appealed.

W. Arthian Davies for the appellant.

T. F. Southall for the respondents.

Cur. adv. vult.

May 12. LORD GODDARD, C.J., read the following judgment of the court. The first contravention alleged was that the distance between the front edge of the riving knife and the teeth of a circular saw exceeded half an inch at the level of the bench table, and the second was that the guard for the top of the saw, being provided with a flange at the side of the saw farthest from the fence, was not kept so adjusted that the flange extended below the roots of the teeth of the saw.

The facts found by the magistrate show that on May 18, 1946, the date of the alleged offences, the saw in question was in motion at the factory of which the respondents were occupiers. It was fitted with a proper riving knife and an adequate guard, but neither were adjusted in accordance with the

regulations, so it cannot be contended that it was properly or securely fenced. It is found that both the riving knife and the guard could easily have been adjusted so as to conform with the regulations, and from that finding we infer that the excessive distance between the guard and the wood was not due to the nature of the work then being done. There is nothing to suggest that they were as close as practicable. Nor is there any suggestion that the actual work rendered the use of the guard impracticable so that advantage could be taken of reg. 23. The machine was being worked by a man who had first been employed by the respondents five days earlier. He had told them that he was a sawyer of 18 years' experience and that he knew the regulations. While the magistrate finds that the man was competent to work and reset the saw without instructions, he also finds that no instructions were given to him as to its working or adjustment nor were those matters ever supervised by anyone on the respondents' behalf. Therefore, it follows that they took the operator at his own valuation as to experience and knowledge and took no pains to find out whether, accepting that he had full knowledge of the regulations, he was a careful and reliable workman who could be trusted to see that the regulations were observed.

It seems to us clear that the magistrate intended to hold that the contravention of the regulations in this case was a contravention by the operator. It was his duty to use and maintain the machine in proper adjustment. This he failed to do, and the contravention, therefore, was "with respect to duties of [the person] employed" or the "contravention . . . of [a] regulation . . . which expressly imposes [a] duty upon him." In these circumstances, it seems to the court that the Factories Act, 1937, s. 130 (2), provides the employer with a defence unless it is proved that he failed to take all reasonable steps to prevent the contravention. It was argued for the appellant that a breach of a duty by the workman would not avail the employer as a defence unless he had taken the steps provided by s. 137, which provides for the actual offender being brought before the court when, if the employer proves to the satisfaction of the court that he has used all due diligence to enforce the execution of the Act and that the other person has committed the offence without his consent, connivance or wilful default, the other person shall be convicted and not the occupier. We are unable to accede to this contention.

Section 130 (2) expressly provides that in the circumstances there mentioned the employed person shall be guilty of an offence and the occupier or owner shall not be guilty of an offence, and where the contravention is by the employed person the onus is on the prosecution to prove that the owner failed to take reasonable steps to prevent the contravention. Section 137 deals with a different state of affairs. It does not deal with the case in which an employed person is guilty of a contravention. It is intended to provide for such a case as might occur if some contractor's workman who was present in the factory interfered with the guards of a machine so that it was left in an unguarded or unsafe condition. The fact that it was in an unsafe condition is a breach of the occupier's absolute duty, but the section gives him a defence if he can show that the contravention was caused by someone else, but in that case the onus of proving all reasonable care is the other way to what it is in s. 130 (2), and it is for the occupier to prove that he was not guilty of want of care. The magistrate has not, however, given any direct finding whether it was proved in the present case that the respondents did not exercise all reasonable care. We think that it may be that he misunderstood the observations of DU PARCQ, L.J., in *Smith v. A. Baveystock & Co., Ltd.* (1) to which he refers. The Lord Justice was not, in our opinion, laying down any proposition of law. What was decided in that case was that in its particular circumstances there had been no breach of the regulations by anyone. A piece of timber of varying thickness was being cut and the guard was adjusted so as to permit of the thickest part being cut. This was permitted by reg. 21, as it would have been impracticable from a commonsense point of view to keep stopping and readjusting the machine according to whether the actual part being cut was one inch, two inches or three inches. In expressing the opinion that in that case, had there been a prosecution, the employers might have had a defence, the Lord Justice was dealing with a man who had been working on a circular saw for two-and-a-half years at the employers' works and for some part of his

previous service with the employers extending over 12 years before he joined the army. The Lord Justice said that in those circumstances he thought that it might have been very difficult to say that the employers had not taken reasonable steps. We repeat that he was there dealing with the particular facts of that case and was making no observations of general application. He was certainly not dealing with such a case as this, where, according to the magistrate's findings, the workman had only been employed for five days at these particular works and during that time had not been subjected to any supervision to find whether he was a careful workman who could be trusted to observe the regulations. A

This case must, therefore, go back to the magistrates with a direction that he find whether, on the facts which he states were proved by the prosecution, he is satisfied that the respondents did take all reasonable steps to prevent the contravention of the regulations. If he finds that the respondents did not take all reasonable care, he will convict, and the appellant will then have the costs of this appeal. If he finds that they did, the dismissal will stand, and the respondents will have their costs in this court. B

Case remitted.

Solicitors: *The Solicitor, Ministry of Labour and National Service* (for the appellant); *Rowe & Maw* (for the respondents).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.] C

ROBERT (otherwise DE LA MARE) v. ROBERT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), November 11, 1946, February 21, March 25, May 7, 1947.] D

Divorce—Nullity—Jurisdiction—Petitioner resident in England at time of petition, but respondent resident in Guernsey—Marriage in Guernsey—Wilful refusal to consummate—Law to be applied.

On Feb. 7, 1940, the parties went through a ceremony of marriage in Guernsey in accordance with the law of Guernsey. They never lived together. The husband was serving in England in the Royal Air Force, and later the wife came to England and joined the Auxiliary Territorial Service. The wife was *bona fide* resident in England when she presented her petition for a decree of nullity on Oct. 9, 1945, but, unknown to her, the husband had returned to Guernsey where he was served with the petition on May 1, 1946. In Feb., 1946, the wife returned to Guernsey. The parties were at all material times domiciled in Guernsey. E

HELD: (i) the wife being resident in England at the time of the institution of her suit, the court had jurisdiction to entertain it.

White (otherwise Bennett) v. White ([1937] P. 111) *applied*.

(ii) the law to be applied was the *lex loci celebrationis* because wilful refusal to consummate a marriage, in order to be justified as a ground for annulment and not dissolution, must be considered as a defect in marriage. F

Bertiaume v. Dastous ([1930] A.C. 79) *applied*. G

(iii) if wilful refusal to consummate a marriage were to be considered as something affecting the capacity of one of the parties to contract marriage, the *lex domicilii* must be applied.

Sottomayor v. De Barros (1877), 3 P.D. 1) *followed*.

AS TO JURISDICTION OF ENGLISH COURTS IN SUITS FOR THE NULLITY OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 6, p. 303, para. 357; and FOR CASES, see DIGEST, Vol. 11, p. 428, Nos. 924-926. H

Cases referred to:

- (1) *White (otherwise Bennett) v. White*, [1937] P. 111.
- (2) *Roberts v. Brennan*, [1902] P. 143; 71 L.J.P. 74; *sub nom. Brennan (otherwise Roberts) v. Brennan*, 86 L.T. 599; 11 Digest 428, 926.
- (3) *Bertiaume v. Dastous*, [1930] A.C. 79; 99 L.J.P.C. 66; 142 L.T. 54, P.C.; Digest Supp.
- (4) *Sottomayor v. De Barros* (1877), 3 P.D. 1.

PETITION by a wife for a decree of nullity of marriage on the ground that her husband had wilfully refused to consummate it. The suit was undefended. The facts appear in the judgment and are summarised in the headnote.

Tolstoy for the wife,

Cur. adv. vult.

A May 7. BARNARD, J., read the following judgment. This case originally came before me on Nov. 11, 1946, and, having heard the evidence, I was satisfied on the facts that the wife had established her case that the marriage had not been consummated owing to the husband's wilful refusal to consummate. I adjourned the case for proof of the Guernsey marriage and for legal argument as to the court's jurisdiction to entertain the suit, and the case again came before me on Feb. 21, 1947.

B The wife, Yolande Helene Robert, otherwise De La Mare, on Feb. 7, 1940, went through a ceremony of marriage with Nicholas John Auguste Robert at the register office, Saint Peter Port, in the Isle of Guernsey, and I am now satisfied that this ceremony was in accordance with the law of Guernsey. The parties never lived together. The husband was serving in England in the Royal Air Force Regiment and later the wife came to England and joined the Auxiliary Territorial Service. I am satisfied that she had a *bona fide* residence in England from Dec., 1942, to Feb., 1946. She was, therefore, resident here when she presented her petition on Oct. 9, 1945, praying that her marriage be pronounced null and void. In Feb., 1946, she returned to her home in Guernsey. It was alleged in the petition that both the wife and the husband were domiciled in England, but no attempt was made to establish an English domicile and I am satisfied on the evidence before me that both the wife and the husband were at all material times domiciled in the Isle of Guernsey. D The notice to appear, at the end of the petition, is addressed to "No. 502019 Corporal Nicholas John Auguste Robert of the Royal Air Force Regiment at present stationed with the Home Forces," but at the time of the presentation of the petition, though unknown to the wife, the husband had returned to his home in Guernsey and was served there with the petition on May 1, 1946. The husband did not appear to the petition and the case was undefended.

E Counsel on behalf of the wife argued that this court had jurisdiction to entertain this suit, first, by reason of the fact that the wife was *bona fide* resident in this country at the time she instituted her proceedings, and, secondly, by reason of the fact that the husband had not objected to the jurisdiction of the court. The jurisdiction of the ecclesiastical courts was based on the residence of the parties, and in suits for nullity this court follows the practice of the ecclesiastical courts. Their jurisdiction, however, seems to have depended F on the residence of the respondent being within the jurisdiction of an ecclesiastical court in England, but BUCKNILL, J. in *White (otherwise Bennett) v. White* (1), following the decision in *Roberts v. Brennan* (2), extended this jurisdiction to include a case where the petitioner was domiciled and resident in England although the respondent was both domiciled and resident abroad. I respectfully agree with the decision of BUCKNILL, J.

G In the case now before me the wife was residing here at the time she filed her petition for nullity, she was subject to English law, and to the best of her belief the husband was still serving in England, though, in fact, she was wrong as to this. It seems to me that she was, therefore, entitled to know whether, by English law, she was married or not. Owing to the course of events she returned to Guernsey before her case came on for hearing, but I consider the material date to be the date on which she instituted the suit. Although in H *White (otherwise Bennett) v. White* (1), the petitioner was both domiciled and resident in England I think it is clear from the authorities that either domicile or residence would found jurisdiction. I have come to the conclusion that the wife being resident here at the time of the institution of her suit, this court has jurisdiction to entertain it. Therefore, it is not necessary for me to deal with the second point raised by counsel.

Non-consummation of a marriage owing to the wilful refusal of the husband to consummate the marriage was introduced as a new impediment to marriage by the Matrimonial Causes Act, 1937. A peculiar feature of this impediment

consists in the voidability of the marriage being based on a post-nuptial fact. Ought I, in these circumstances, to apply the *lex fori*, which is the English law, or the *lex loci celebrationis*, or the *lex domicilii*, both of which are, in the case before me, the law of Guernsey? There is, however, evidence before me of a barrister-at-law practising in the Royal Courts of Justice, Guernsey, to the effect that wilful refusal of a respondent to consummate the marriage is a ground for a decree of nullity of marriage according to the law of Guernsey. I have come to the conclusion that I ought to apply the *lex loci celebrationis*, for the following reasons. Wilful refusal to consummate a marriage, in order to be justified on principle as a ground for annulment and not dissolution, must be considered as a defect in marriage, an error in the quality of the respondent. If this is right, then VISCOUNT DUNEDIN, in delivering the judgment of the Privy Council in *Berthiaume v. Dastous* (3), clearly states the law applicable to such a case in the following words ([1930] A.C. 83):

If there is one question better settled than any other in international law, it is that as regards marriage—putting aside the question of capacity—*locus regit actum*. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage.

If I were wrong, and wilful refusal to consummate a marriage was to be considered as something affecting the capacity of one of the parties to contract marriage, then I am bound by the decision of the Court of Appeal in *Sottomayor v. De Barros* (4), to apply the *lex domicilii*. In the present case both the contracting parties were, at the time of their marriage, domiciled in Guernsey and their marriage was celebrated in Guernsey. Therefore, applying the law of Guernsey, the wife is entitled to the decree for which she asks.

Decree nisi of nullity.

Solicitors: *Seton Pollock*, Law Society's Service Department.

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

irmed. C.A. [1948] 1 All E.R. 564.

WILKINSON v. BARKING CORPORATION

[KING'S BENCH DIVISION (Morris, J.), April 15, May 5, 1947.]

Local Government—Superannuation of officers—Right to annual superannuation allowance on ceasing to be employed—Question to be decided by Minister—Claim after cessation of employment—Local Government Superannuation Act, 1937 (c. 68), s. 35.

Practice—Procedure—Preliminary point of law—Unconditional appearance by defendants—Right to plead that plaintiff has no cause of action—R.S.C., Ord. 25, r. 2.

W., who was employed by a local authority and was entitled, as an employee, to participate in the benefits of a superannuation fund, ceased to be so employed on Dec. 17, 1945, and the local authority decided that he was not entitled to an annual superannuation allowance under the Local Government Superannuation Act, 1937, s. 8 (1) (a). In an action by W., begun on July 31, 1946, claiming a declaration that he was so entitled, unconditional appearance to the writ was entered by the local authority, but it was pleaded by para. 6 of the defence that W. had no cause of action because, under s. 35 of the Act of 1937, the question whether or not he was entitled to an allowance was to be determined by the Minister of Health. The master ordered that the issue raised by this defence should be disposed of before the trial, under R.S.C., Ord. 25, r. 2. At the hearing W. contended (i) that, since the authority had entered an unconditional appearance, the plea in para. 6 of the defence was bad since it denied the jurisdiction of the court; (ii) that s. 35 of the Act of 1937 applied only to persons who were still in the employment of the authority and not to persons who had ceased to be employees:—

HELD: (i) the fact that the local authority had entered an unconditional

appearance to the writ did not preclude them from raising the point that W. had no cause of action because his proper and only remedy was the exercise of a statutory right of appeal, and the procedure under R.S.C., Ord. 25, r. 2, was, therefore, not open to objection.

Wright v. Prescott Urban District Council (1916) (86 L.J.Ch. 221) considered.

(ii) although W. had ceased to be employed by the local authority before action brought, s. 35 of the Act of 1937 applied to him and he had no cause of action.

[AS TO PRELIMINARY POINT OF LAW, see HALSBURY, Hailsham Edn., Vol. 25, p. 251, para. 416; and Vol. 26, pp. 68, para. 110; and FOR CASES, see DIGEST, Pleading, pp. 49, 50, Nos. 394-398.

FOR THE LOCAL GOVERNMENT SUPERANNUATION ACT, 1937, see HASLBURY'S STATUTES, Vol. 30, p. 385.]

Cases referred to:

- (1) *Re Orr Ewing, Orr Ewing v. Orr Ewing* (1882), 22 Ch.D. 456; 52 L.J.Ch. 529; 48 L.T. 555; on appeal, sub nom. *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34; Digest Practice 381, 888.
- (2) *Western National Bank of City of New York v. Perez, Triana & Co.*, [1891] 1 Q.B. 304; 60 L.J.Q.B. 272; 64 L.T. 543; Digest Practice 381, 889.
- (3) *Moore v. Gamgee* (1890), 25 Q.B.D. 244; 59 L.J.Q.B. 505; 16 Digest 122, 202.
- (4) *Preston v. Lamont* (1876), 1 Ex.D. 361; 45 L.J.Q.B. 797; 35 L.T. 341; 40 J.P. 745; Digest Practice 372, 829.
- (5) *Wright v. Prescott Urban District Council* (1916), 86 L.J.Ch. 221; 115 L.T. 772; 81 J.P. 43; Digest Pleading 82, 694.
- (6) *Pasmore v. Oswaldtwistle Urban Council*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 16 Digest 302, 1150.
- (7) *Doe d. Rochester (BP.) v. Bridges* (1831), 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 42 Digest 750, 1737.

PRELIMINARY ISSUE of law, under R.S.C., Ord. 25, r. 2, in an action by the plaintiff for a declaration that he was entitled to receive an annual superannuation allowance under the Local Government Superannuation Act, 1937, s. 8 (1) (a). The defendants (the local authority) entered unconditional appearance to the writ, but pleaded, by para. 6 of the defence, that the plaintiff had no cause of action because, under s. 35 of the Act, his only remedy against a decision of the local authority was by way of appeal to the Minister of Health. The facts appear in the judgment.

Herbert Malone for the plaintiff.

Harold Williams for the corporation.

Cur. adv. vult.

May 5. MORRIS, J., read the following judgment. In this action the plaintiff claims a declaration that, on his ceasing to be employed by the defendants on Dec. 17, 1945, he was entitled to receive from the defendants an annual superannuation allowance under the provisions of s. 8 (1) (a) of the Local Government Superannuation Act, 1937. He claims that he completed ten years' service with the defendants and that he was, by reason of permanent ill-health, incapable of discharging efficiently the duties of his employment as parks superintendent. For reasons which they allege in their defence, the defendants deny that the plaintiff is entitled to an annual superannuation allowance, and they allege that there is a case for the application of s. 24 of the Act, which is in these terms:

A contributory employee who is dismissed or resigns, or otherwise ceases to hold his employment, in consequence of an offence of a fraudulent character or of grave misconduct shall forfeit all claim to any rights under this part of this Act in respect of his previous service.

By para. 6 of their defence, the defendants pleaded as follows:

The defendants will rely on s. 35 of the Local Government Superannuation Act, 1937, and will contend that, by virtue of the said section, any question as to the plaintiff's right to an annual superannuation allowance under part I of the said Act is required to be determined by the Minister of Health and that the plaintiff has no cause of action.

Section 35 of the Local Government Superannuation Act, 1937, is in these terms:

Any question concerning the rights or liabilities of an employee of a local authority, or of a person claiming to be treated as such an employee, under any of the provisions

of part I or this part of this Act, or any regulations made under this Act, shall be decided in the first instance by the authority concerned, and if the employee is dissatisfied with any such decision or with the authority's failure to come to a decision, shall be determined by the Minister, and the Minister's determination shall be final: Provided that the Minister may at any stage of the proceedings on the reference to him, and shall, if so directed by the High Court, state in the form of a Special Case for the opinion of the High Court any question of law arising in those proceedings.

The writ was issued on July 31, 1946, and was served on the same day, together with the statement of claim. Unconditional appearance was entered on Aug. 13, 1946. The defence was delivered on Nov. 5, 1946. There was no reply. On Feb. 21, 1947, an order was made by the master in the following terms:

Upon hearing counsel for the plaintiff and defendants, it is ordered by consent that the issue raised in para. 6 of the defence in this action be set down for hearing and disposed of before the trial, pursuant to R.S.C., Ord. 25, r. 2, and that the costs of this application be costs in the cause.

Order 25, r. 2, is in the following terms:

Any party shall be entitled to raise by his pleading any point of law and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

The only matter which is now before me is, therefore, the issue raised in para. 6 of the defence. On behalf of the plaintiff, counsel addressed two main submissions to me. In the first place, he contended that, as the defendants had entered unconditional appearance, it was not open to them to plead as they do in para. 6 of their defence. Counsel urged that, having failed to move to set aside the writ, it was now too late for the defendants to take a point which, he contended, went to the question of the jurisdiction of the court. In the second place, he contended that s. 35 did not apply, for he submitted that the word "employee" in that section should be construed as denoting a person who is being employed and not to include a person who has been employed or one who, as the defendants contend, has been dismissed from their employment.

As to the first point, it is to be observed that the plaintiff, appearing by counsel before the master, agreed that the issue raised by para. 6 of the defence should be set down for hearing and disposed of before the trial, whereas the plaintiff now seeks to say that such issue is not open to the defendants. This first point taken on behalf of the plaintiff is, therefore, a point other than that agreed by counsel and ordered by the master to be set down for hearing. The plaintiff did not take any step to strike out para. 6 of the defence, nor did he ask leave to deliver a reply. It is doubtful, therefore, whether this point is now open to the plaintiff, but, as I am anxious not to deal with this matter on any narrow or rigid basis, and as I heard full arguments on the point, I will proceed to deal with it.

Counsel for the plaintiff submitted that, if the defendants proposed to rely on the matters pleaded in para. 6 of the defence, they should have entered conditional appearance or should have taken out a summons under Ord. 12, r. 30, to set aside service on them. He argued that when the defendants had entered unconditional appearance it became too late for them to rely on the matters raised in para. 6. He referred to and relied on *Re Orr-Ewing*; *Orr-Ewing v. Orr-Ewing* (1), *Western National Bank of New York v. Perez Triana & Co.* (2), *Moore v. Gamgee* (3), and *Preston v. Lamont* (4). No doubt, as a general rule, complaint as to any irregularity in the service or issue of a writ of which defendants have knowledge cannot be raised after unconditional appearance, but no such matter here arises, and, furthermore, the cases cited do not, in my judgment, establish that the defence raised in para. 6 is not open to the defendants. It is to be observed that in *Wright v. Prescott Urban District Council* (5), a plaintiff claimed a declaration that certain orders made by the defendants under the Housing, Town Planning, etc., Act, 1909, were bad in law. Before pleadings were delivered, the defendants moved for an order to stay all further proceedings in the action, on the grounds that, having regard to s. 39 of the Housing, Town Planning, etc., Act, 1909, the court had

no jurisdiction to review and disturb the orders and that the plaintiff's remedy was to appeal to the Local Government Board. It was also said that the action was statute barred. NEVILLE, J., decided that the motion was premature because made before the delivery of the statement of claim. The defendants do not demur to the jurisdiction of the court and, indeed, if the point of law is decided in their favour, may then ask the court to give judgment in their favour, but they plead that the plaintiff's proper and only remedy is the exercise of a statutory right of appeal. The plaintiff contends that the submissions made by the defendants in regard to the construction of and the applicability of s. 35 are erroneous, but the defendants do not suggest that the court has not got jurisdiction to decide these matters, and, indeed, in conjunction with the plaintiff, have, as I have pointed out, agreed to an order for the trial of them as preliminary points of law. Whether some other procedure might or might not alternatively have been followed, as, for example, that of applying to stay the action, does not arise for decision, since, in my judgment, the procedure that has been adopted is not open to objection.

The defence raised in para. 6 is comparable with the defences pleaded in *Pasmore v. Oswaldtwistle Urban District Council* (6). The procedure adopted in that case was that the points of law were by agreement argued before the trial of the cause. It was in his speech in that case that the Earl of Halsbury said ([1898] A.C. 394):

The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think LORD TENTERDEN accurately states that principle in the case of *Doe d. Rochester v. Bridges* (7). He says: "Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." The words which the learned judge, LORD TENTERDEN, uses there appears to be strictly applicable to this case. The obligation which is created by this statute is an obligation which is created by the statute and by the statute alone. It is nothing to the purpose to say that there were other statutes which created similar obligations, because all those statutes are repealed; you must take your stand upon the statute in question, and the statute which creates the obligation is the statute to which one must look to see if there is a specified remedy contained in it. There is a specified remedy contained in it, which is an application to the proper government department.

In support of his second main contention, counsel for the plaintiff pointed to the definition in s. 40 of the Act of the word "employee." The definition is as follows:

"Employee" means an employee whether permanent or temporary, but does not include a person whose employment is of a casual nature.

Attention was specially directed to the word "is" in the phrase "whose employment is of a casual nature." Counsel further pointed to the provisions of s. 1 (3) (c) which reads:

In this Act . . . the local authority, or other body, in whose employment a contributory employee is, are in relation to him referred to as the "employing authority."

Attention was again directed to the word "is." It was submitted that the plaintiff should not be regarded as an employee within the meaning of s. 35 and it was urged that the section has no application where questions are being considered at a time when a person has ceased to be employed.

In my judgment, these arguments are fallacious. The plaintiff admits that he was an employee up to Dec. 17, 1945, and claims that as from that date he is entitled to receive an annual superannuation allowance. If on Dec. 17, 1945, he was entitled to participate in the benefits of a superannuation fund it was because he was an employee. Questions have arisen whether on Dec. 17, 1945, he was so entitled or whether there were reasons which disentitled him. Those questions seem to me to be clearly comprehended within the opening words of s. 35 of the Act, namely, the words: "Any question concerning the rights or liabilities of an employee of a local authority, or of a person claiming to be treated as such an employee, under any of the provisions of pt. I or this part of this Act . . ." If this is so, it follows that any such question is to be decided in the first place by the authority concerned,

and, if the employee is dissatisfied with any such decision, then the question is to be decided by the Minister specified by the Act.

In the course of the submissions, it was urged that matters arise in this action, and may arise in other cases, which can best be investigated and disposed of by the machinery of a trial in court, with its full opportunities for the examination and cross-examination of witnesses. It is not shown that these opportunities will be denied in any proceedings which take place on a reference to the Minister, but, whether this is so or not, these are considerations which do not arise, for they are relevant only to questions as to the policy of the legislation in question and with such questions the court is not concerned. For the reasons which I have given, I decide the question of law raised in para. 6 of the defence in the defendants' favour. In those circumstances, there appears to be nothing left in the action to try, and I, therefore, give judgment for the defendants.

Judgment for defendants.

Solicitors: *Hatten, Asplin, Jewers & Glenny*, Barking (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *E. R. Farr*, Town Clerk, Barking.

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

YEO v. STEWART AND OTHERS.

[KING'S BENCH DIVISION (Sellers, J.), April 30, May 1, 1947.]

Contract—Agent of life assurance society—Rules of society incorporated in contract of employment—Amendment of rules—Whether binding on agent appointed before amendment—Validity of amendment.

Friendly Societies—Life assurance society—Amendment of rules—Machinery for amendment contained in two rules—Amendment of rule providing for election of rules revision committee but no corresponding amendment of rule providing for special general meeting to amend rules—Validity of amendments made by special general meeting.

By a written contract, dated Feb. 22, 1936, the plaintiff became an agent to a life assurance society on the terms (*inter alia*) that he would comply with all the rules and conditions applicable to agents as stated in the rules of the society. The rules in existence at that time were made in 1933, and r. 30 gave the agent the right to sell his "insurance book" on certain conditions. By rr. 39 and 40, provision was made for the alteration of the rules. By r. 39, amendments could only be made at a special general meeting called every 5 years, the relevant date for this case being 1943. Rule 40 provided for the election in 1942 and every fifth year thereafter (*i.e.*, a year before the holding of the special general meeting) of a rules revision committee to consider what alterations were necessary and report thereon to the special general meeting. Owing to the difficulty of holding general meetings during the war, in each of the years 1940-1944 the society obtained from the Industrial Assurance Commissioner, under the Societies (Miscellaneous Provisions) Act, 1940, s. 1, a direction that no annual or special general meeting should be held in that year, and in 1941 a direction under the Act was obtained to amend r. 40 so as to provide that, should there be no annual general meeting in 1942, the election of the rules revision committee should take place at the first annual general meeting to be held thereafter. The society proposed at the same time to amend r. 39, but the commissioner did not consider it necessary. At the general meeting held in 1945, a rules revision committee was duly set up under the amended r. 40, and it reported to a special general meeting held on July 2, 1946, where a majority of the members passed an amendment to r. 30. The plaintiff (who was also a member of the society) contended (i) that the society had no power to make an amendment to the rules on July 2, 1946, because, under r. 39, amendments could only be made in 1943 and every fifth year thereafter; (ii) that his contract with the society was on the basis of the rules in force at the date of the contract and that any subsequent amendment could not affect the terms of his employment:—

HELD: (i) on the true construction of the society's rules, rr. 39 and 40 must be read together and the essence of the rule with regard to the machinery

for alteration was that there should be a quinquennial period in relation both to the setting up of the rules revision committee and to consideration by a special general meeting of any recommendation one year thereafter, and, therefore, the meeting held in 1946 to consider amendments was properly held under the rules and had authority to make amendments, and the amendment to r. 30 had been validly passed.

(ii) the terms of the plaintiff's contract incorporated all the rules of the society which were applicable to agents and, since such rules were subject to the application of rr. 39 and 40, these two rules were also included in the contract and any subsequent amendments were, therefore, binding on the plaintiff.

Page v. Liverpool Victoria Friendly Society ((1927), 43 T.L.R. 712) applied.

Southern Foundries (1926), Ltd. v. Shirlaw ([1940] 2 All E.R. 445) distinguished.

[AS TO AMENDMENT OF RULES, see HALSBURY, Hailsham Edn., Vol. 15, pp. 324-327, paras. 573-577; and FOR CASES, see DIGEST, Vol. 25, pp. 298-301, Nos. 73-93.

FOR THE SOCIETIES (MISCELLANEOUS PROVISIONS) ACT, 1940, s. 1, see HALSBURY'S STATUTES, Vol. 33, pp. 153, 154.]

Cases referred to :

- (1) *Page v. Liverpool Victoria Friendly Society* (1927), 43 T.L.R. 712; Digest Supp.
- (2) *Southern Foundries (1926), Ltd. v. Shirlaw*, [1940] 2 All E.R. 445; [1940] A.C. 701; 109 L.J.K.B. 461; 164 L.T. 251; Digest Supp.

ACTION by an agent of a life assurance society asking for declarations (i) that a resolution of the society made on July 2, 1946, was not binding on members of the society and was null and void; (ii) that the terms of his employment were not affected by the purported alteration of one of the society's rules by the resolution in question. The facts appear in the judgment.

J. Scott Henderson, K.C., and *Cecil Binney* for the plaintiff.

Sir David Maxwell Fyfe, K.C., and *C. A. J. Bonner* for the defendants.

SELLERS, J. : The plaintiff in this action is a member and agent of the Scottish Legal Life Assurance Society. The defendants are respectively the trustees of that society and the board of management. The plaintiff sues on his own behalf and on behalf of other members (other than the defendants) of that assurance society and he asks for two declarations and some incidental relief. The first declaration is that a resolution of the society is not binding on the members of the society and is null and void. Secondly, he asks for a declaration that he (the plaintiff) is employed as an agent of the society on the conditions contained in the rules of the society prior to July 2, 1946, and that the terms of his employment are not affected by the purported alteration of the rules which he has previously asked to be declared not binding on members of the society.

Two separate and distinct issues are raised on the pleadings in this case. The first is : Was the plaintiff's contract with the society—which was clearly subject to some extent, at any rate, to the rules of the society—on the basis of the rules in force at the time of the making of the contract so that, so far as the plaintiff was concerned, the rules were fixed and unalterable, or was the plaintiff's contract on the basis of the rules as they existed from time to time, if properly amended? The second issue to be decided is : Had the society power to make an amendment of the rules on July 2, 1946?

The plaintiff had been in the insurance business as an agent since he was 21 years of age, but he did not become associated with the Scottish Legal Life Assurance Society until 1936. He then applied on a printed form for appointment as an agent in the Brixton area and in that application he gave particulars of his previous service, references and so forth. That application was accepted and it was made so that the plaintiff could acquire from a man who was then an existing agent of the society his "insurance book," as it is called, the man in question being a Mr. Rainbow who had been what is known as a nominated agent of the society and who, under the existing rules of the society, could, on the termination of his agency, sell his book to a purchaser approved by the society. The plaintiff was approved and he entered into a written agreement with the society dated Feb. 22, 1936. As a consequence of that, the company

thereby agreeing to appoint the plaintiff as an agent to the Brixton area under the terms and conditions there set out to which I shall refer, the plaintiff entered into an agreement to purchase Mr. Rainbow's book from Mr. Rainbow. The contract need not be more particularly referred to, but it did transfer to the plaintiff the whole of the collecting book of Mr. Rainbow for a sum of £298 8s. 2d. That sum was calculated on a basis which was well recognised and, by reason of the activities since that time of the plaintiff, it is said by him that that book is now worth something like £418 on the basis of a free sale of the book under the same sort of conditions as prevailed when the plaintiff acquired it. At the time of this contract the rules of the society then in force were the 1933 rules, but, the 1939 rules which have been produced before me are in the same terms, so far as they are relevant to this case, as those existing in 1933. The rule which dealt with the aspect of agency with which this case is concerned—*i.e.*, the right of the nominated agent, who has acquired a book in the way that the plaintiff has acquired his book, to dispose of it, or the right of his personal representative to dispose of it—is r. 30. Quite generally, and without going into the detail of phraseology of r. 30, that rule gave the agent (*i.e.*, the plaintiff in this case) a right to sell his book within a stated period provided that he fulfilled the preliminary conditions which that rule prescribes. It also included a right to transfer the business obtained by the agent, not directly by his own activities, but through the board of management.

The matter which has given rise to the conflict in this case is a proposed new rule. I need not read it, but it is clear that it is quite different from the existing r. 30 at the time when the plaintiff entered into his contract. In particular, it takes away that second right which the agent had because it provides that no agent shall have a right to transfer any business given to him by the board of management. On the facts of this case it is, in fact, conceded that the plaintiff had not up to the time of this action ever received any business from the board of management, but, notwithstanding that, it is, of course, clearly a proposed alteration in the rule with regard to nominated agents. The second material alteration is that the society are given power by the rule to purchase these books from nominated agents, whereas previously they had no such power. If, after a period of three months, the agent had not found a suitable purchaser, and the society continued through their own activities the collection of the premiums and then sought out a purchaser who was suitable to them, on the transaction of purchase going through, the society accounted to the agent for the purchase price. That innovation and this proposed amendment giving the society power to purchase the book very largely give rise to this present action. The plaintiff on behalf of himself and other agents objects to that rule, and it appears that the broad object of policy of the rule is that the society desires to terminate in due time the practice of nominated agents, and, in order to reduce costs, to have salaried agents working on a block system, which they think will prove an economy and of benefit to the members of the society as a whole.

In this case an allegation in the pleadings that this amendment was harsh and unfair to the nominated agents has (very properly, I think) not been pursued, and I have not had investigated before me the effect of this proposed amendment on the nominated agents. The proposed rule says :

No agent (unless he shall have acquired his book by nomination) appointed after the said date of the registration of amendments of rules, shall have any right of nomination.

It is said that, since the society have the power to purchase the book and are not going to employ nominated agents in the future, it will reduce or tend to reduce the purchase price of the book and also that, in the event of no agreement, the matter can go to arbitration, and that may be to the prejudice of the agent, one of the rules providing that he pays half the cost of the arbitration. Though I do not see very clearly the full effect of it, I will accept that this rule is a disadvantage to the nominated agents who have, so it is said, a vested right in the books which they have acquired and hope to sell when they cease to hold the agency.

The rules of the society in 1939 make provision, in the circumstances therein stated, for their own alteration, the relevant rules being rr. 39 and 40. Although

the rules are dated in 1939, that is the time when the rules were registered, and they were, in fact, drawn up in 1938. Rule 39 is headed : " Making alterations in and rescinding rules," and is in these terms :

Save as provided in relation to standing orders under r. 38 no new rules shall be made, nor any rule amended, altered, or rescinded, unless with the consent of a majority of delegates present at a general meeting specially called for the purpose, in accordance with the Acts. No amendment of rules is valid until registered. No amendment, alteration or rescission and no addition to these rules shall be made except at special general meetings called for the consideration thereof to be held in 1943 and every fifth year thereafter.

There follows a proviso which is not relevant to this case. Thus, that rule made in 1938 provided for a revision or consideration of revision of the rules five years later in 1943, and then in every fifth year after that. Rule 40 is headed : " Rules Revision Committee " and as it stood in 1939 read as follows :

In 1937 and every fifth year thereafter the delegates shall appoint eleven of their number, four from Scotland, four from England, one from Wales, one from Northern Ireland, and one from Eire, as a rules revision committee, to consider along with the board of management and officials what alterations and amendments of rules are required, and to report thereon and recommend such alterations and amendments as they deem proper to the special general meeting to be held for the consideration of alterations and amendments of rules in the following year. The delegates so elected shall hold office for one year.

This rule complies, as far as date is concerned, with the quinquennial position —this being, no doubt, a rule in 1933. There was provision made for the appointment of this rules revision committee in 1937 to report in 1938, as they appear to have done, on any alteration and amendment of the rules, and then r. 39 comes into operation providing that every fifth year a special general meeting may be called to consider any of these alterations, and, if necessary, to make amendments.

This was the machinery adopted in the rules with regard to amendments, and it was pointed out that it contains what might be termed safeguards, in that, first, it provides for the revision committee as stipulated in r. 40, and then r. 39 provides that there shall be no amendment of the rules unless a majority of the delegates present at the general meeting specially called approve. There is statutory protection as well, because the rules thereafter have to be approved by the Registrar of Friendly Societies, and until they are registered they are of no effect.

Shortly after the rules of 1939 came into effect and operation, the recent war broke out and intervened, and as a consequence this society, in company with many others, found it difficult to carry on the routine of annual general meetings, and so forth, which their rules required. Under the Societies (Miscellaneous Provisions) Act, 1940, certain dispensations were granted. Section 1 of the Act is in these terms :

(1) For the purpose of enabling the rules of societies and statutory requirements relating to societies to be relaxed in certain respects during the period of the emergency, the committee of management of any society may apply to the Chief Registrar to give a direction under this section and, if the Chief Registrar is satisfied that by reason of circumstances attributable to the emergency it is expedient to do so, he shall give the direction accordingly. (2) A direction given under this section may dispense with or vary any rule of the society or enactment requiring meetings of the society to be held at specified times or periods or at specified places and may, notwithstanding anything in the rules of the society or any enactment or any regulation, rule or order made under any enactment, authorise . . . (b) the making of amendments of the rules of the society, being amendments so specified, by a resolution of the committee of management or of a general meeting of the society.

The society duly availed themselves of that Act and the provisions therein contained. Application was made to the Industrial Assurance Commissioner and, as a consequence, certain directions were given. In June, 1940, the commissioner directed that there should be no annual general meeting and no special general meeting in 1940. Then, on further application to the commissioner, a similar dispensation was given with regard to 1941 and, indeed, right up to 1945. But, in addition to these applications, a letter was written by the society's solicitors on Mar. 8, 1941, in these terms :

Referring to our previous correspondence, we inclose herewith draft direction. We think it is necessary to have certain actual alterations of rules to provide for the retirement of the office bearers, delegates, etc., after the emergency is over, as well as the

special emergency rule dispensing with annual general meetings and district meetings of the society during the emergency, and continuing everyone in office during that period, also authorising the board of management to exercise the functions of general meetings.

There appears to have been appended to that letter a draft direction which, as far as this case is concerned, proposed two amendments, one to r. 39 and one to r. 40. The answer of the commissioner to that letter on Mar. 21, 1941, was in these terms :

With reference to your letter of Mar. 8 I am directed to return the draft direction. This goes beyond the scope of application made to the board in your letter of Jan. 7 and has had to be modified as indicated in red ink. The commissioner is of opinion that an amendment of r. 39 is unnecessary at present and he is not prepared to dispense with the holding of more than one annual general meeting at a time. The draft has been amended to include dispensation with the 1941 meeting and the proposed new emergency provisions ; r. 51 has been adjusted to save the necessity for repeated consequential directions. A clause has also been added to enable the board to exercise the functions of district meetings.

As a result of that there was an amendment by direction of the commissioner, not to r. 39, but to r. 40, and that has subsisted up to the present time. There are two minor amendments in the early text of the rule, the first line of which reads as follows : " In 1937 and every fifth year thereafter, subject as hereinafter provided," and then it continues on the old basis until, as far as this case is concerned, the last paragraph, which is added as follows :

In the event of dispensation by the Industrial Assurance Commissioner with the holding of an annual general meeting in 1942, the election of the committee shall take place at the first annual general meeting held after the date of the registration of this partial amendment of rules, and every fifth year thereafter.

That was in 1941, and it was not then known whether there would be an annual general meeting in 1942 or 1943, because the dispensation was given only year by year, and it is quite understandable that in Mar., 1941, it would be considered unnecessary to amend r. 39 because, if the annual general meeting, when it was resumed after the termination of the war or when conditions made it possible, was held in 1942, r. 40 could then be invoked and they could then have appointed the rules revision committee which could have reported in 1943, if there had then been allowed to be held a special general meeting in that year. If the members in general meeting, had met in 1942, they could have dealt with any proposed amendment in 1943. There was, however, no general meeting or special meeting in 1943 or in 1944. The first general meeting after this gap was in 1945 and on that occasion r. 40 was followed. A rules revision committee was set up which reported to the special general meeting held at Blackpool on July 2, 1946, when a majority of the members passed the amendment to r. 30 of which complaint is now made. That amendment was submitted for registration, but its registration has been held in abeyance pending the decision of the court in this action. Those seem to be the facts giving rise to the issues which I indicated at the outset of this judgment.

The submission made on behalf of the plaintiff is that the contract into which he entered with the society is one which is fixed as regards its terms, or, at any rate, that all the rules which were to be implied in his contract were expressly fixed as at the date of the contract—the rules are dated in 1933 and the contract in 1936—and two clauses in the contract are particularly referred to in that respect. Reliance is placed on cl. 3, which is contained in the conditions of appointment on the printed form which is the contract between the parties. Clause 3 is in these terms :

That I will comply with all the duties and conditions applicable to agents as stated in the rules of the society, and strictly adhere to all the instructions contained in the collecting book.

The other clause in the contract on which some reliance is placed by the plaintiff is the second half of cl. 5 :

... should I be entitled to nominate to my book, and a suitable nominee be obtained earlier, the business must at once be shown up.

Clause 3 of the contract clearly makes reference to the rules of the society, and it is said by the society that this contract is one whereby the plaintiff was employed on the terms (amongst others) of the rules of the society by which he was bound, and that those rules must be construed as the rules existing

from time to time and not as just the rules existing at the time when this particular agent's contract was made with the company. On behalf of the plaintiff it is argued that in any event that clause only brings in the rules which are applicable to the duties and conditions of an agent, and that it does not include all the rules and, in particular, does not include rr. 39 and 40 which provide for amendment and alteration in certain events. Following that, the plaintiff contends that the rules which are applicable to this contract in regard to duties and conditions are those which existed in 1936 at the time of the making of the bargain.

In my view, cl. 3 of the document incorporates, as part of the terms of the contract, all the rules of the society, in so far as they are applicable to agents and to the duties and conditions of agents, but that does not, to my mind, exclude the two rules, 39 and 40, which make provision for alteration. There is a number of rules dealing with agents, but the one in question here is r. 30 and that is one of the rules which became a term of the plaintiff's contract and which is subject, like the other rules, to the application of rr. 39 and 40. I feel no difficulty in holding that this clause has to be construed so as to include rr. 39 and 40 as well as r. 30. In reference to the issue whether there can be any amendment of those rules, it is apparent that the rules themselves—if rr. 39 and 40 are to be regarded as rules binding on the plaintiff, as I think they are—provided for a quinquennial consideration, and, if thought fit, an amendment of the rules as they stand, and the view which I should have taken of that is that the rules themselves, having their own machinery and provisions for amendment, could from time to time be amended in accordance with those rules as the members of the society thought fit, and that any such amendments would be binding on the plaintiff.

I think that view is supported by *Page v. Liverpool Victoria Friendly Society* (1), which was also the case of a friendly society and the headnote of which is in these terms :

The plaintiff was appointed an agent of the defendants, a friendly society, whose rules, though subject to alteration, provided at that time for the retention of agents in office so long as their conduct was satisfactory. After the plaintiff reached the age of 65 the defendants altered their rules by providing that agents should be compulsorily retired at the age of 65, and in accordance with the amended rules the defendants terminated the plaintiff's employment. In an action for a declaration that the defendants were not entitled to do so, *Held*, that as the rules, on the face of them, were alterable, the plaintiff was not entitled to the declaration claimed, and the action failed.

In his judgment ROWLATT, J., said (43 T.L.R. 712) that :

... the plaintiff took office under a rule of the society, but the rules, on the face of them, were subject to alteration. The rule under which the plaintiff claimed what was equivalent to a freehold tenure was alterable, and it was duly altered, and the plaintiff was retired in accordance with the rule as altered.

I think that decision supports the view that I have taken in regard to this contract—indeed, it is, I think, indistinguishable—that the rules here incorporated into this contract do provide their own terms for amendment and alteration, and, therefore, the plaintiff fails on his contention with regard to the contract, assuming, of course, that the rules have been properly amended as required by the rules themselves. I should add that the decision of ROWLATT, J., in *Page v. Liverpool Victoria Friendly Society* (1) was affirmed by the Court of Appeal.

Reliance was placed by counsel for the plaintiff on *Southern Foundries* (1926), *Ltd. v. Shirlaw* (2), a decision in the House of Lords, but, in my view, the majority decision of their Lordships in that case turned essentially on the construction of the particular contract under consideration. By cl. 2 of the contract, which is set out in the speech of LORD WRIGHT, it was provided : "Mr. Shirlaw shall hold the said office for the term of 10 years from Dec. 1, 1933," and that is really the governing factor in that case. It was argued there that the alteration of the articles—which could not be precluded by reason of that contract—only amounted to a breach of the contract and did not affect the contract itself. I think that that case is distinguishable from the present one and that *Page v. Liverpool Victoria Friendly Society* (1) is much more in point. I, therefore, hold that the plaintiff's contract was one which was subject to the rules, including rr. 39 and 40.

On that issue both parties advanced various arguments as to the impracticability or unreasonableness of the opposing contentions. On the one hand, it was argued that it was impracticable to treat the contract as one which was fixed, because it was said that agents would be employed from time to time and have many contracts on varying terms. On the other hand, it was contended on behalf of the plaintiff that the rights of the agent with regard to the book which he was purchasing might at any time be affected if the contention which was advanced by the society was upheld. I think that one has to look at the matter as one of construction, and those are only incidental submissions. On behalf of the plaintiff the argument went further and it was submitted that, even assuming the construction which I have put on the contract to be correct, there ought to be implied into it a term that a condition with regard to the right to nominate would be unalterable, and in that connection some reliance was placed on a circular letter of September, 1934, which was apparently a publication by the society to the delegates attending the annual general meeting in that year. In that letter a statement was made about what is called the "book interest" in these terms :

Whilst book interest is not the subject of any specific recommendation, the committee evidently assume that lowering of commission would either extinguish, or much reduce, its value. They realise that to directly attack book interest would involve the consideration of compensation, and it is perhaps for this reason that the attack is made indirectly.

I do not think there is any evidence to show that the plaintiff had seen that letter prior to entering into the contract. It is certainly not a letter in terms addressed to agents. It is addressed to delegates, but the plaintiff is a member and no doubt many other members are agents of the society. But when one looks at this from the point of view of implying a term which is necessary to give efficacy and proper effect to the contract, looking at it through the eyes of the other contracting party, the society, I cannot think that there is any ground whatsoever for implying a term that the rules as they then stood in relation to this matter are unalterable, and I do not accept that contention put forward on behalf of the plaintiff.

If the rules, as I find, are of effect in respect of the plaintiff and his contract, then I have to turn to consideration of the question whether r. 30, as it existed in 1939, has been, subject to ultimate registration by the registrar, properly amended, and whether its proposed amendment is in accordance with the rules and procedure laid down in the rules of the society. That involves consideration of rr. 39 and 40, r. 40 being the amended one, and the question is : Have the rules been validly amended by the majority decision of the society at this special general meeting of July, 1946 ? It is said on behalf of the plaintiff that there was no power in the society, applying their rules, to make any such amendment because r. 39 stipulates that such amendment (if any) to the rules shall be made in 1943, and every fifth year thereafter, and the rule relied on was made on July 2, 1946. In relation to r. 40 I do not think it is now contested that that was validly amended, and my view is that that is so. Its amendment came about in the way I have indicated, arising out of the application to the commissioner under the Act of 1940 and was the direct result of his direction. On May 21, 1941, the commissioner directed that r. 40 should be amended in the way in which it is now framed and that direction appears to me to have statutory and mandatory force and has resulted in a valid alteration of r. 40.

The effect of that is this. Applying the rule, a dispensation was given in respect of the annual general meeting of 1942, and similarly up to 1944. The first general meeting after this cessation of meetings was in 1945. The amended r. 40 provides for the election of a committee—i.e., the rules revision committee—at the first annual general meeting held after the date of the registration of the partial amendment of rules and every fifth year thereafter. The committee met and r. 40 provides that they had :

... to consider along with the board of management and officials what alterations and amendments of rules are required, and to report thereon and recommend such alterations and amendments as they may deem proper to the special general meeting to be held for the consideration of alterations and amendments of rules in the following year.

Therefore, so far as 1945 is concerned, the rule provides for consideration of that

report and it would come up for consideration at the special general meeting to be held in the following year. Having regard to the substituted date of the annual general meeting (*i.e.*, "substituted" by reason of the special war conditions) the first annual general meeting after the war is to be held in the following year, *i.e.*, in 1946, and by that time the delegates elected for this purpose to the rules revision committee shall cease to hold office.

A I think that these two rules clearly must be read together in order to find the machinery for any alteration. Rule 40, of course, only provides, as counsel for the plaintiff pointed out, for the rules revision committee, and it might well be that r. 39 could operate without it, but I think that the two rules must be read together—at any rate, to some extent—and r. 39 does make provision for a special general meeting. It provides :

B No amendment, alteration or rescission and no addition to these rules shall be made except at special general meetings called for the consideration thereof to be held in 1943 and every fifth year thereafter.

It is that provision on which the plaintiff here relies. It is because that rule was not altered to meet what was really involved in the alteration of r. 40, in the light of events which happened, that gives rise to this contention advanced on behalf of the plaintiff.

C The commissioner who had the duty of directing the alteration of the rules did, in fact, as pointed out in the letter of Mar. 21, 1941, express the opinion then that no amendment of r. 39 was necessary at that time, as indeed was the position, because in 1941 the date 1943 might easily have been applicable. But in the light of events, when the first annual general meeting was held in 1945, and then this special general meeting under r. 40 was required for the consideration of alterations and amendments of the rules in the following year,

D 1943 was inapplicable—so, indeed, was five years from then, 1948. I have come to the conclusion that the essence of the rule with regard to the machinery for alteration is that there should be a quinquennial period in relation both to the setting up of the rules revision committee and to consideration of any recommendation by a special general meeting one year thereafter, and it is really involved in r. 40, in the circumstances which arose, that that consideration should take place in order to keep to the quinquennial arrangement, as necessarily

E modified by war conditions, which the rules stipulate. Therefore, the meeting held in 1946 to consider these rules was, in my view, a meeting properly held under the rules and was one which had authority to consider and (if they so thought fit) to amend the rules. The special general meeting did by authority amend r. 30, and all I need say is that I think that amendment was validly passed by the society at that meeting on July 2, 1946.

F In those circumstances, in my view, the declarations asked for by the plaintiff are misconceived. In my judgment, the plaintiff has not shown that he is entitled to a declaration on behalf of the other members of the society to the effect that the resolution of July 2, 1946, altering r. 30, is not binding on the members and is null and void, neither is he entitled to a declaration that his employment as an agent is on the conditions contained in the rules of the society prior to July 2, 1946, and that his terms of employment are not affected by the

G alteration of r. 30. I think that r. 30, as amended and substituted, when it is registered with the Industrial Assurance Commissioner, will be of full effect and that the plaintiff's contract will be affected thereby. In those circumstances there must be judgment for the defendants.

Judgment for the defendants with costs.

H Solicitors : *Seaton Taylor & Co.* (for the plaintiff) ; *Kingsley Wood, Williams & Murphy*, agents for *Maclay Murray & Spens*, Glasgow (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

LEWISHAM BOROUGH COUNCIL v. MALONEY.

[COURT OF APPEAL (Somervell, Cohen and Evershed, L.JJ.), May 7, 8, 9, 23, 1947.]

Emergency Legislation—Requisition—Land—Land charges—Need for registration of interest of requisitioning authority—“Right or privilege over or affecting land”—Defence (General) Regulations, 1939, reg. 51 (1)—Land Charges Act, 1925 (c. 22), s. 10 (1), Class D (iii).

A dwelling-house owned by Mrs. M. was requisitioned under reg. 51 (1) of the Defence (General) Regulations, 1939, by the town clerk of L. under powers delegated to him by the Minister of Health under reg. 51 (5). The house was adapted so as to constitute two living units, the lower of which was subsequently released to Mrs. M. who thereupon occupied that part. The son of Mrs. M. purchased the whole property, and, despite a refusal of the plaintiffs to release the upper portion he took possession of it.

HELD: the words “right or privilege over or affecting land” in the Land Charges Act, 1925, s. 10 (1), Class D. (iii), have a restricted meaning *ejusdem generis* with the word “easement,” and do not extend to include the rights of possession and user arising on the exercise of powers of requisitioning under Defence Regulation 51, and, therefore, those rights do not require to be registered as a land charge to prevent their being void as against a purchaser of the land.

[AS TO CLASS D LAND CHARGES, see HALSBURY, Hailsham Edn., Vol. 19, pp. 359-360, paras. 753-756. FOR THE LAND CHARGES ACT, 1925, s. 10 (1) CLASS D (iii), see HALSBURY'S STATUTES, Vol. 15, p. 535.]

Case referred to:

(1) *Taff Vale Railway Co. v. Cardiff Railway Co.*, [1917] 1 Ch. 299; 86 L.J. Ch. 129; 115 L.T. 800; 11 Digest 111, 68.

APPEAL by the plaintiffs, Lewisham Corporation, from an order of His Honour JUDGE SIR GERALD HURST, K.C., made at Bromley County Court, and dated Feb. 17, 1947.

The county court judge held that the rights of possession and user arising on the exercise by a local authority of powers of requisitioning delegated to it by the Minister of Health were land charges within the Land Charges Act, 1925, s. 10 (1), Class D (iii), and, accordingly, were not binding on the second defendant as a purchaser for value of the property from the first defendant unless they were registered. The facts appear in the judgment and are summarised in the headnote.

Danckwerts and *S. I. R. Craig* for the plaintiffs.

Jukes for the defendants.

Cur. adv. vult.

May 23. SOMERVELL, L.J., read the following judgment of the court. In this case certain premises were requisitioned on July 2, 1943, by the town clerk of Lewisham. The town clerk was acting under the powers conferred by the Defence Regulations, 1939, reg. 51, and delegated to him by the “competent authority,” in this case the Minister of Health, under reg. 51 (5). Possession was taken of the premises for the purpose of housing persons rendered homeless by enemy action. The validity of this action (otherwise than as regards non-registration under the Land Charges Act, 1925) was not challenged before us. The owner of the premises was Mrs. Maloney, the first defendant. On June 14, 1946, the lower portion of the premises was released, but not the upper. On Oct. 15, the second defendant, the son of the first defendant, entered the upper part of the premises which were at that time vacant. The plaintiffs claim as against both defendants possession, an injunction, and damages for trespass.

The first point argued before us was that the right and interest of the plaintiffs should have been registered under the Land Charges Act, 1925, s. 10 (1) Class D. (ii); that the second defendant is a purchaser of the legal estate for money or money's worth; and that the plaintiffs' right to possession is void as against him under s. 13 (2) of the Act cited. The judge decided this point in the defendants' favour. That the second defendant had purchased the estate from the first defendant was not disputed.

So far as relevant, s. 10 (1), provides :

Class D :—A charge or obligation affecting land of any of the following kinds, namely . . . (iii) Any easement right or privilege over or affecting land created or arising after the commencement of this Act, and being merely an equitable interest (in this Act referred to as an “equitable easement”)

A The first question is whether the right to possession or the taking of possession with the other rights conferred on the competent authority under the regulation are within the words of s. 10 (1), Class D (iii). Those rights may be summarised in the following words. The competent authority for the purposes set out in the regulation can take possession of any land. The land may be used in such manner as the competent authority thinks expedient for the purposes aforesaid notwithstanding any restriction imposed by Act of Parliament or otherwise. The competent authority may do or authorise persons using the land to do anything which any person having an interest in the land would be entitled to do by virtue of that interest. The competent authority may, by order, provide for prohibiting the exercise of rights of way and of other rights.

B Before coming to the actual question of construction it is worth while to consider what is the entry that it is suggested should be made in the registry. The right to take possession for the purposes as set out in the regulation is exercisable over all land. It is not suggested that the mere existence of this right has to be registered in respect of all land. The entry has only to be made when the right is exercised in respect of some particular land. What one expects to find in the registry are rights, rather than the fact of their exercise. This is not, of course, conclusive, but we think there would be some difficulty in framing the appropriate form of entry.

C We add the following further general observations. The object of the Land Charges Act, 1925, in conjunction with the other property statutes of the same year was to simplify the title to and the transfer of land. It must, we think, be at least conceded that “charges or obligations” (if such they be) of the kind we have described, arising under the Defence Regulations, bear no obvious analogy to the kinds of rights or interests which might, apart from the Property Acts, have burdened the title to land. It is true that such effects of the Defence Regulations show a greater resemblance to “charges” arising, E *e.g.*, under town planning legislation, but it is to be noted that these latter are separately treated under the Land Charges Act, 1925, s. 15, as “local land charges” and that, although it was thought appropriate to make an express exception of local land charges from Class B in s. 10 (1) of the Act, it was not thought necessary to except local land charges from what is said by counsel for the defendants to be the wide language of Class D (iii).

F With these general observations we turn to the interpretation of the material part of s. 10 (1) of the Act. No doubt the words “right . . . over or affecting land” without a context might, and, indeed, would, have a very wide meaning—a meaning capable of covering rights which could not be described in ordinary language as “charges or obligations.” Thus, it might be said that a person entitled to the benefit of a contract to create a legal estate had a “right . . . over or affecting land,” but it is clear from Class C (iv) that

G such a right is not intended to fall within Class D (iii). We note also the separate treatment of local land charges in s. 15, their exclusion from Class B, and the absence of any such exclusion from Class D (iii), to which we have already referred. The words in question, therefore, on which counsel relies for the defendants, in our view, have in their context a restricted meaning. They follow the word “easement” and the kind of charge and obligation comprised in the whole phrase is in the Act to be referred to as an “equitable easement.”

H An Act of Parliament, if clear words are used, may provide that a word or words of narrow import may comprise matters which would normally be regarded as outside their scope, and in this connection the learned judge referred to what was said by SCRUTTON, L.J., in *Taff Vale Railway v. Cardiff Railway* (1). We fully accept this principle, but there is, in our judgment, sufficient in the context of the material words in s. 10 (1) of the Act to prevent their extension to cover the possessory rights of a competent authority under the Defence Regulations and to prevent those words having a significance wider than appears to us, in the context, to be their natural meaning.

Counsel for the plaintiffs submitted that the words are apt, and only apt, to cover incorporeal rights or rights similar in their general incidents to incorporeal rights. The argument is, we think, attractive, but we desire to avoid deciding anything beyond the particular point before us. We think it, therefore, sufficient for us to say that, in our judgment, it would, in the light of the whole context in which the words are used, be an unnatural extension of their meaning to construe them as including such statutory rights of possession and user of the land possessed as are conferred by reg. 51. The judge, we think, may have been inclined to take the view he did, looking at the words by themselves. He gave them a wide construction because he considered that the taking of possession under reg. 51 was a right to which, having regard to the purpose of the Land Charges Act to be gathered from its terms, its machinery ought to apply and that the words were capable of a construction covering the rights in question. With respect to the judge, we do not think that the words are capable of so wide a meaning. We are also not altogether in agreement with the reasoning which led him to his conclusion. This court was pressed, as was the judge, with the possibility of requisitioned premises being left for a time unused or unoccupied, as happened in the present case, there being no visible indication, therefore, to an intending purchaser, of the fact that the land was requisitioned. This is, of course, a possible case. It may have occurred many times. The case contemplated by reg. 51 is, however, the taking possession of land for one of the purposes set out and its user for that purpose, such user being apparent. Another point which has some substance was made by counsel for the plaintiffs. Assuming a purchaser succeeds in making the requisition void, the competent authority could at once retake possession. This goes to negative the view that the general purpose of the Land Charges Act can be relied on as extending the words of Class D (iii) to cover requisitions.

This is enough to dispose of this point, though we thought there was considerable force in the argument that reg. 51, on its true construction, conferred a right of taking possession good as against all the world and not liable to be voided by a failure to take a step—namely, registration—not referred to in the regulation. It is unnecessary to deal with this and with the other points which were argued. We only desire to add this. Where statutory rights affecting land are given which might be held or reasonably argued to be within the words of s. 10 (1), Class D (iii), although not clearly within them, it is desirable that the statute should deal expressly with the matter.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Allen Milner Smith*, Town Clerk, Lewisham (for the plaintiffs); *J. H. Milner & Son* (for the defendants).

[Reported by R. L. ZIAR, ESQ., Barrister-at-Law.]

GALLAGHER v. DORMAN, LONG & CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., Wrottesley, L.J., and Lynskey, J.), April 28, 29, May 23, 1947.]

Factories and Shops—Dangerous machinery—Safety provisions—Statutory duty by employers—Delegation—Liability to employee in civil action—Breach of duty caused by act of injured employee—"Delegation"—Factories Act, 1937 (c. 67), ss. 24 (4) (5), 137 (1).

Where statutory duties are laid on an employer such as those contained in s. 24 of the Factories Act, 1937, (which provides that no crane or other lifting machine shall be loaded beyond the safe working load marked thereon) he is liable in civil proceedings for damage caused to his employees by breach of them, notwithstanding that he may have taken the steps indicated in s. 137 of the Act to have those duties carried out by properly instructed and competent subordinates. That which will enable him to escape from being found guilty of an offence under the Act will not afford a shield of defence in civil proceedings against a plaintiff who is injured through the neglect of the subordinate. Where, however, the person injured as a result of the breach of the statutory duty is the employee to whom the employer has properly delegated the

performance of that duty, and the breach of duty is caused by the act or omission of such employee, such employee cannot be heard to say that his injury was caused by the breach of statutory duty and not caused by his own act or omission.

Per curiam: The word "delegation" when used in connection with the statutory duty of the employer does not mean the same thing as "employment." An employer does not, merely by employing his servant to work a crane, delegate to him the statutory duty of seeing that the crane is not overloaded. The theory of delegation of a statutory duty is intelligible where the duty is a positive duty such as to keep the guard of a power saw in adjustment. In the case of a negative duty, such as not to overload a crane, the conception of delegation presents considerable difficulty. The question which arises is whether it can be inferred from the evidence.

[FOR THE FACTORIES ACT, 1937, s. 24, see HALSBURY'S STATUTES, Vol. 30, p. 220.]

Cases referred to:

- (1) *Lotinga v. North Eastern Marine Engineering Co. (1938), Ltd.*, [1941] 3 All E.R. 1; [1941] 2 K.B. 399; 111 L.J.K.B. 65; 106 J.P. 1; Digest Supp.
- (2) *Vyner v. Waldenburgh Bros., Ltd.*, [1945] 2 All E.R. 547; [1946] 1 K.B. 50; 115 L.J.K.B. 119; 173 L.T. 330; Digest Supp.
- (3) *Smith v. Baveystock & Co., Ltd.*, [1945] 1 All E.R. 531; Digest Supp.

APPEAL from an order of Mr. Commissioner TRISTRAM BERESFORD, K.C., at Durham Assizes, in an action by the plaintiff against the defendants for negligence and for breach of statutory duty, through which the plaintiff suffered injury. The commissioner held that the defendants had delegated (as they were entitled to do), to the plaintiff and another employee, P., the duty of seeing that a crane on which they were engaged as slingers was not overloaded, and that, therefore, they (the defendants) had provided a safe and proper system of working; and, further, that the plaintiff and P. were the persons whose duty it was to see that the crane was not overloaded, and, as the accident to the plaintiff was due, in his judgment, if not to the carelessness, at any rate to the inadvertence, of the plaintiff and P., the plaintiff had failed to establish that the defendants had been guilty of breaches of statutory duty under s. 24 (4) and (5) of the Factories Act, 1937. The plaintiff appealed.

Paley Scott, K.C., and *Norman Black* for the plaintiff.

Fenwick, K.C., and *Victor Coen* for the defendants.

Cur. adv. vult.

May 23. WROTTESELEY, L.J., read the following judgment of the court. On June 18, 1946, the plaintiff was engaged in unloading iron angles about 30 ft. long from a railway truck, by means of a travelling crane along a parallel line of railway. He and another man named Pearce were acting as slingers, bundling the lengths of iron and slinging them on to the hook of the crane, which was then operated by the crane driver so as to lift them clear of the truck and any other obstruction and swing them round and deposit them on the ground. After at least two and perhaps three loads had been lifted in this way and deposited safely, the load which caused the accident was in process of being hoisted when the crane toppled over, causing the bundle of iron to fall back on to the plaintiff, and so inflicting the serious injury for which he brought his action.

The action was brought under two heads. First, at common law, the plaintiff charged the defendants, who were the employers of the plaintiff, with negligence in failing to provide a proper or safe system of working, that is to say, in providing no means of ascertaining that the lift was one within the capacity of the crane, but leaving it to the workmen to guess the weight of the load as best they could. He also claimed that the defendants did not provide an efficient dial on the crane to act as an indicator as to what was a safe load for the crane to lift, having regard to the angle of the jib. Secondly, the plaintiff set up breaches of statutory duty on the part of the defendants, such as that the rails on which the crane moved were not properly maintained, contrary to s. 24 (3) of the Factories Act, 1937; that the defendants did not comply with s. 24 (4) under which there should have been

an automatic indicator or table of safe working loads; and that they permitted the crane to be loaded beyond the safe working load, contrary to s. 24 (5) of the same Act. In their defence the defendants alleged contributory negligence on the part of the plaintiff in that: (i) he did not take proper precautions for his own safety, (ii) he kept no proper look-out, and (iii) he under-estimated the weight of the sling. Although there was no very clear evidence on the matter, it is clear that the whole case was conducted by both sides on the basis that the crane toppled over and injured the plaintiff because it was, in fact, overloaded, *i.e.*, that when the angle irons were attached by the plaintiff and the other slinger, Pearce, to the crane, the result was that it was loaded beyond the safe working load as indicated by the table attached to a plate on the crane, and that on this account the crane overbalanced and the plaintiff was hurt. In fact, the whole matter in issue at the trial was whether this overloading was brought about by the negligence of the plaintiff himself, it being conceded that there was a breach of s. 24 (5) of the Factories Act, 1937. A B

The relevant facts established in the course of the hearing were as follows. The plaintiff had been engaged in this work as a slinger for 14 months, and the other slinger, Pearce, for 40 years. They were expected to judge what was a safe load, and they knew and accepted that obligation as part of their employment. On the crane was a notice which read as follows: C

Crane to lift the following loads on 4 ft. 8 ins. gauge. 3 tons at 24 ft. radius; 5 tons at 16 ft. radius. Blocked up: 5 tons at 23 ft. radius; 6 tons at 19 ft. radius.

Section 24 (4) and (5) of the Act are as follows:

(4) There shall be plainly marked on every lifting machine the safe working load or loads thereof, except that in the case of a jib crane so constructed that the safe working load may be varied by the raising or lowering of the jib, there shall be attached thereto either an automatic indicator of safe working loads or a table indicating the safe working loads at corresponding inclinations of the jib or corresponding radii of the load. (5) No lifting machine shall, except for the purpose of a test, be loaded beyond the safe working load as marked or indicated under the last foregoing subsection. D

It will be seen, therefore, that once the radius of 16 ft. was exceeded, the only safe working load up to 24 ft. was 3 tons, under the express provision of the Act. In addition, the crane had an automatic indicator which, had it been in order, would have indicated by a pointer the load which the crane could carry, having regard to the angle of the jib. It can be seen from the photograph which was in evidence that it would have pointed to 3 tons or 5 tons, but not to any intermediate weight. No weight was indicated on the dial between 3 tons and 5 tons, and in this respect the figures on the indicator corresponded with those on the notice. This indicator was not in working order, but moved sluggishly because it was corroded or had been damaged. It was, therefore, an unreliable guide, and was not, in fact, relied on. In fact, the lift which led to the accident was at a radius of 20 ft. The plaintiff, acting in consultation with Pearce, judged the weight of the lift which caused the accident at 4 tons. E F

It was sought on behalf of the defendants in argument before us to establish that the plaintiff was deliberately working on the footing that at a 20 ft. radius 4 tons was a safe load, but that for some reason the plaintiff chose to take a chance and put on a load of nearly 6 tons. There was, however, no evidence that at 20 ft. radius a 4 ton load was a safe load. Such a load was, in any event, not a safe load in law, as it exceeded the load mentioned in the notice, nor was there evidence that the load which caused the accident was nearly 6 tons. Indeed, no evidence was given of what, in fact, the load was which caused the accident, beyond the estimate of the plaintiff and Pearce that it was 4 tons. All the court can say is that it was, in fact, more than 3 tons, and an overload such as to cause the crane to topple over. On these facts the defendants claimed that they had delegated, and that they were entitled to delegate, to the plaintiff and Pearce, both men of great experience, and so capable of judging the sort of weights which in fact this crane could lift, the duty of seeing that the crane was not overloaded. This was, the defendants said, a safe and proper system of working. The commissioner upheld this contention. G H

As to the dial on the crane, since neither the slingers nor the crane driver consulted it, and its lack of repair was not brought to the notice of the defendants, the commissioner held that the lack of repair could not be held to be negligence on the part of the defendants. As regards the duties laid on the defendants by statute, the commissioner found that the lack of repair of the rails on which the crane ran was not established. This finding of the commissioner is not challenged. As regards the duty to see that the crane was not loaded beyond the safe working load as shown by the table, the commissioner, having found this was 3 tons, decided that the plaintiff and Pearce, since they were experienced people who had been doing this work for a number of years, were the persons whose duty it was to see that the crane was not overloaded, and were, indeed, the only people in a position to judge. The accident was due, in his judgment, if not to their carelessness, at any rate to their inadvertence, and, therefore, the plaintiff failed to establish that the defendants had been guilty of breaches of statutory duty. Accordingly, he refrained from considering whether the plaintiff had been guilty of contributory negligence. Before us it was argued on behalf of the plaintiff that on the evidence there had been a breach of the statutory duty imposed by s. 24 (5) of the Factories Act, 1937, on the defendants as employers, inasmuch as the crane had been overloaded. This duty, it was said, was one which the defendants neither did, in fact, nor could in law, delegate to the plaintiff and Pearce, so as to discharge the liability from their own shoulders. In any event, there was not such instruction as was necessary if the plaintiff (with only 14 months' experience) was to appreciate the dangers against which he was supposed to guard. Section 137 of the Act which, in certain circumstances, enables the occupier of a factory to excuse himself by alleging and proving (a) that he has used all due diligence to enforce the execution of the Act and of any relevant order or regulation made thereunder, and (b) that another person (in this case the plaintiff) had committed the offence in question without his consent, connivance, or wilful default, does not, it was said, apply so as to defeat a claim in a civil court for damages flowing from a breach of a statutory duty. There was not, and there was not found by the commissioner to be, any contributory negligence in the proper meaning of that phrase.

We think that there can be no doubt that where statutory duties are laid on an employer, such as those contained in s. 24 of the Factories Act, 1937, he remains liable in civil proceedings for damage caused to his employees generally by the breach of them, notwithstanding that he may have taken the steps indicated in s. 137 to have those duties carried out by properly instructed and competent subordinates. In other words, that which will enable him to escape from being found guilty of an offence under the Act will not afford a shield of defence in civil proceedings against a plaintiff who is damaged through the neglect of the subordinate: *Lotinga v. N.E. Marine Engineering Co.* (1), *Vyner v. Waldenbury Bros., Ltd.* (2). Where, however, the person injured as a result of the breach of the statutory duty is the employee to whom the employer has properly delegated the performance of that duty, and the breach of duty is caused by the act or omission of such employee, such employee cannot be heard to say that his injury was caused by the breach of the statutory duty and not caused by his own act or omission: *Smith v. Baveystock & Co., Ltd.* (3).

The first question which arises in this case is: Was there any delegation by the defendants to the plaintiff, either alone or jointly with Pearce, of the performance of the statutory duty imposed by s. 24 (4) and (5) of the Factories Act, 1937? The duty imposed on the defendants by the joint effects of sub-ss. (4) and (5), so far as this crane was concerned, was not to load the crane with more than 3 tons when the radius of the jib exceeded 16 ft. There was no evidence of any express delegation of this duty to either the plaintiff or Pearce. It is true that they were given the duty to load the crane, and in this was implied the duty to perform that task carefully and with such skill as they possessed, but this is not the same thing as to say that the statutory duty not to overload the crane was delegated to them. The word "delegation" when used in connection with the statutory duty of the employer does not mean the same thing as "employment." An employer does not, merely by employing his servant to work a crane, delegate to him the statutory duty of seeing that the crane is not overloaded. The theory of delegation of a

statutory duty is intelligible where the duty is a positive duty such as to keep the guard of a power saw in adjustment. In the case of a negative duty such as not to overload a crane, the conception of delegation presents considerable difficulty. We have then to consider whether any such delegation can be inferred from the evidence. According to the plaintiff and Pearce, neither had been informed of the safe load of the crane. All that they knew was that it was a 5 ton crane. No evidence was called by the defendants to contradict this evidence. Apparently, the plaintiff and Pearce believed that a 4 ton load was a safe load at 20 ft. radius, and loaded the crane on this basis. If any inference can be drawn from these facts it would be that neither of them had ever been instructed not to load more than 3 tons with the jib over a 16 ft. radius, and so that there had been no delegation by the defendants of their duty under s. 24 (4) and (5) to either of these men. The question whether such a delegation could properly be made to two men jointly (and if so what the effect of this would be in law), or whether the plaintiff was a person properly qualified to perform such delegated duty, does not, therefore, arise. A B

There remains to be considered the question whether the plaintiff, by his own negligence, caused or contributed to the accident. So far as can be gathered from the evidence, the duty, so far as the crane was concerned, owed by the plaintiff to the defendants, was to use the best of his skill and knowledge to estimate the weight of each load and to keep it within what he believed to be the safe weight, which, with the jib at a 20 ft. radius, was, as he thought, 4 tons. The case sought to be made in cross-examination by the defendants was that the weight of the load at the time of the accident was 5 tons, 18 cwts. They did not, however, succeed in establishing this in cross-examination, and called no evidence to support this view. All that the evidence shows is that the plaintiff thought they had a load of only 4 tons, and that the crane toppled over. No deliberate overloading is established by the evidence, and the onus of showing this is on the defendants. Whether the accident was due to a mistake of judgment as to the weight of the lift, or to a mistake as to the capacity of the crane at this radius, was not cleared up. The highest it can be put against the plaintiff and Pearce is that, by an honest mistake or inadvertence, they were wrong in their estimate of the weight of the lift. This, in our view, would not constitute a breach of the duty which they owed to their employer. C D E

There was, however, a common law duty on the plaintiff to exercise reasonable care for his own safety. On the facts of this case can it be said that he failed in that duty? It is not every mistake or inadvertence that amounts to contributory negligence. If a man exercising his skill and knowledge to the best of his ability makes a mistake, particularly, as in this case, in estimating what would be a safe lift, it does not, in our view, amount to contributory negligence. The defendants, therefore, have failed to establish that there was any negligence on the part of the plaintiff which contributed to his accident. F

We have not, so far, dealt with the allegation of breach of the common law duty to provide a safe system of working. From the conclusions to which we have come it follows, in our opinion, that a breach has been established in that the defendants took no proper steps to ensure that the men were properly instructed as to the limit of the capacity of the crane. The appeal, therefore, will be allowed with costs. G

Appeal allowed with costs.

Solicitors: *Russell Jones & Co.* (for the plaintiff); *Tarry, Sherlock & King*, agents for *Cohen, Jackson & Scott*, Stockton-on-Tees (for the defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

J. (otherwise S.) v. J.

[COURT OF APPEAL (Somervell and Cohen, L.J.J., and Lynskey, J.), May 15, 16, 23, 1947.]

Divorce—Nullity—Wilful refusal to consummate marriage—Husband sterilised before marriage by medical operation—Avoidance of procreation of children—Wife's knowledge of operation at time of marriage—Whether bar to decree—“Lack of sincerity”—Matrimonial Causes Act, 1937 (c. 57), s. 7 (1) (a).

A The parties went through a form of marriage on June 16, 1934. Before that date and when the parties had been engaged for some months the husband consulted a doctor with a view to having an operation performed on himself which, while leaving him able to achieve penetration and emission, made it impossible for sexual intercourse to result in the conception of a child. On Apr. 30, 1934, the husband, at the request of the doctor, put before the wife for signature a statement acknowledging the understanding of both parties of the effect of the operation. The wife at first refused to sign it as she wanted to have children, but finally, in the hope that she would be able later to persuade the husband to take a different view, she agreed to sign if the husband promised not to have the operation performed until after the marriage. The husband promised, but the operation was performed before the marriage and this came to the knowledge of the wife on May 6, 1934. For the first two or three years of the marriage intercourse took place regularly, thereafter rarely, and the marriage became increasingly unhappy. The wife was not aware until 1945 that she might have grounds for nullity, whereupon she left the husband and commenced proceedings. The wife declared that she had had no material or other benefits from the marriage.

D HELD: (i) applying *Cowen v. Cowen* ([1945] 2 All E.R. 197), the husband, by his act in having the operation performed, rendered himself incapable of effecting consummation by reason of a structural defect which he had himself brought about in his organs of generation.

E (ii) the wife's knowledge of the husband's impotence before marriage was not an absolute bar in law to a decree of nullity, (dictum of LANGTON, J., in *Nash v. Nash* ([1940] 1 All E.R. 209) approved), and, in all the circumstances, including her knowledge, and applying the principles in *G. v. M.* (1885) (10 App. Cas. 171), the petition should not fail for “insincerity.”

Decision of JONES, J. ([1946] 2 All E.R. 760) reversed.

[AS TO LACK OF SINCERITY IN SUITS FOR NULLITY FOR IMPOTENCE, see HALSBURY, Hailsham Edn., Vol. 10, p. 643, para. 942; and FOR CASES, see DIGEST, Vol. 27, pp. 350-352, Nos. 3338-3353.]

F Cases referred to:

(1) *Cowen v. Cowen*, [1945] 2 All E.R. 197; [1946] P. 36; 114 L.J.P. 57; 173 L.T. 176; Digest Supp.

(2) *Nash v. Nash*, [1940] 1 All E.R. 206; [1940] P. 60; 109 L.J.P. 60; 164 L.T. 48; Digest Supp.

(3) *G. v. M.* (1885), 10 App. Cas. 171; 53 L.T. 398; 27 Digest 351, 3339.

(4) *L. v. L.*, 1931 S.C. 477; [1931] S.L.T. 256; Digest Supp.

G APPEAL by the wife from a decision of JONES, J., dated Nov. 22, 1946, and reported [1946] 2 All E.R. 760. The learned judge held that the act of the husband in undergoing an operation before marriage which prevented his wife from having a child by him amounted to wilful refusal to consummate the marriage, but that the wife, by marrying with knowledge of the operation, had acquiesced in the circumstances of the marriage and it would, therefore, be inequitable and contrary to public policy to grant her a decree of nullity.

H *Richard O'Sullivan, K.C.*, and *R. J. A. Temple* for the wife.

The husband was not represented.

Cur. adv. vult.

May 23. SOMERVELL, L.J., read this judgment of the court. In this case the judge dismissed a wife's petition for nullity of marriage. The case was undefended. The wife alleged that the marriage had never been consummated and that the non-consummation was due either to incapacity or a wilful refusal to consummate.

The parties were married on June 16, 1934. Just before the marriage the husband had an operation which, while leaving him able to achieve penetration and emission, made it impossible for sexual intercourse to result in the conception of a child. He told the doctor who performed the operation that he was getting married and that there was insanity in his future wife's family. It seems that this was untrue. In *Cowen v. Cowen* (1), this court decided that a husband had wilfully refused to consummate a marriage where he had insisted on using a contraceptive when intercourse took place. In other words, A
a marriage is not consummated if a husband, by his own act, prevents "intercourse" from having its natural consequence in "the passage of the male seed into the body of the woman" ([1945] 2 All E.R. 199). The husband in the present case effected by the operation the same result which could have been effected by the use of a contraceptive on each successive occasion. There is no question of natural sterility. Applying *Cowen v. Cowen* (1), it seems to us that, by his act in having the operation, he rendered himself incapable of effecting consummation by reason of a structural defect which he had himself brought about in his organs of generation. B

This, however, does not dispose of the case. The doctor who performed the operation required a statement to be signed by the wife as well as by the husband setting out their understanding of the effect of the operation. This form was presented by the husband to the wife on Apr. 30, 1934. They had at this date been engaged to be married for some months. She refused to sign it, as she wanted to have children. There was an argument. Finally, she said she would sign it if he promised he would wait and not have the operation until after the marriage. She hoped she would be able to persuade him to take a different view after the marriage. He so promised, but, in fact, had the operation and this came to her knowledge on May 6, 1934, some six weeks before the marriage. The question is whether this knowledge of hers is in law an absolute bar to her petition. It is clearly of great importance, as LANGTON, J., said in *Nash v. Nash* (2) ([1940] 1 All E.R. 209), as shedding light on the issue of "sincerity." LANGTON, J., in that case (*ibid*) expressed the view *obiter* that the petitioner's knowledge of impotence before marriage is not an absolute bar in law. C D

Counsel for the wife referred us to a passage in *ESMEIN'S LE MARIAGE EN DROIT CANONIQUE*, p. 268, as showing that in mediaeval canon law knowledge of impotency before marriage was not a bar to subsequent proceedings for nullity on the ground of impotency. A passage to the same effect is to be found in *SANCHEZ DE MATRIMONIO*, Lyons ed., 1654, vol. 2, p. 376. In *G. v. M.* (3) (10 App. Cas. 184) the EARL OF SELBORNE, L.C., stated that on this general subject the law of Scotland differed from the law of England. We were, however, quite rightly referred by counsel to *L. v. L.* (4). On the point under consideration the court was divided. The LORD PRESIDENT (CLYDE) regarded knowledge before marriage as a bar. LORD MORISON held it was no bar and LORD BLACKBURN reserved the point though inclined to LORD MORISON's view. We have come to the conclusion that the opinion expressed by LANGTON, J., to which we have referred is a correct statement of the law. E F

The next question is whether the petition should be dismissed in all the circumstances, including the wife's knowledge, for lack of what is called "sincerity." It is necessary to state further facts. Intercourse took place regularly for the first two or three years of the marriage, thereafter rarely. The marriage became increasingly unhappy. Before the marriage when the fact of the operation became known to the wife, the husband had said she could adopt children. When she suggested this later he would have nothing to do with it. She did not know that she had or might have grounds for nullity until late in 1945. She then left the husband and started these proceedings. She said she had had no material or other benefits from the marriage. Counsel submitted, first, that mere lapse of time is not by itself a bar, though of course a material circumstance in considering "sincerity." This is in accordance with what was stated by the EARL OF SELBORNE, L.C., in *G. v. M.* (3) (10 App. Cas. 189). Secondly, he submitted that the material date is when the petitioner, not only knows the facts, but is also aware of his or her legal rights. This is again, in accordance with what was stated by the EARL OF SELBORNE, L.C., in *G. v. M.* (3) (*ibid*, 185), and by LANGTON, J., in G H

Nash v. Nash (2) ([1940] 1 All E.R. 210). The opinions on this branch of the law of the EARL OF SELBORNE, L.C., LORD WATSON and LORD BRAMWELL in *G. v. M.* (3), although *obiter*, are the most authoritative guidance on this subject. We feel no difficulty with regard to the period after the marriage, as the wife sought to exercise her rights or what may be her rights as soon as she was aware of them.

The judge, in dismissing the petition, did so by reason of the wife's knowledge before marriage. He came to the conclusion that in view of this it was "inequitable and contrary to public policy," that the wife should now be entitled to relief. The matter was not so fully argued before him as before us and we have come to a different conclusion. It is important to note that this is not a case where the knowledge existed at the time of the engagement. The parties had been engaged for some time. It was sprung on the wife a few weeks before the date for the marriage. She had protested against the idea. The husband had previously made her swear to say nothing about this operation to anyone. In any case it would not have been an easy reason for her to give for breaking off her engagement. The natural inference from her evidence we think is that she felt it was too late to draw back. We do not think that, in these and the other circumstances and doing our best to apply the principles of the EARL OF SELBORNE and LORD WATSON, this petition should fail for "insincerity." We do not think the question of wilful refusal to consummate the marriage arises. In the result, the order of the learned judge will be set aside and a decree *nisi* pronounced with costs of this appeal.

Appeal allowed with costs.

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *R. M. Wood, Johnson & Sons*, Birmingham (for the wife).

[Reported by R. L. ZIAR, ESQ., Barrister-at-Law.]

CRATE v. MILLER.

[COURT OF APPEAL (Somervell and Evershed, L.JJ., and Wynn-Parry, J.), April 28, May 16, 1947.]

Landlord and Tenant—Notice to quit—Validity—Date of expiration—Periodic tenancy—Termination at end of current period—Date of last day of period.

A tenant occupied a furnished room on a weekly tenancy commencing on a Saturday. A notice to quit dated July 5, 1946, (which was a Friday) from the landlord's solicitors, was in the following terms: "We hereby give you notice that the landlord will terminate your tenancy on Friday, July 19, 1946, or at the end of the next complete week of your tenancy from the date hereof, on which date you are hereby required to quit and deliver up possession":—

HELD: (i) in all cases of periodical tenancy, whether yearly, quarterly, monthly or weekly, the same principle is to be applied, and a valid notice to quit must be expressed so as to terminate the tenancy at the end of a current period; a notice to quit on either the "anniversary" of the date of commencement of the tenancy or on the day before can be construed as a notice to quit when the current period in question is ended; and, therefore, the notice to quit on Friday, July 19, 1946, was effectual to terminate the tenancy.

Sidebotham v. Holland ([1895] 1 Q.B. 378) *applied*.

Queen's Club Gardens Estate, Ltd. v. Bignell ([1924] 1 K.B. 117) *approved*.

[AS TO DATE OF EXPIRATION OF NOTICE TO QUIT, see HALSBURY, Hailsham Edn., Vol. 20, p. 133, para. 142; and FOR CASES, see DIGEST, Vol. 31, pp. 440-445, Nos. 5858-5918.]

Cases referred to:

- (1) *Sidebotham v. Holland*, [1895] 1 Q.B. 378; 64 L.J.Q.B. 200; 72 L.T. 62; 31 Digest 440, 5866.
- (2) *Queen's Club Gardens Estates, Ltd. v. Bignell*, [1924] 1 K.B. 117; 93 L.J.K.B. 107; 130 L.T. 26; 31 Digest 447, 5932.

APPEAL by the tenant from an order of possession made by His Honour JUDGE DALE at Lambeth County Court on Oct. 15, 1946. The facts appear in the judgment of the court delivered by SOMERVELL, L.J.

The tenant appeared in person.
The landlord did not appear.

Cur. adv. vult.

May 16. **SOMERVELL, L.J.**, read the following judgment of the court. In this appeal the landlord sought an order against the tenant for possession of furnished premises. It was admitted that the premises were furnished, and no question, therefore, arose under the Rent Restrictions Acts. The county court judge made an order for possession. The tenant appealed and appeared before us in person. The landlord did not appear. A

It was argued in the court below, and before us, that the notice to quit was invalid in that it expired on a Friday instead of on a Saturday. The notice to quit reads as follows :

To Mr. Percy Miller, 67, Kennington Oval, S.E.11. As solicitors for your landlord, Mrs. Crate, of the furnished room occupied by you and being let to you together with board at £1 15s. 0d. per week, we hereby give you notice that the landlord will terminate your tenancy on Friday, July 19, 1946, or at the end of the next complete week of your tenancy from the date hereof, on which date you are hereby required to quit and deliver up possession. Dated July 5, 1946. Reid Sharman & Co. Solicitors for the landlord. B

The judge found that the tenancy was a weekly tenancy commencing on a Saturday, which he described as a "Saturday to Saturday tenancy," and there was clear evidence on which he could so find. He referred in the note of his findings to *Sidebotham v. Holland* (1) a decision of this court. That case dealt with a yearly tenancy which began on May 19. The question was whether a notice to quit and deliver up possession on May 19, being an anniversary of the day on which the tenancy commenced, was a good notice. It seems to us clear that all the members of the court were of opinion that a notice to quit on the 18th would have been a good notice. **A. L. SMITH, L.J.**, doubted whether the notice to quit on the 19th was a good notice, because, as he said ([1895] 1 Q.B. 387) : C

... it is not a notice expiring upon the last day of the year of the tenancy, but upon the day after.

The majority decided that it was a good notice, and we will quote one sentence from their judgment, which was delivered by **LINDLEY, L.J.** : D

But, although a half year's notice to quit on the 18th would be correct, it does not follow that notice to quit on the 19th, which is the anniversary of the day on which the tenancy commenced, is bad, and I am clearly of the opinion that it is not. E

In support of this view a number of authorities were considered.

As we read that decision, it is based, first, on the view that, on the dates in question there, the tenant had to quit and deliver up possession by midnight at the end of May 18 ; secondly, that a notice to quit and deliver up possession either on the 18th or on the 19th could be construed as a notice to quit at that moment of time, being the end of the period, in that case a year, which began on the previous May 19. **LINDLEY, L.J.** says (*ibid*) : F

... a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before.

In other words, a notice to quit on either day could be construed as a notice to quit when the current period in question ended. As a matter of language a notice "terminating a tenancy" on the last day of a current period (which was the form used in the present case) may, apart from *Sidebotham v. Holland* (1), fairly be said to mean the same thing as a notice to quit and deliver up possession on the following day, for in both cases the landlord is intimating that the last day of the current period is to be the last day of the tenancy. G

In *Queen's Club Gardens Estates, Ltd. v. Bignell* (2), the question of weekly tenancies was considered by a Divisional Court and the principles applicable were stated very fully by **LUSH, J.** He held, and **SALTER, J.** agreed with his judgment, that in all cases of periodical tenancy, whether yearly, quarterly, monthly, or weekly, the same principle is to be applied and a valid notice to quit must be expressed so as to terminate the tenancy at the end of a current period. In our view, this is right, and *Sidebotham v. Holland* (1), therefore, applies to the present case and was rightly accepted by the county court judge H

as authority for the view that the notice given by the landlord was effectual to terminate the tenancy.

We would like to add that the expression "Saturday to Saturday tenancy," which was used by the county court judge in this case and by SALTER, J. in the case cited, is, or may be, misleading. If a tenancy for a week begins on a Saturday it expires at midnight on the following Friday. We think that SALTER, J. was wrong when he treated the Monday as the second of the seven days forming a current week of the tenancy. If a tenancy commences on a Saturday we think Monday is the third of the seven days forming a current week.

The present notice to quit, as will be seen, contains an alternative. Presumably, this was inserted on grounds which are referred to by A. L. SMITH, L.J., in *Sidebotham v. Holland* (1) ([1895] 1 Q.B. 389). He there says that the landlord would have avoided the difficulties which had arisen if he had added the words which are very ordinarily inserted in a notice to quit "or at the expiration of the year of your tenancy which shall expire next after the end of one half year from the service of this notice." It will be seen that in the present notice the alternative purports to run from the date of the notice and not of its service, which was, in fact, three days later, so that, if the landlord had had to rely on the alternative, the length of the notice would have been insufficient. In the course of the argument the court felt that a possible point might have been taken with regard to this alternative, and also possibly with regard to the validity of the use of this suggested alternative form, which may be said to leave it in doubt on which day the landlord claimed to re-enter. There is, however, no suggestion in the judge's note that any such point was taken below, and it did not seem to us, therefore, open to the court to consider it on the present appeal. In saying this, we do not desire to be thought to be expressing any opinion one way or the other on either point. The appeal will be dismissed with costs.

Appeal dismissed with costs.

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

med. C.A. [1948] 1 All E.R. 713.

Re A DECISION OF A DISTRICT AUDITOR.

APPEAL OF V. R. DICKSON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), May 2, 12, 1947.]

Local Government—Audit—Powers of district auditor—Fraud by company—Surcharge on managing director—Local Government Act, 1933 (c. 51), s. 228.

A company overstated the time it had spent on work for a local authority, and, as a result, large overpayments were made by the authority. The district auditor estimated the amount of loss to the authority, and purported to surcharge therewith the managing director of the company.

HELD: the district auditor had no power to surcharge anyone who was not a member, officer or servant of the authority whose accounts were being audited.

[AS TO POWERS AND DUTIES OF AUDITOR, see HALSBURY, Halsbury's Laws, Vol. 21, pp. 223, 224, para. 415; and FOR CASES, see DIGEST, Vol. 33, pp. 19-21, Nos. 76-86.]

Case referred to:

(1) *R. v. Roberts*, [1908] 1 K.B. 407; 77 L.J.K.B. 281; 98 L.T. 154; 72 J.P. 81; 33 Digest 40, 217.

APPEAL by notice of motion under the Local Government Act, 1933, s. 229 (1), against a surcharge made by a district auditor. The facts appear in the judgment of ATKINSON, J.

J. Scott Henderson, K.C., and *H. G. Garland* for the appellant.

Pritt, K.C., and *H. B. Williams* for the respondent, the district auditor.

Sir Valentine Holmes, K.C., and *H. V. Lloyd-Jones* for the London County Council.

Cur. adv. vult.

May 12. ATKINSON, J., read the following judgment of the court. On Jan. 18, 1941, the London County Council entered into a contract with

Hortensia Garages, Ltd., for the repair and maintenance of vehicles used for civil defence purposes. The price to be paid for services rendered by the company included wages actually paid, plus 157½ per cent., plus the net cost of materials. The contract provided the fullest opportunities for inspection of work cards, time sheets, books and wages records. After somewhat more than 3 years it was discovered that certain of the accounts sent in by the company were wrong in that the time alleged to have been spent was grossly overstated. The appellant, Dickson, was the managing director of the company. He was prosecuted for obtaining money by fraud and convicted. A The sums, the subject of the charges on which he was convicted, amounted to £103 3s. 1d.

The respondent, the district auditor, then proceeded to estimate as best he could the loss suffered by the London County Council on the basis that the invoices sent in by the company were fraudulently exaggerated throughout the whole period. He came to the conclusion that the London County Council had been defrauded to the extent of at least £20,000. Thereupon, he caused to be served on Dickson this notice : B

In auditing the accounts for the three years ended Mar. 31, 1944, of the London County Council, it appears to me that the funds of the said council have incurred a deficiency or loss, particulars of which are given on the back hereof. Upon the evidence before me, I am inclined to the view that you are responsible either wholly or in part for the said deficiency or loss. In order to afford you an opportunity of being heard on the subject, before I decide whether it is my duty to surcharge you with the said amount or some portion thereof, I beg to inform you that I have adjourned the audit so far as relates to this matter to Wednesday, June 19, 1946. Particulars : Loss occasioned to the London County Council by your misconduct in improperly making inflated claims upon the said council and obtaining payment thereon in excess of that lawfully due to you to the extent of at least £20,000. C

This notice was followed by requests by Dickson's solicitors for particulars and of the evidence on which the surcharge was made. The auditor declined to accede to either request and fixed June 26, 1946, for hearing anything Dickson might have to say in answer to the surcharge. Counsel attended on behalf of Dickson. The auditor explained that he was satisfied on the evidence before him that there had been a very serious overstatement by the firm of the hours expended, and that he had endeavoured to make a correct estimate of the probable amount of the loss and the cost in relation to repairs. He explained how he had done it and referred to the evidence of five witnesses. "It was open" he said "to Mr. Dickson, if he wished, to show quite conclusively that his figures were wrong." Counsel explained that he was not in a position to deal with it, as he had neither seen nor heard the evidence relied on and had no opportunity of hearing or cross-examining the witnesses. A further opportunity of being heard was offered and declined and thereupon the surcharge was certified on Sept. 20, 1946. Dickson now appeals. D E F

The first point of counsel for the appellant was that the surcharge is wholly misconceived as a district auditor has no power to surcharge anyone other than members, officers and servants of the authority whose accounts he has to audit. The claim by the auditor is certainly startling. Apparently, he considers that, if the London County Council has a cause of action against any person, the council need not bring an action to enforce the claim (when, of course, the claim would have to be proved), but he (the auditor) can deal with it by the simple process of surcharging the person with the amount of the claim, leaving it to him to come to the court to disprove the liability so imposed. The objectionable nature of such a proceeding is made plain by one of the remarks of the auditor to counsel for Dickson. He said : G

I do appreciate that there is always some difficulty about audit procedure, because, of course, the auditor is in the unenviable position of being, so to speak, the judge and the prosecutor. H

The auditor bases his claim to be entitled to surcharge Dickson on the Local Government Act, 1933, s. 228, which provides :

(1) It shall be the duty of the district auditor at every audit held by him (a) to disallow every item of account which is contrary to law ; (b) to surcharge the amount of any expenditure disallowed upon the person responsible for incurring or authorising the expenditure ; (c) to surcharge any sum which has not been duly brought into account

upon the person by whom that sum ought to have been brought into account ; (d) [and this is the more relevant part] to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred ; (e) to certify the amount due from any person upon whom he has made a surcharge . . .

A It is the auditor's contention that " any person " means any person, whether a member, officer or servant of the council or not, and that everybody is subject to his jurisdiction in just the same way as those whose accounts he is there to audit.

B Counsel for the auditor felt the difficulty of contending for a power to surcharge unrestricted as to the class of persons who could be so dealt with. He was asked this question : If the auditor came across an expenditure on the repair of a vehicle belonging to the London County Council and was told that that repair was rendered necessary by a collision with a van belonging to, say, Carter Paterson, did he contend that the auditor could forthwith surcharge the company for the expense so incurred ? The answer was " No," and the claim was then put in these words, " that ' any person ' meant any person who stands in a relation to the local authority which calls on him for diligence or good conduct on some special ground other than the general duty resting on all members of the community." There is nothing in the section on which C to found such a definition of " person." Contract would seem, at any rate generally, to be the basis of special relationships, yet loss due to breach of contract is not mentioned in s. 228 as a loss which can be surcharged.

The power of a district auditor to surcharge was, I think, first conferred by the Poor Law Amendment Act, 1844, s. 32, and the relevant words were :

D . . . and such auditor shall charge in every account audited by him the amount of any deficiency or loss incurred by negligence or misconduct of any person accounting, or of any sum for which such person is accountable, but not brought by him into account against such person, and shall certify . . .

This was replaced by the Public Health Act, 1875, s. 247, the relevant words being :

E . . . shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person.

Section 228 of the Act of 1933 omits the word " accounting." The auditor's claim is based on that omission. It certainly was never suggested that under the 1844 Act or the Act of 1875 the words " persons accounting " could include persons accounting to, or liable to account to, the local authority. Clearly the words referred to accounting which fell to be audited.

F The meaning of the words was considered in *R. v. Roberts* (1), where the auditor had surcharged certain members of the highway committee of the council with several sums representing losses incurred by the council in respect of contracts for horse forage and crushed ballast because the highest instead of the lowest of several tenders had been accepted. The assistant engineer had been included for a sum representing the price of 410 yards of material in excess of the quantity actually delivered and also in respect of the crushed ballast. The persons surcharged obtained rules *nisi* for a *certiorari* to bring up and quash the surcharges, and this court made the rules absolute. The G auditor appealed without success. The interest of the case lies in the views expressed as to the meaning of the words " person accounting," whether they were wide enough to include any member or officer of the local authority whose accounts were being audited or whether the words covered only those officers actually bringing in an account for audit. The court were divided in H their views. LORD COZENS-HARDY took the view that the words were wide enough to enable any officer or servant of the local authority to be surcharged. He said ([1908] 1 K.B. 418) :

Strictly speaking, such a person would not be a person bringing in an account subject to audit and therefore liable to be surcharged in such account. But I think " surcharge " is used in a less technical sense and is equivalent to " charge " ; and this enables me to reach the conclusion that the words " any person accounting " in the second limb of the sub-section are wide enough to include any member of the local authority whose accounts are before the auditor.



FARWELL, L.J., took the same view, although he arrived at it in a slightly different way. He said (*ibid.* p. 440) :

"The person accounting" refers back to the line before, "the person making or authorising the making of" the payment, showing that "accounting" is not confined to figures submitted to audit, but extends to conduct for which any committee or officer is liable to be called to account.

FLETCHER MOULTON, L.J., took a different view. His view, as expressed in the headnote (*ibid.* p. 407), was :

The powers and duties of the auditor under s. 247 (7) are strictly confined to auditing and the words "person accounting" in that latter part of that sub-section, which requires the auditor to "charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person," mean the person who brings in accounts for audit. Therefore, where the accounts submitted for audit are the accounts of a metropolitan borough council, the person accounting is the council, and the auditor has no power to inquire into the negligence or misconduct of the individual members or servants of the council.

In our view, in all probability the word "accounting" was omitted from the 1933 Act to negative the strict interpretation put on the words by FLETCHER MOULTON, L.J., and to make it clear that the interpretation of the MASTER OF THE ROLLS and FARWELL, L.J., was intended by Parliament. It is unthinkable that Parliament intended by the omission of a single word to make so startling and drastic a change in the law as to give a district auditor the power to make and adjudicate on claims by the local authority of which he is auditor against third parties who have nothing whatever to do with the accounts he is auditing, and to do that by a procedure which gives the third party no right to hear and challenge the evidence against him, and no right to subpoena witnesses. The words must be interpreted in the light of ss. 219 and 241. The auditor is there to audit accounts. He is there to be a watchdog on the local authority, its officers and servants. He is there to check their accounts and saddle the appropriate members and officers with loss for which they are responsible. The words "negligence or misconduct" are very apt to describe and cover the grounds on which members and servants of an authority can become indebted to the authority. Misconduct is not a word normally applied to any claim against a third party. If claims against third parties were intended to be covered, surely breach of contract would find a place in the section.

In the view of this court, the district auditor has no power to surcharge anyone who is not a member, officer or servant of the authority whose accounts are being audited. We are told that this is not the first time that the district auditor has surcharged persons other than those I have indicated. We think he would be well-advised if he stuck to his auditing and ceased to make claims on members of the public and thereupon to adjudicate upon them, thereby usurping the functions of the courts.

Appeal allowed with costs.

Solicitors: *Alfred C. Warwick & Co.* (for the appellant); *Sharpe Pritchard & Co.* (for the respondent district auditor); *J. H. Pawlyn* (for the London County Council).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

C. v. C.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Jones, J.), January 29, April 27, 28, 29, May 20, 1947.]

Husband and Wife—Summary jurisdiction—Custody—Legitimated child—"Child of the marriage"—No formal declaration of legitimacy—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5 (b)—Married Women (Maintenance) Act, 1920 (c. 63), s. 1 (1)—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 188 (1), 193 (1)—Legitimacy Act, 1926 (c. 60), s. 1 (1).

On June 19, 1944, the wife, then a single woman, gave birth to a child, the husband, who was a single man at that time, being the father. On Mar. 16, 1946, the parties were married. By that marriage the child was legitimated by virtue of the provisions of s. 1 (1) of the Legitimacy Act,

1926, but no petition had been presented on behalf of the child under s. 2 of that Act, and no declaration had been made under s. 188 of the Supreme Court of Judicature (Consolidation) Act, 1925, that the child was the legitimate child of the parties. On a complaint by the wife before justices that the husband had deserted her and neglected to maintain her and the child, the justices made an order giving the custody of the child to the mother.

HELD : the order was within the jurisdiction of the justices.

Semble : Section 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, gives the Divorce Court jurisdiction to deal with the custody of a child legitimated *per subsequens matrimonium* under s. 1 (1) of the Legitimacy Act, 1926, "the marriage of whose parents is the subject of the proceedings," and a decree of legitimacy under s. 188 of the Act is not a condition precedent to the exercise of that jurisdiction.

Bednall v. Bednall and Shivussawa (1), [1927] P. 225; *Green v. Green* (2), [1929] P. 101; *Jones v. Jones* (3) (1929), 98 L.J.P. 74 *not followed*. *M. v. M.* (4), [1945] 2 All E.R. 525 *approved*.

[EDITORIAL NOTE.] It should be noted that, so long as the above expression of opinion stands, the passage in Halsbury referred to below, which was based on the three cases now disapproved of, can no longer be regarded as good law.

AS TO ORDER FOR CUSTODY OF ILLEGITIMATE CHILD, see HALSBURY, Hailsham Edn., Vol. 10, p. 754, para. 1188; and FOR CASES, see DIGEST SUPP.]

Cases referred to :

- (1) *Bednall v. Bednall and Shivussawa*, [1927] P. 225; 96 L.J.P. 150; 137 L.T. 632; Digest Supp.
- (2) *Green v. Green*, [1929] P. 101; 98 L.J.P. 58; 140 L.T. 93; Digest Supp.
- (3) *Jones v. Jones* (1929), 98 L.J.P. 74; 140 L.T. 647; Digest Supp.
- (4) *M. v. M.*, [1945] 2 All E.R. 525; [1946] P. 31; 115 L.J.P. 29; 173 L.T. 305; Digest Supp.
- (5) *Evans v. Evans and Blyth*, [1904] P. 274; 73 L.J.P. 87; 91 L.T. 356; 27 Digest 532, 5762.
- (6) *Langworthy v. Langworthy* (1886), 11 P.D. 85; 55 L.J.P. 33; 54 L.T. 776; 27 Digest 552, 6057.
- (7) *Thomasset v. Thomasset*, [1894] P. 295; 63 L.J.P. 140; 71 L.T. 148; 27 Digest 533, 5780.
- (8) *Re Wicks' Marriage Settlement, Public Trustee v. Wicks*, [1940] Ch. 475; 109 L.J.Ch. 163; 163 L.T. 31; Digest Supp.

APPEAL by the husband from an order of Bolton (Lancashire) justices, made on Dec. 10, 1946, awarding custody to the wife of a legitimated child in respect of whom no declaration of legitimacy had been made under s. 188 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Duveen for the husband.

E. Holroyd Pearce, K.C., and *Stuart Horner* for the child.

The wife was not represented.

Cur. adv. vult.

May 20. LORD MERRIMAN, P., read the following judgment of the court. This is an appeal by a husband against an order of the justices for the county borough of Bolton, in the county of Lancaster, made on Dec. 10, 1946. Before the justices the wife complained that the husband had deserted her on Nov. 27, 1946, and had thereafter wilfully neglected to maintain her and their child, and she asked also that she be given the custody of the child. The justices found that the husband had deserted the wife as she alleged, and they ordered him to pay her the nominal sum of 1s. a week for her maintenance, and the sum of 6s. a week for the maintenance of the child. They also gave her the custody of the child. The husband does not appeal against the findings of the justices as to his desertion or as to maintenance, but he appeals against the provision in the order giving custody of the child to the wife on the grounds (1) that the justices had no jurisdiction to make any order with regard to the child, and (2) that the wife in any event was and is not entitled to the custody of the child. The wife was not represented. When the appeal first came before this court on Jan. 29, 1947, it appeared that the allegation of want of jurisdiction in the justices was based on the fact that the child, Isobel, was born before the marriage of the parties, and had been legitimated by their subsequent marriage by virtue of the provisions of the Legitimacy

Act, 1926. It seemed to us to be desirable in these circumstances that the hearing of the appeal should be adjourned so that the child should be represented. At our request the Official Solicitor agreed to appear for the child, and on the adjourned hearing on Apr. 28 and 29, 1947, he was represented by counsel. The court is indebted to counsel on both sides for their assistance. In the meanwhile the Official Solicitor had made certain enquiries as to the parties and their respective homes, and has sworn an affidavit verifying a report by a member of his staff. In consequence of this report counsel for the husband did not contend that the justices were wrong in giving the custody of the child to the wife, if they had jurisdiction to do so. We have considered the report, and agree with the view taken by the justices. That being so, there remains only the ground of want of jurisdiction.

There is no dispute about the facts. The justices found that the wife was a single woman when she gave birth to the child on June 19, 1944, and that the husband, who was a single man at the time of the birth, is the father of the child. The parties were married on Mar. 16, 1946, and by that marriage the child was legitimated by virtue of the provisions of the Legitimacy Act, 1926, but no petition has been presented on behalf of the child under s. 2 of that Act, and no declaration has been made under s. 188 of the Judicature Act, 1925, that she is the legitimate child of the parties.

We are confronted here with two separate points, one of which is of importance both to the jurisdiction of this Division and to the jurisdiction of magistrates' courts with regard to custody, while the other affects only the jurisdiction of magistrates' courts. The first point is whether *Bednall v. Bednall* (1), *Green v. Green* (2), and *Jones v. Jones* (3), were rightly decided. It was held in these cases that the Divorce Court has no jurisdiction under s. 193 of the Judicature Act, 1925, to deal with the custody of a legitimated child as being "a child, the marriage of whose parents is the subject of the proceedings," unless and until a formal declaration of legitimacy by virtue of the Act of 1926 has been obtained. Manifestly, if these cases were rightly decided in relation to the words used in s. 193 of the Judicature Act, 1925, the absence of such a declaration of legitimacy would be equally fatal to the jurisdiction to treat a legitimated child as "a child of the marriage" within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925. This point, therefore, affects both jurisdictions. The second point is whether, even if these cases are held to be wrongly decided and the decision of DENNING, J., in *M. v. M.* (4), is held to be right, it would still be impossible to hold that a legitimated child is "a child of the marriage" within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts, although he is "a child the marriage of whose parents is the subject of the proceedings" within the meaning of s. 193 of the Judicature Act, 1925.

This brings us to the question whether *Bednall v. Bednall* (1), and the cases following it, or *M. v. M.* (2), were rightly decided. We do not think it necessary to examine the cases referred to by DENNING, J., in which legitimacy was in issue otherwise than in connection with divorce proceedings, but some assistance may, perhaps, be derived from *Evans v. Evans* (5). This was a petition for variation of settlements after a decree of dissolution of marriage where a child had been born between the date of the decree *nisi* and the date of the decree absolute, and its paternity was hotly contested by the petitioner. Before deciding the question of the variation of settlements GORELL BARNES, J., directed an issue to be tried to ascertain the status of the child. It is true that this was a decision, not on the question of custody, but on a separate petition for what is now dealt with as ancillary relief on the main petition, and that the child was made a party to the proceedings, but it is clear that the learned judge did not think it necessary to invoke the procedure under the Legitimacy Declaration Act, 1858, and the Attorney-General was not made a respondent as is prescribed by s. 6 of that Act (now s. 188 (4) of the Judicature Act, 1925), as a condition precedent to dealing with the matter. In *M. v. M.* ([1945] 2 All E.R. 528), DENNING, J., placed great reliance on the decision of the Court of Appeal in *Langworthy v. Langworthy* (6), which is referred to as showing that the test under s. 193 of the Judicature Act, 1925, [which is in the same terms as s. 35 of the Matrimonial Causes Act, 1857, the section there under discussion], is "parenthood not legitimacy." That case established that a child of

the union who is rendered illegitimate by the annulment of the marriage can be dealt with under s. 193, for the very reason, as is pointed out by COTTON and FRY, L.J.J., (11 P.D. 89), that the section expressly refers to nullity proceedings, but in relation to proceedings for divorce, at any rate, we think that to say that parenthood, not legitimacy, is the test, goes too far. It cannot, in our opinion, be suggested that, although the parenthood is undisputed, an illegitimate child who cannot be legitimated is the subject of custody proceedings under s. 193, on the divorce of the spouses who are, in fact, his parents, but we agree with DENNING, J., that the fact that the wording of s. 193 is wide enough to cover the case of a child of the union rendered illegitimate by the annulment of the marriage of his parents, tends to support the view that in divorce proceedings it is also wide enough to include a child who has been rendered legitimate.

We recognise the inconvenience of upsetting the practice of this Division in regard to legitimated children which has prevailed for nearly 20 years and is based on the authority of cases in two of which the Attorney-General appeared to assist the court, but this court is not bound by these decisions, and if we think that they were wrongly decided we are bound to say so. In our opinion, they were wrongly decided, and the decision of DENNING, J., in *M. v. M.* (4), was right. Our reasons, which are substantially those which prevailed with DENNING, J., can be stated quite shortly. In a divorce suit, although the welfare of the child is the paramount consideration, the question of custody is an issue between the parents: *Thomasset v. Thomasset* (7), [1894] P. 301, per LINDLEY, L.J. Provided the other conditions are fulfilled, it is the subsequent marriage of his parents which renders the child legitimate by virtue of the Legitimacy Act, 1926, and it is that same marriage of those parents which is the subject of the proceedings in which the custody order is sought to be made. In our opinion, s. 193 of the Judicature Act, 1925, gives the court jurisdiction in such a case, and a decree of legitimacy under s. 188 of the Judicature Act, 1925, is not a condition precedent to the exercise of that jurisdiction.

As regards the second point, the most formidable argument in support of the contention that a legitimated child should not be regarded as "a child of the marriage" is derived from the judgment of FARWELL, J., in *Re Wicks' Marriage Settlement* (8). This was a case of a special character arising on the construction of a particular ante-nuptial settlement. In 1893 when the marriage settlement was executed and the marriage took place, there was in existence an illegitimate child of the spouses. The settlement contained power to appoint, after the life interest of the wife, to any one or more of the issue of the spouses as the husband should by deed, will or codicil appoint. It goes without saying that there was at that time no question in this country of the legitimation of the illegitimate child by the marriage, and he would not be included in the accepted interpretation of the word "issue" when the settlement was made. After the death of the wife, and at a time when the question whether the child born before the date of the marriage was a permissible object of the power of appointment given to the husband, or was entitled to a share of the trust fund in default of appointment, was still *sub judice*, the husband by deed appointed the whole of the trust fund to that child, although there were alive legitimate issue of the marriage who had a vested interest in the trusts subject to the divesting of any one or more of them by a permissible exercise of the power of appointment. In these circumstances FARWELL, J., held, on the construction of this instrument, that the legitimated child was not a proper object of the power of appointment under this deed, notwithstanding the effect of the Legitimacy Act, 1926, and that, although he was "legitimate" by virtue of the use of that word in the Legitimacy Act, he was not a child of the marriage. At the outset of his judgment the learned judge said ([1940] Ch. 477) :

It cannot, in my judgment, be true to say that the defendant Lionel Arthur Wicks was a child of the marriage; he is a legitimate child of the spouses, but he is not a child of the marriage because in fact he was born before his parents were married.

Now, in common parlance it is difficult to draw any distinction between such phrases as "a legitimate child," "a legitimate child of the spouses," "a child born in lawful wedlock," or "a child of the marriage." It seems to us that

they are synonymous terms. Parliament can alter the status of a child, but it cannot alter the chronological order of events, *i.e.*, legitimation by virtue of the Act of 1926 can, as a matter of history, merely be notional. It is not to be expected that Parliament will employ more than one of several synonymous terms, in the alternative, to express its meaning. When, therefore, in s. 1 of the Legitimacy Act, 1926, Parliament enacts that in the case of a living illegitimate person whose parents marry or have married one another either before or after the commencement of the Act, the father being at the time of the marriage domiciled in England or Wales, the marriage shall render that person legitimate from whichever is the later of the two dates [the commencement of the Act or the date of the marriage], it is difficult to see why, by the same process, that person is not also "rendered" a child born in lawful wedlock, or a child of the marriage. Parliament, by the very use of the words "rendered legitimate" recognises that it is a notional process, and it seems to us that there is no reason, except the fact that Parliament has used one synonym rather than another to express the same notion, for holding that the historical fact that the person was born before his parents were married prevents him from acquiring the same status in whatever form of words it is described. It may be that the decision in *Re Wicks* (8), can be supported on the construction of the particular instrument, but, in our opinion, it does not oblige us to hold that a legitimated child is not a child of the marriage within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts.

Another argument was based on the operation of s. 6 (2) of the Legitimacy Act, 1926, on the Widows', Orphans' and Old Age Contributory Pensions Act, 1925. Under the latter Act the pensionable rights of widows becoming such after the coming into force of the Act depend, by s. 3, among other things, on there having been at least one child of the marriage, and the same applies by virtue of s. 18 (c) to the entitlement of widows existing when the Act came into force. By s. 44 (1) of the Act, a child includes, in certain conditions, an illegitimate child. It was necessary, therefore, to make clear the position of a legitimated child. Accordingly, sub-s. 4 of the same section enacts that where a child born before the marriage of his parents has been legitimated by virtue of the subsequent marriage of his parents, the child shall, for the purposes of this Act, be "deemed" to be a child born of the marriage. Now at that time the Legitimacy Act, 1926, had not come into existence, but the Widows', Orphans' and Old Age Contributory Pensions Act applied to Scotland. It is reasonably clear, therefore, that this last sub-section was intended to deal with the established law of Scotland on this subject, but similar wording is used in this connection in s. 6 (2) of the Legitimacy Act, 1926, and it is argued that by specifically enacting that for certain purposes a legitimated child should be "deemed" to be a child of the marriage, Parliament was recognising that the child was not, in fact, "a child of the marriage." This argument, no doubt, has force in relation to the combined effect of the Widows', Orphans' and Old Age Contributory Pensions Act, 1925, and the Legitimacy Act, 1926, but, again, we find it difficult to distinguish between the process of "rendering legitimate" contrary to historical fact, and "deeming" the child to be legitimate. Both alike seem to us to be notional processes. However that may be, we are of opinion that it would be wrong to infer from the absence in the Legitimacy Act, 1926, of any similar provision in relation to the Summary Jurisdiction (Separation and Maintenance) Acts, that Parliament intended to declare that, for the purposes of those Acts, a legitimated child was not a child of the marriage.

For these reasons we are of opinion that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *J. A. H. Powell* (for the husband); *Official Solicitor* (for the child).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

Re EASTEX MANUFACTURING CO., LTD.'S APPLICATION.

[CHANCERY DIVISION (Wynn-Parry, J.), May 1, 2, 5, 6, 7, 8, 21, 1947.]

Trade Marks—Application to register—Mark “likely to deceive or cause confusion” with mark already on register—Defensive registration—Notional user—Trade Marks Act, 1938 (c. 22), s. 12, 27 (1) (6).

In determining whether registration of a trade mark would be contrary to the Trade Marks Act, 1938, s. 12, defensive registration must be treated on the same basis as ordinary registration, because, by s. 27 (6) of the Act, s. 12 applies to defensive registration. The primary consideration under s. 12 is, not the proved user, in fact, of the trade mark already registered, but the extent of the monopoly given by the existing registrations held by the proprietors thereof, and the risk to that monopoly if the new mark applied for is registered, that risk being assessed by the notional user postulated by the formula laid down by EVERSHED, J., in *Re Smith Hayden's Application* (63 R.P.C. 97, at p. 101) which is to the following effect: Assuming user by the proprietors of the mark already registered of their mark in a normal and fair manner for any of the goods covered by the registration of that mark, is the court satisfied that there will be no reasonable likelihood of deception or confusion among a substantial number of persons if the proprietors of the mark now sought to be registered also use their mark normally and fairly in respect of any goods covered by their proposed registrations? It is to test the rights of the proprietor of a registered mark when application is made to register another mark that the notional user is postulated. In such a case, while actual user does not form the test, it may well be referred to when considering what is the proper extent of a notional user in a normal and fair manner. The notional user will usually be found to be wider and more extensive than the actual user. The onus is on the applicants for registration to establish that there is no real, tangible danger of confusion if the mark applied for is used in a normal and fair manner. On the other hand, the objections put forward by the opponents of the registration must be real and not fanciful.

[AS TO DEFENSIVE TRADE MARKS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 555, 556, para. 860. FOR THE TRADE MARKS ACT, 1938, see HALSBURY'S STATUTES, Vol. 31, p. 753.]

Cases referred to:

- (1) *Re Smith Hayden's Application* (1946), 63 R.P.C. 97.
- (2) *Re Pianotist Co.'s Application* (1906), 23 R.P.C. 774; 43 Digest 170, 257.
- (3) *Re Rysta, Ltd.'s Application, Re Aristoc, Ltd.'s Opposition*, [1943] 1 All E.R. 400; *reversd. sub nom. Aristoc, Ltd. v. Rysta, Ltd.*, [1945] 1 All E.R. 34; [1945] A.C. 68; 114 L.J. Ch. 52; 172 L.T. 69; 62 R.P.C. 65; Digest Supp.

APPEAL by motion from a decision of the Assistant Comptroller of Trade Marks, dated July 11, 1946, allowing the registration of three trade marks applied for by the respondents, Eastex Manufacturing Co., Ltd. The application was opposed by the appellants, Lastex Yarn and Lactron Thread, Ltd. The facts appear in the judgment.

Lloyd-Jacob, K.C., and *P. Stuart Bevan* for the appellants.
Burrell, K.C., and *S. I. Levy* for the respondents.

Cur. adv. vult.

May 21. WYNN-PARRY, J., read the following judgment. This is an appeal from the decision of the Assistant Comptroller of Trade Marks, dated July 11, 1946, in favour of Eastex Manufacturing Co., Ltd., the respondents to the appeal, allowing the registration in class 25 (in respect of coats and costumes, all for women, not being waterproof or rainproof) of three marks applied for by them. In the first application (No. 620,685, dated Oct. 22, 1942), the mark consists of the word “Eastex” printed in block letters. In the second application, the mark consists of the word “Eastex” printed in script form, and, in addition, below it a relatively small device consisting of the figure of some animal, probably a lion or a unicorn, holding a crown. In the third application (No. 620,812, dated Nov. 2, 1942), the mark consists of the word “Eastex” written in the same script form as in the case of the second mark applied for, together with the words, also in script form: “Full figure fashions,”

written below in smaller type. The registration of these marks is opposed by Lastex Yarn and Latron Thread, Ltd., on the grounds that they are the proprietors of seventeen trade marks each consisting of the word "Lastex" registered in respect of various specifications of goods in the textile classes, that they have extensively used the word "Lastex" as a trade mark in their business, and that registration of the marks applied for would be contrary to the Trade Marks Act, 1938, ss. 11 and 12. The Assistant Comptroller, in his decision, took the view that so much of the evidence had to be considered under both sections that it would be convenient, not to endeavour to deal separately with the two sections, but to deal comprehensively with the question of the likelihood of deception or confusion arising. Before me, however, counsel for the respondents, in his able and exhaustive argument, dealt with the two sections separately, and I have come to the conclusion, particularly as there is no express finding by the Assistant Comptroller under s. 11, that, having regard to the way in which the matter developed before me, it would be preferable that I should follow this course.

It will, first, be convenient to state the scope of the inquiries under the respective sections, for which purpose I cannot do better than adapt to the present case the formula evolved by EVERSHED, J., in *Re Smith Hayden's Application* (1): (A) Under s. 11: Having regard to the reputation acquired by the name "Lastex," is the court satisfied that the mark applied for, if used in a normal and fair manner in connection with any goods covered by the registration proposed, will not be reasonably likely to cause deception and confusion among a substantial number of persons? (B) Under s. 12: Assuming user by the appellants of their mark "Lastex" in a normal and fair manner for any of the goods covered by the registrations of those marks, is the court satisfied that there will be no reasonable likelihood of deception or confusion among a substantial number of persons if the respondents also use their mark "Eastex" normally and fairly in respect of any goods covered by their proposed registrations? In the case of each section the onus is on the respondents, as applicants, to establish to the satisfaction of the court that there is no real, tangible danger of confusion. On the other hand, the objections put forward by the appellants must, equally, be real and not fanciful.

Under s. 11 the existence of registration of the appellants' mark "Lastex" is *nihil ad rem*. The vital consideration is the extent and also the nature of the reputation which they have acquired and enjoyed in the word "Lastex" at the dates of the respondents' applications. This is purely a question of fact. [HIS LORDSHIP reviewed the evidence and continued:—] On the evidence, I cannot see any risk of confusion in practice. So far as ordering is concerned, the persons who will order from the appellants are manufacturers who know what they want, namely, the Lastex yarn, to be incorporated in their garments. So far as the retailers are concerned, they will order from the manufacturers garments containing Lastex yarn, on the one hand, and from the respondents coats and costumes under the brand name of "Eastex," on the other hand. So far as the public is concerned, on the assumption that the appellants' advertising campaign and their method of identifying their yarn by labels have succeeded, which I see no reason to doubt, I can see no real, tangible danger that they will confuse articles containing "Lastex" yarn, on the one hand, with articles sold under the brand name of "Eastex," on the other hand. I, therefore, come to the conclusion that, as regards s. 11 of the Act, the respondents have discharged the onus which lies on them.

I turn now to s. 12. Here, of course, different considerations arise. The Assistant Comptroller has found that the goods of the respondents' specifications and the specification of the appellants' defensive registration No. 604,297 include goods of the same description within the meaning of s. 12 of the Act. Counsel for the respondents accepted this conclusion at the hearing before me, and, having considered the Assistant Comptroller's reasoning, I would say that, with respect, I entirely agree with him. Apart from this defensive registration which is in respect of articles of clothing made wholly or partly of material in which india rubber is incorporated, and apart from registration No. 143,299, which is in respect of "Binding, boot laces, shoe laces, braid, trimmings, cord for trimming, galloons, lace, dress shields for sewing inside garments, ribbons, and webbing, all being goods not in the piece composed

wholly or mainly of cotton" and is not restricted to articles in which india rubber is an essential component, the goods covered by the registrations on which the appellants rely broadly consist of yarns and threads, textile piece goods, and certain other textile goods, in all of which india rubber is incorporated to a greater or lesser degree, and do not include articles of clothing. The Assistant Comptroller expressed the view that the specifications of the registrations (other than the defensive registration No. 604,297), which relate to piece goods, also cover goods of the same description as those in respect of which the respondents seek registration, but that in this instance the conflict as to goods is somewhat slight. Again I entirely agree with him.

It will thus be seen that, as regards s. 12, the appellants must rely, and they did, in fact, rely, on the defensive registration No. 604,297, the scope of which I have already stated. As regards this aspect of the matter, the Assistant Comptroller held (i) that, having regard to the provisions of s. 27 (6), a defensive registration, so far as s. 12 is concerned, must be treated as if it were an ordinary registration; and (ii) that, taking into account all the relevant considerations, it was scarcely possible to envisage conditions under which, assuming use of the respondents' and appellants' marks in a fair and normal manner, no real, tangible danger of visual confusion of the marks would arise, and that, therefore, the respondents had just succeeded in discharging the *onus* which lay on them.

Counsel for the respondents although, of course, accepting the conclusion of the Assistant Comptroller, which was in his favour, submitted that the Assistant Comptroller had misdirected himself in law as to the effect of s. 12 on a defensive registration, and submitted that, on the view of the section which he puts forward, the Assistant Comptroller should have come more easily to a decision in the respondents' favour.

Section 27, (1) and (6), read as follows:—

(1) Where a trade mark consisting of an invented word or invented words has become so well known as respects any goods in respect of which it is registered and in relation to which it has been used that the use thereof in relation to other goods would be likely to be taken as indicating a connection in the course of trade between those goods and a person entitled to use the trade mark in relation to the first-mentioned goods, then, notwithstanding that the proprietor registered in respect of the first-mentioned goods does not use or propose to use the trade mark in relation to those other goods and notwithstanding anything in the last foregoing section, the trade mark may, on the application in the prescribed manner of the proprietor registered in respect of the first-mentioned goods, be registered in his name in respect of those other goods as a defensive trade mark and, while so registered, shall not be liable to be taken off the register in respect of those goods under the last foregoing section. . . . (6) Except as otherwise expressly provided in this section, the provisions of this Act shall apply in respect of the registration of trade marks as defensive trade marks and of trade marks so registered as they apply in other cases.

In my view, the effect of the language of s. 27 (6) is that the provisions of s. 12 apply to defensive registrations. Indeed, with this conclusion counsel for the respondents does not quarrel. But, he says, the question is how far it applies. His argument can, I think, be put thus. Section 12 proceeds on the assumption that the trade mark of the opponent is a valid trade mark and, therefore, having regard to the definition of "trade mark" in s. 68, that it is one which the proprietor uses or proposes to use. Where, as in the present case, the two marks are not identical, the question arises under s. 12 whether the mark of the applicant so nearly resembles the mark of the registered proprietor as to be likely to deceive or cause confusion. This is a question of fact for the court on the evidence. It cannot, however, be answered without postulating user, as is shown in the formula enunciated by *EVERSHED, J.*, to which I have referred. But to postulate user of a defensive trade mark is not possible, because, as is made clear by s. 27 (1), it is of the essence of a defensive registration that the proprietor does not use or propose to use it. Therefore, counsel for the respondents propounded the following test as applicable in the present case: "Assuming that the use by any person other than the *Lastex* company of the trade mark '*Lastex*' in relation to the goods covered by the defensive registration would, by reason of the user of that mark on *Lastex* yarn, be calculated to deceive, would the use of the mark '*Eastex*' be calculated to deceive if used for the goods for which protection is applied?"

This is an ingenious, and at first sight attractive, argument, but, in my view, it is not sound. When once it is conceded that s. 12 applies to defensive trade marks, there must be found in s. 27 language of great strength before the application of s. 12, which by s. 27 (6) is apparently complete, is to be cut down and limited. It must be remembered that s. 12 applies to all marks on the register, whether they are used or not. Non-user may in given circumstances endanger continued registration, but, while a mark remains on the register, the proprietor continues to be entitled to the monopoly which that registration gives him under the Act, and to protection in respect of that monopoly. It is for the purpose of testing his rights when application is made to register another mark that there is postulated the notional user contemplated by the formula of *EVERSHED, J.* In such a case, actual user does not form the test, though it may well be referred to for the purpose of considering what is the proper extent of a notional user in a normal and fair manner. The notional user may well be, and will usually be, found to be wider and more extensive than the actual user. Again, in my view, on its language, s. 27 postulates a notional user. The words "that the use thereof" [in sub-s. (1)] mean "if it were used." I can see, therefore, no grounds for saying that the test to be applied under s. 12 in the case of a defensive trade mark is any different from the test to be applied in the case of an ordinary trade mark.

I, therefore, proceed to consider this case under s. 12, treating the defensive registration No. 604,297 on the same basis as if it were an ordinary registration. Under this section the proved user, in fact, of the name "Lastex" is not the primary consideration. The primary consideration is the extent of the monopoly given by the existing registrations held by the appellants, and the risk to that monopoly if the marks applied for are registered, that risk being assessed by the notional user postulated by the formula to which I have referred.

In this connection I have to bear in mind the particular considerations adumbrated by *PARKER, J.* (23 R.P.C. 777) in *Re Pianotist Co.'s Application* (2), and all other relevant considerations, including the element of imperfect recollection referred to by *LUXMORE, L.J.* ([1943] 1 All E.R. 407) in *Re Rysta, Ltd.'s Application* (3). It appears to me that, on the facts of the present case, one of the matters which I must take into consideration under s. 12 is the type of user by the appellants of the name "Lastex," which I have had to consider in discussing the matter under s. 11. It was urged that, in considering the matter under s. 12, actual user was *nihil ad rem*. This appears to go too far. It has been shown that, by the method of attaching labels to the garments and articles incorporating Lastex yarn and in the advertising campaign which they have conducted, the appellants have deliberately purposed to educate the public to accept the word "Lastex," not as showing the commercial origin of the article to which it is attached, but as showing that Lastex yarn is incorporated in the article. That is, they have been at pains to create an accurate impression. Now I must assume for the purposes of the notional user under s. 12 that the Lastex yarn will be incorporated in women's coats and costumes, a use which is covered by the defensive registration No. 604,297, but I must also assume that in respect of those coats and costumes the mark "Lastex" will be used in the same way as it has hitherto been used on such articles as swim-suits, corsets, belts, brassieres and surgical hose, namely, in such a way as to identify it, not with the garment as a brand name, but as indicating that "Lastex" yarn of the appellants' manufacture is incorporated therein. Otherwise, in the circumstances, I should not be assuming use by the appellants in a fair and normal manner. This appears to me to be the crux of the matter. Postulating such user of the appellants' mark in relation to women's coats and costumes, and postulating the use of the mark "Eastex" as a brand name on women's coats and skirts, indicating that they are the manufacture of the proprietor of the mark, and taking all relevant circumstances into consideration, is real, tangible confusion likely to result?

It is obvious from the wording of his decision that the Assistant Comptroller regarded this as a borderline case. I agree with him. I have most carefully considered his decision and I cannot find that he has anywhere misdirected himself. It was argued that he was wrong in taking the view that different

considerations apply between cases where the goods are identical and where they are goods of the same description, and that, having come to the conclusion that, if the respondents had proposed to use their marks on identical goods, the visual resemblance between the marks was so close that he would have been bound to refuse the registration, the Assistant Comptroller should have regarded the question as closed in favour of the appellants. I do not so read the section. It appears to me that quite different considerations may apply when one is considering a case involving identical goods from a case involving goods of the same description, and that the *onus* placed on an applicant may well be less onerous in the latter case. This appears to me to be one of those cases where the court should not lightly differ from the conclusions of fact of the very experienced Assistant Comptroller. I have, however, accepted the responsibility which is mine as the judge hearing the appeal, and I have come to my own conclusion. In my judgment, taking into account all the circumstances to which I have referred, I conclude, as did the Assistant Comptroller, that the respondents have discharged the *onus* cast on them under s. 12. The appeal will, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Clifford-Turner & Co.* (for the appellants); *Bennett & Bennett* (for the respondents).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

BIONDI v. KIRKLINGTON & PICCADILLY ESTATES, LTD.

[CHANCERY DIVISION (Roxburgh, J.), May 12, 13, 19, 1947.]

Landlord and Tenant—Lease—Renewal—Lease for 35 years—Covenant to renew on request of lessees “made 6 months before the expiration of the term”—Request to renew made within 10 days of date of lease.

By a lease dated Mar. 1, 1911, a house was demised for 35 years from Feb. 8, 1911, and the lessor covenanted with the lessees that, “on the written request of the lessees made 6 calendar months before the expiration of the term hereby granted, and if there shall not at the time of such request be any existing breach or non-observance” of any of the lessees’ covenants, he would grant them a lease for the further term of 14 years from the expiration of the term granted. On Mar. 10, 1911, the lessees served a notice on the lessor stating that they elected to exercise the option for renewal contained in the lease:—

HELD: on the true construction of the covenant for renewal, the phrase “on the written request of the lessees made 6 calendar months before the expiration of the term hereby granted” was not capable of meaning “at any time before Aug. 8, 1945,” because (a) no long interval of time was contemplated between the making of the request and the granting of the further lease, and (b) the further lease was not to be granted until towards the end of the term, and, therefore, the assignee of the lease was not entitled to a further lease by reason of the notice of Mar. 10, 1911.

[AS TO COVENANTS FOR RENEWAL, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 152-157, paras. 165-169; and FOR CASES, see DIGEST, Vol. 31, pp. 69, 70, Nos. 2167-2169, and pp. 73-75, Nos. 2202-2209.]

ACTION by the assignee of a lease claiming specific performance of a covenant for renewal contained in the lease. The facts appear in the judgment.

Andrew Clark, K.C., and Donald H. Cohen for the plaintiff.

Holroyd Pearce, K.C., and Rawlence for the defendants.

Cur. adv. vult.

May 19. **ROXBURGH, J.**, read the following judgment. By a lease dated Mar. 1, 1911, Emil Danziger demised Brunswick House, Jermyn Street, to Brunswick House, Ltd., for 35 years from Feb. 8, 1911. The lease contained a covenant for renewal in the following terms:

The lessor hereby covenants with the lessees that the lessor will on the written request of the lessees made 6 calendar months before the expiration of the term hereby granted, and if there shall not at the time of such request be any existing breach or

non-observance of any of the covenants on the part of the lessees hereinbefore contained at the expense of the lessees grant to them a lease of the demised premises for the further term of 14 years from the expiration of the said term at the same rent and containing the like covenants and provisos as are herein contained with the exception of the present covenant for renewal, the lessees on the execution of such renewed lease to execute a counterpart thereof.

On Mar. 10, 1911, the original lessees served on the original lessor a notice in the following terms :

To Emil Danziger, Esq. Brunswick House, Ltd. hereby give you notice that, in pursuance of the option in that behalf contained in an indenture of lease dated Mar. 1, 1911, and made between yourself on the one part and themselves on the other part, being a lease of Brunswick House aforesaid for 35 years from Feb. 8, 1911, they elect to exercise the said option to obtain a further lease for a term of 14 years of the premises, Brunswick House, aforesaid, demised to them by the said indenture on the terms specified in such indenture.

On Dec. 22, 1913, the original lessor gave to the original lessees a licence to assign the lease. The recitals in that document refer to the notice of Mar. 10, 1911, but the operative words did not. In the course of time the lease and the benefit of the notice, whatever that may be, were assigned to the plaintiff. The reversion expectant on the determination of the lease became vested in the defendants, and the document of Mar. 10, 1911 came into their possession accordingly. The premises had become known as the Felix Hotel.

In July, 1945, the plaintiff desired to avail herself of the covenant for renewal, and her solicitors, on making inquiries of the defendants' solicitors, were surprised to learn of the existence of the notice of Mar. 10, 1911. As no question of estoppel falls to be decided, I will only add that the plaintiff's solicitors did try by way of precaution to give a confirmatory notice in writing of her desire to avail herself of the covenant for renewal, but their attempt was abortive because her non-observance of covenants in the lease precluded them from doing so. This was admitted before me. Accordingly, the plaintiff is bound to stand or fall by the notice of Mar. 10, 1911. She issued her writ on Nov. 4, 1946, claiming specific performance of the covenant for renewal and damages.

The phrase : "On the written request of the lessees made 6 calendar months before the expiration of the term hereby granted"—i.e., Feb. 8, 1946—is capable of at least four different meanings: (i) made on Aug. 8, 1945; (ii) made at any time before Aug. 8, 1945; (iii) made on or a reasonable time before Aug. 8, 1945; and (iv) given so as to take effect on Aug. 8, 1945. Of these four, the second alone would avail the plaintiff and is the meaning for which she contends.

Close inspection of the clause leads me to one clear conclusion, that is to say, that no long interval of time was contemplated between the making of the request and the granting of the further lease. In the first place, it is to be granted "on" the written request. Secondly, apart from the word "on," as no exact timetable is laid down, it must be assumed that the lessors were to perform their part of the covenant within a reasonable time after the receipt of the request. Thirdly, I cannot believe that the parties contemplated as possible that a notice might be given to the lessor in 1911, lie dormant until 1945, and then rise up to confront an unsuspecting assignee of the reversion at the end of the term. It is beside the point that, in the events that actually happened, the assignee of the lease, and not the assignee of the reversion, was the unsuspecting party. Fourthly, although the proviso relating to breach or non-observance of covenants is, as a matter of grammatical construction, attached to the making of the request, and, accordingly, requires to be complied with only at the date of the request, its practical importance is in relation to the granting of the further lease, and, if any considerable interval of time had been in contemplation, the time for compliance would, I feel sure, have been correlated to the granting of the further lease and not to the making of the request. These are my grounds for holding that no long interval was contemplated between the two.

I am also impelled towards another conclusion, namely, that the further lease was not to be granted until towards the end of the term. The covenant describes itself as a "covenant for renewal," and refers to the further lease

A as a "renewed lease," but any further lease to be granted in or about 1911 could not reasonably be described as a "renewed lease" and a covenant which envisaged the grant of a reversionary lease to take effect in 35 years' time could hardly fall within the category of "covenants for renewal." Again the phrase "expiration of the term" in this covenant must mean "expiration by effluxion of time," and, accordingly, if the term came to an end owing to a re-entry, the reversionary lease would be without a starting point, and, accordingly, could not take effect. I find it difficult to believe that the covenant contemplated the possibility of the grant of a reversionary lease in 1911 which would take effect if, but only if, the lease expired by effluxion of time in 1946. Lastly, the proviso relating to breach or non-observance of the covenants, to which I have already referred would be of very little value to the lessor, if the lessee, provided that he was not in default on the day after the lease was granted, could ensure for his successors in title a further lease even though (as happened) they were in default at the expiration of the term.

B These two conclusions, if well founded, compel the rejection of the only construction of the words "on the written request made 6 months before the expiration of the term" which would avail the plaintiff. I admit that the other three constructions also involve difficulties. It would not be easy to hold that the notice had to be given on one particular day and no other, and the remaining two constructions cannot readily be extracted from the language used. But, C in my judgment, any one of these three is to be preferred to that for which the plaintiff contends as doing less violence to good sense and language. Having reached this conclusion, I need not go on to consider whether the notice which was in fact given in 1911 amounted to such a written request as the covenant requires, or whether a notice given so long ago by a predecessor in title can avail a lessee who, while in breach of covenant, seeks to make it D the foundation 35 years afterwards of an action for specific performance or damages. The action must be dismissed.

Action dismissed with costs.

Solicitors: *Gamlen, Bowerman & Forward* (for the plaintiff); *Burton & Ramsden* (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

WRIGHT v. BENNETT AND ANOTHER.

[KING'S BENCH DIVISION (Denning, J.), April 16, May 9, 1947.]

Practice—Costs—Taxation—Refresher fees—"Total time occupied by trial"—Midday adjournment—R.S.C. Ord. 65, r. 27 (48).

F In calculating "the total time occupied by the trial" for the purposes of R.S.C. Ord. 65, r. 27 (48), the time occupied by the midday adjournment during the hearing of a case should be excluded.

Collins v. Worley (1889), 60 L.T. 748, "no longer law."

G [AS TO COSTS ON TAXATION (REFRESHER FEES), see HALSBURY, Halsbury's Laws of England, Vol. 26, pp. 102, 103, paras. 192, 193; and FOR CASES, see DIGEST, Title Practice, pp. 934-937, Nos. 4740-4760.]

Cases referred to:

(1) *Collins v. Worley* (1889), 60 L.T. 1748.

(2) *Masson Templier & Co. v. De Fries*, [1910] 1 K.B. 535; 79 L.J.K.B. 392; 102 L.T. 155.

H SUMMONS on a review of taxation adjourned into court for judgment. The facts appear in the judgment.

Dare for the plaintiff.

Fletcher-Cooke for the first defendant.

R. T. Paget and Silkin for the second defendant.

May 9. DENNING, J., read the following judgment. In this case the first point is whether or not the midday adjournment is to be included for the purpose of refresher fees to counsel. The case was heard on 20 days. The associate, in accordance with R.S.C. Ord. 36, r. 40, made a note of "the time actually occupied" by the trial on

each day. He has recorded the very minute on which the case started on each day, the time at which the case was adjourned for the midday adjournment, the time at which it was resumed, and the time at which it ended on each day. His note shows that on four of the days the court sat only in the morning. On the remaining 16 days the case was adjourned at midday for a time which varied from 50 to 70 minutes. These midday adjournments add up to a total of 15 hours, 43 minutes. I am told that on some of the days the judge during the interval heard pressing applications in other cases, but there is no record of the time occupied by those applications. The associate was concerned only with the precise time actually occupied by this case. The taxing master has included the midday adjournments totalling 15 hours, 43 minutes, for the purpose of refreshers, i.e., taking one refresher for every five hours, it makes three refreshers more than would have been allowed if that time had been excluded. He thought that there was considerable justification for the objection to it, but felt bound to follow the rule laid down in *Collins v. Worley* (1). That case was decided in 1889 at a time when the relevant rules were different from what they are now, and when the practice as to midday adjournments was very different. The report of that case discloses that in those days an adjournment for 30 minutes was considered to be a prolonged one, and that counsel could not do other work in the interval, but had to be on hand because they did not know when the judge would return. Nowadays a judge always announces the time at which he will resume and occasionally extends the time so as to enable counsel to do other work.

The senior taxing master was good enough to come at my request and tell me in the presence of the parties what is the practice of the taxing office for the purpose of refreshers. The practice is to include the time occupied by the midday adjournment as part of the trial, including short applications in other cases, but that when a long application taking, say, 20 minutes or 30 minutes is taken in the interval, the whole of the midday adjournment is excluded, as well as the time of the application.

In my opinion, the amendments in the rules since 1889 render *Collins v. Worley* (1), no longer of authority. The relevant rules are Ord. 65, r. 27 (48), and Ord. 36, r. 40. The latest amendment was made in 1937. Previously, a refresher was payable for "every clear day," but now: "If the total time occupied by the trial shall exceed the period of five hours, the taxing master may allow a refresher for "every complete period of five hours" in excess of the first five hours, and the associate has to make a note of "the time actually occupied" on each day. That wording is plain. In calculating the total time occupied by the trial the times of the actual hearing of the case in court should be taken and added together, all midday adjournments being excluded. This means that the practice as to refreshers is brought into line with the practice as to court fees (see fee 29). No distinction can be drawn in the relevant rules and none should exist in practice. It was suggested that I should not disturb the existing practice as to refreshers, but that practice is only that which has existed since 1937, and it has never been sanctioned by judicial authority. It has not continued so long as to become authoritative and I allow the objection.

Order accordingly.

Solicitors: *H. S. Wright & Webb* (for the plaintiff); *George C. Carter & Co.* (for the first defendant); *Wilkinson, Howlett & Moorhouse* (for the second defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

ECCLES v. BRYANT AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), April 22, May 19, 1947.]

Sale of Land—Contract—Duplicate contracts—Need of actual physical exchange.

The vendors agreed to sell freehold property to a purchaser and a draft contract was agreed by the parties. On June 11, 1946, the vendors' solicitors wrote to the purchaser's solicitors stating that the vendors had signed their part of the contract and that they were ready to exchange contracts, but they did not suggest any appointment for a formal exchange, nor did they offer to post their part of the contract. On June 14 the purchaser's solicitors replied that they would obtain the purchaser's signature to his part of the contract and "forward" it to the vendors. On June 17 the purchaser's solicitors informed the vendors' solicitors on the telephone that the contract had been signed by the purchaser, and a letter containing the duplicate contract signed by him was posted to the vendors' solicitors on June 18, reaching them on June 19. This letter crossed in the post a letter from the vendors' solicitors (also dated June 18, and received by the purchaser's solicitors on June 19) repudiating the contract. In an action by the purchaser for specific performance of the contract, the vendors contended that there had been no completed contract because there had been no exchange of duplicate contracts:—

HELD: (i) although an exchange of the two parts of a contract was usual, it was not essential, and the contract might be made binding, not necessarily by a physical exchange, but by any method which the parties might decide to adopt, the phrase "signed and exchanged" merely meaning "signed and made binding."

Phillips v. Edwards (33 Beav. 440) and *Spottiswoode, Ballantyne & Co., Ltd. v. Doreen Appliances, Ltd.* ([1942] 2 All E.R. 65) distinguished. *Keppel v. Wheeler* ([1927] 1 K.B. 577) and *Chillingworth v. Esche* ([1924] 1 Ch. 97) considered.

(ii) the purchaser's signature, together with the letter from his solicitors of June 18 was an acceptance on June 18 of the offer made by the vendors by their signature and the letter of their solicitors of June 11, and the vendors' repudiation, which took effect when it was communicated to the purchaser on June 19, was, therefore, too late.

Re Imperial Land Co. of Marseilles, Harris' Case (1872), (7 Ch. App. 578) and *Henthorn v. Fraser* ([1892] 2 Ch. 27) applied.

Per curiam: there was no real analogy between the delivery of a deed, as a sequel to its being signed and sealed, and the exchange of the two parts of a contract.

[AS TO OFFER AND ACCEPTANCE, see HALSBURY, Hailsham Edn., Vol. 7, pp. 83-95, paras. 116-133; and FOR CASES, see DIGEST, Vol. 12, pp. 63-67, Nos. 366-388, and pp. 75-79, Nos. 434-468.]

Cases referred to:

- (1) *Re Imperial Land Co. of Marseilles, Harris' Case* (1872), 7 Ch. App. 587; 41 L.J.Ch. 621; 26 L.T. 781; 12 Digest 76, 440.
- (2) *Henthorn v. Fraser*, [1892] 2 Ch. 27; 61 L.J.Ch. 373; 66 L.T. 439; 12 Digest 61, 349.
- (3) *Phillips v. Edwards* (1864), 33 Beav. 440; 3 New Rep. 658; 12 Digest 170, 1246.
- (4) *Keppel v. Wheeler*, [1927] 1 K.B. 577; 96 L.J.K.B. 433; 136 L.T. 203; Digest Supp.
- (5) *Chillingworth v. Esche*, [1924] 1 Ch. 97; 93 L.J.Ch. 129; 129 L.T. 808; Digest Supp.
- (6) *Lockett v. Norman-Wright*, [1925] Ch. 56; 94 L.J.Ch. 123; 132 L.T. 532; Digest Supp.
- (7) *Wilson v. Balfour* (1929), 45 T.L.R. 625; Digest Supp.
- (8) *Spottiswoode, Ballantyne & Co., Ltd. v. Doreen Appliances, Ltd.*, [1942] 2 All E.R. 65; [1942] 2 K.B. 32; 111 L.J.K.B. 569; 167 L.T. 33; Digest Supp.
- (9) *Brogden v. Metropolitan Ry. Co.* (1877), 2 App. Cas. 666; 12 Digest 52, 289.

ACTION by the purchaser for specific performance of a contract for the sale of land. The defence was that there was no binding contract because there had been no exchange of duplicate contracts by the parties. The facts appear in the judgment.

Fox-Andrews, K.C., and *Ronald E. Hopkins* for the purchaser.

Neville Gray, K.C., and *Hubert A. Rose* for the vendors. *Cur. adv. vult.*

May 19. **VAISEY, J.**, read the following judgment. This is a purchaser's action for the specific performance of a contract, or alleged contract, and, alternatively, for damages for the breach thereof. The contract, if contract there be, is for the sale by the defendants to the plaintiff at the price of £6,000 of a freehold house and some 11 acres of land known as Barns Branford at Horne in the county of Surrey. Stated briefly, the point which I have to decide is whether, in the circumstances of this particular case, a document signed in duplicate by the plaintiff and the defendants (the fact that it had been so signed having been communicated by the parties to each other) has become binding on them as a contract notwithstanding that there has been no physical exchange of the two duplicates between them. A

Before I come to the facts of the case, I desire to make a few general observations on this matter of "exchanging" contracts. Plainly there is no real analogy between the delivery of a deed, as a sequel to its being signed and sealed, and the exchange of the two parts of a contract, for a deed never becomes operative until it is delivered, whereas in regard to many contracts or memoranda of contracts no question of any exchange can arise—where, for example, there is but one writing signed by both parties, or where both are represented by the same solicitor. The practice of a physical exchange of contracts at a prearranged time and place is, no doubt, a very common and convenient one, though probably this ceremonial proceeding is less frequent in these days of short staffs than it formerly was. When it is adopted, the intention of the parties may usually be inferred to be to make the critical moment of the actual formation of the contract the moment when the two documents are passed across the table. It is more difficult, I think, to discover such critical moment when the exchange is effected by post. In that, and, indeed, in every case, the intention has to be ascertained from the words or conduct of the parties. Suppose, for example, one of the parties says to the other: "I have signed my part of the contract. Will you please now sign your part and post it to me?" Suppose the other party does so, and the first mentioned party, having received the other's part signed, repents him of his bargain and repudiates the transaction, is it too late for him to do so? That is not unlike what has happened in the present case. B
C
D

The negotiations between the parties here began in Apr., 1946, and were considerably protracted by reason chiefly of the plaintiff's misgivings on a number of points. They were conducted throughout on the basis of being "subject to contract." A draft contract was prepared, and by June 11, at the latest, the draft, as a draft, had been agreed and finally settled between the parties. I now turn to the correspondence. On June 11 the defendants' solicitors, who practise at East Grinstead, wrote to the plaintiff's solicitors, who practise in London, as follows: E

Bryant & Pollock to Eccles: *re* Barns Branford. Our clients have now signed their part of the contract herein and we are ready to exchange and shall be glad to hear from you. F

The part of the contract so signed was certainly in the form agreed and settled as above mentioned. The reply to that letter is dated June 14, and says:

We thank you for your letter of June 11, and are obtaining our client's signature to the contract herein . . . We will forward you our client's part of the contract in due course. G

I pause to observe that the proposal for "forwarding" the plaintiff's part of the contract was in no way objected to, or dissented from, in the letters which follow. On the next day, June 15, the defendants' solicitors wrote to the plaintiff's solicitors:

We have your letter of the 14th instant . . . We must repeat that if the matter is to go through contracts must be exchanged immediately, and it must be completed by the 24th instant which means that it has to be dealt with quickly. H

That letter reached the plaintiff's solicitors on June 17, which was a Monday, and on the morning of that day a conversation took place on the telephone between representatives of the two firms of solicitors which appears to me to have a very vital bearing on the question which I have to decide. I have the evidence of the plaintiff's solicitors' managing clerk, Mr. Smith, but not

the evidence of the other party to the conversation. Mr. Smith said :

I informed them [*i.e.*, the defendants' solicitors] on June 17 on the telephone that the contract had been signed by Mr. Eccles.

He later read out from his diary a note made at the time as follows :

On receipt of the letter from [the defendants' solicitors] attending them on the telephone with regard to their suggestion that the matter must be completed by June 24, pointing out that this was clearly impracticable and informing them that we had the contract signed.

He was then asked in cross-examination this question : " They were pressing to have the contract, were they not ? " to which he answered " Yes." And in re-examination he was asked : " In the course of the conversation nothing was said about any withdrawal on the part of the defendants ? " to which he answered " No." On the following day, June 18, the plaintiff's solicitors, after referring to the Monday's telephone conversation, and to a question about the reinstatement of certain damage as to which there had been discussions, wrote as follows to the defendants' solicitors :

We inclose herewith the contract signed by our client, and shall be glad to receive in exchange the part signed by your clients.

This letter was posted in London before 5.30 on the Tuesday afternoon, and reached the defendants' solicitors in course of post on the morning of June 19. It crossed in the post a letter from the defendants' solicitors, dated the same June 18, in the following terms :

With reference to your telephone call yesterday we are instructed to inform you that our clients have decided not to proceed with the sale to your client, owing to the delay which has occurred on your client's part in dealing with the matter. They have accordingly disposed of the property elsewhere.

In fact, the defendants, five days later, *i.e.*, on June 24, entered into a contract to sell the property at an enhanced price to a Miss Edmonds, and I am told that it was subsequently conveyed to her. In the meantime, however, the plaintiff had caused his contract, or alleged contract, to be registered as an " estate contract," thereby giving Miss Edmonds notice of it. It is to be observed that the defendants' solicitors, though apparently willing, if not anxious, to receive the plaintiff's part of the contract by post, never offer to send their own part, and never suggest any appointment for a formal exchange.

What intention has to be imputed to the parties in regard to the question of the means by which, and the moment at which, they were to pass from negotiation and to become finally and irrevocably bound in contract ? It was suggested to me that the solicitors had no authority to arrange for anything except an " exchange," but whether it is suggested that the exchange must be what I have called " ceremonial," or could be effected by post, I am not sure. In my view, the solicitors had ample authority to arrange for any reasonable procedure, *i.e.*, either a ceremonial exchange, or an exchange by post, or an exchange such as, in my opinion, was in point of fact carried out. Reading the letters, and considering the telephonic conversation to which I have called attention, I think that what the defendants' solicitors in fact said was : " We have signed our part of the contract, so that if you sign your part and post it to us the matter will be in order." Or the matter may be put thus. As every contract must be resolved into an offer and acceptance, the defendants' signature *plus* the letter of June 11 was an offer, and the plaintiff's signature *plus* the letter (from his solicitors) of June 18 was an acceptance. If so, such acceptance took effect on the evening of June 18 (see *Re Imperial Land Co. of Marseilles, Harris' Case* (1), and *Henthorn v. Fraser* (2)), and the defendants' repudiation, which took effect when it was communicated to the plaintiff on the morning of June 19 (see *Henthorn v. Fraser* (2)), was too late. On these grounds, I think the plaintiff must succeed.

I must, however, refer to certain reported cases to which my attention was drawn. Speaking generally of those authorities, I would say that most, if not all, of the references which they contain to a contract being " signed and exchanged " only mean that it is, or has to be, " signed and made binding," that is, not necessarily by a physical exchange, but by any other method

which the parties may decide to adopt. Of such alternative methods examples could be given. The parties might, for instance, arrange to have the two parts of the contract deposited with a third party, for example, at a bank; or there might be a mutual undertaking to exchange; or they might agree to dispense with the ceremony altogether, for example, where the same solicitor is acting for both or where they have agreed that they are to be effectively bound by their mere signatures. While an exchange of contracts is usual, it is in no sense essential, and there is nothing in the authorities to say that it is.

I will now refer shortly to the cases. In *Phillips v. Edwards* (3), the headnote is as follows:

The doctrine of part performance of a parol agreement is not to be extended by the court, and it is inapplicable to a case where a trustee has a power to lease, at the request in writing of a married woman, which has not been made. Land was vested in a trustee for the separate use of Mrs. E., a married woman, and the deed gave the trustee a power to lease at the request in writing of Mrs. E. The trustee and Mrs. E. agreed, by parol, to let the property to the plaintiffs, and a lease was prepared, approved of and executed by the trustee and by Mrs. E.; but before their solicitor had parted with it and before the plaintiffs had executed it, Mrs. E. recalled her assent to it. She had made no request to the trustee "in writing": *Held*, that there was no contract binding on Mrs. E. and no part performance, and that the plaintiffs could not enforce the agreement.

ROMILLY, M.R., said (33 Beav. 445, 446):

The consequence is, that in every way of looking at it it comes round to the same question, and the full extent of it is this: What is the effect of a parol agreement to lease a plot of land, followed by the approval, on both sides, of the draft lease, and by the execution of the indenture of demise itself by the lessor, but countermanded by him before the delivery of it to the intended lessee, and before the lessee executed the counterpart. I am of opinion that there exists a *locus penitentiae* in the lessor, and that he may, at any time before the solicitor or his agent has delivered over the lease to the lessee, countermand the delivery of it and refuse to be bound by it. I am of opinion that such execution does not constitute a contract. It is argued with perfect truth, that a contract need not be signed by both parties, and that if A. sign a contract offering to sell certain lands to B., and send it to him, B. may accept it and thereupon enforce the performance of it. But, for the purpose of making it binding on the signer, the contract must be sent to B., either by A. or his agent duly constituted for that purpose. But what is more germane to the present question is this: in the case of a contract, A. may countermand it and refuse to perform it at any time before B. has accepted it and before B. has also thereby bound himself to perform it. But nothing of that sort occurred here; and if the most formal contract had been prepared and signed by the defendants, and given to their agent to be delivered to the plaintiffs, they or either of them might have stopped the whole thing before the document left their agents' hands.

This, of course, was a case of a deed, delivery of which was essential, and there was the further point that the power to lease was only to arise on a written request which had not been given. I cannot find anything to help me in that case.

Keppel v. Wheeler (4), contains many references to exchange. I will mention them, premising, however, that the word in its contexts means "become binding" and is not to be read as indicating the necessity for an exchange in every case, irrespective of any arrangements the parties may make to suit their own convenience. The headnote of *Keppel v. Wheeler* (4), is as follows:

Agents employed to sell land are generally employed to obtain the best purchase price reasonably obtainable. Their duty to their principal does not cease when they have procured an offer to purchase which he accepts subject to contract. It is still their duty to inform him of any offer which they receive at a higher price than that so accepted, and they remain subject to this duty until final contracts of sale and purchase have been signed and exchanged. The owner of house property employed a firm of house agents to sell the property. They gave particulars to a tenant of the property, among other persons, and procured an offer from a prospective purchaser. They communicated this offer to the owner, and he accepted it subject to contract. The tenant then made an offer to the agents to purchase the property from the prospective purchaser at an increased price. In the *bona fide* belief that they had performed their duty as agents to the owner when he had accepted the offer of the prospective purchaser subject to contract, they omitted to inform the owner of the offer of the tenant. Afterwards final contracts for the sale and purchase of the

property were signed and exchanged by and between the owner and the prospective purchaser. The owner then brought an action against the agents for damages for breach of duty in not disclosing to him the offer of the tenant before the contracts were signed and exchanged. The agents counterclaimed for commission on the sale of the property:—*Held*, that the obligation of the agents to the owner was not fully performed when he had accepted the offer subject to contract but continued until final contracts were exchanged; that this obligation involved a duty to communicate to him the offer of the tenant; that having committed a breach of this duty they were liable in an action for damages, and that the measure of damages was the difference between the price named in the contracts and the price offered by the tenant. *Held* also that in the circumstances the agents were entitled to their commission.

BANKES, L.J., said ([1927] 1 K.B. 584) :

I pause here to state plainly what is now well established, that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged; so that although those instructions were given by the appellant to the respondent Atkins, the matter remained in negotiation in the eye of the law until June 11, that being the date on which the contracts were exchanged, though they were apparently signed on June 8. So between May 29, when the authority was given to close with Mr. Essam's offer subject to contract, and June 11 or possibly June 12, the matter, as between the plaintiff and Mr. Essam, remained in negotiation.

SARGANT, L.J., said (*ibid*, 593) :

To my mind it is quite clear as regards time, that when agents are employed to find a purchaser for a property, their position as agents cannot definitely end at any time short (at the earliest) of the time when a definite binding contract is entered into and exchanged: and that if in the interval they receive information—whether, as in this case, from some one with whom they had originally communicated on behalf of their principal, or from some outside source, which tends to show that the value of the property was greater than had been supposed, or is otherwise of a nature to influence materially the judgment of their principal in going on with, or ceasing to go on with, the contract which was being originally negotiated, they are bound to communicate that information to their principal; and if they do not do so, they are guilty of a breach of their duty as agents.

In *Chillingworth v. Esche* (5), my attention was drawn to a reference by SARGANT, L.J. ([1924] 1 Ch. 114) to a contract being “signed and exchanged,” as against which I find corresponding references by SIR ERNEST POLOCK, M.R., to a contract being “executed” (*ibid*, 105) and “prepared concluded and executed” (*ibid*, 106), and by WARRINGTON, L.J., to a formal document being “signed” (*ibid*, 111)—all alluding to the same eventuality. No emphasis is to be laid on the word “exchange” as used by SARGANT, L.J. I find nothing to help me in *Lockett v. Norman-Wright* (6), or in *Wilson v. Balfour* (7), and the only other case cited to me was *Spottiswoode, Ballantyne & Co., Ltd. v. Doreen Appliances, Ltd.* (8), the headnote of which is :

The plaintiffs, who were owners of a lease of premises, by a letter written by their agents, agreed to let the premises to the defendants “subject in the usual way to your references being satisfactory, and to the terms of a formal agreement to be prepared by their [the plaintiffs’] solicitors.” They also said that, if the references were approved, and the defendants paid a quarter’s rent in advance, they would do certain work to the premises and would allow the defendants to enter into possession, provided that the defendants gave an undertaking to vacate the premises if no agreement was entered into. The defendants paid the quarter’s rent in advance and entered into possession of the premises. The plaintiffs’ solicitors drew up a draft lease, which was sent to the defendants, who agreed the terms with the plaintiffs’ agents. A few days later the plaintiffs refused to proceed with the agreement to let the premises to the defendants and called on them to remove their machinery and to vacate the premises. As the defendants refused to do so, the plaintiffs brought an action to recover possession, and the defendants counterclaimed for specific performance of the agreement by the plaintiffs to give a lease of the premises to them:—*Held*, that the letter of the plaintiffs’ agents did not serve to complete a binding contract, and that the true meaning of the words “subject to the terms of a formal agreement to be prepared” was that no contract was to exist between the parties unless and until a formal agreement had been entered into. Decision of ATKINSON, J., reversed.

LORD GREENE, M.R., said ([1942] 2 K.B. 34, 35) :

The question for our determination is very short, and one, which, to my mind, with all respect to the learned judge, has a clear answer. It turns on the meaning of the letter of Aug. 1, 1941, the crucial words being those which refer to a formal agreement being entered into. It is said by the defendants that the words in the letter mean nothing more than that, as soon as the solicitors for the plaintiffs had put into formal shape the matters on which the parties were in agreement, a binding, unconditional contract would come into existence, notwithstanding that the formal document in which those terms were to be set out was never signed and exchanged by the parties. On the other hand, the plaintiffs contend that the language means that no contract was to exist between the parties unless and until a formal agreement had been entered into. In my opinion, the second construction is unquestionably right. I am quite unable to construe the words "subject to the terms of a formal agreement to be prepared by their solicitors" as meaning that the "formal agreement" referred to is *not* one which is to be executed by the parties in the usual way. An unexecuted document would not be a formal agreement. If any doubt could remain as to the true construction of the phrase, the matter is entirely settled, in my judgment, by the words referring to the undertaking to vacate when called on if no agreement is entered into. It is manifest that the agreement there referred to is the same as the formal agreement mentioned in the earlier passage, and how a formal agreement is to be entered into unless it is executed and exchanged in the usual way I am unable to discover. The real fact of the matter is that the language used here is equivalent to the common and more concise phrase "subject to contract" and it is well settled that that phrase makes it clear that the intention of the parties is that neither of them is to be contractually bound until a contract is signed in the usual way.

In the judgment of GODDARD, L.J. (*ibid*, 37) the passage I have already quoted from the judgment of BANKES, L.J., in *Keppel v. Wheeler* (4), was cited with approval.

The question here, as in all the cases cited, is not whether the contract was signed and exchanged in the usual or any other way, but whether, having been signed, it became by exchange or otherwise binding as a contract between the parties. The circumstances of the case are unusual, but, on the whole, I think that it did become binding when the plaintiff, in response to the defendants' invitation, put his signed part of the contract into the post on the afternoon of June 18, 1946. I may refer to the passage in LORD BLACKBURN'S speech in *Brogden v. Metropolitan Ry. Co.* (9), where he said (2 App. Cas. 691) :

But I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound. If a man sent an offer abroad saying: I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that, you must ship the first cargo as soon as you get this letter, there can be no doubt that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea, it would go to the bottom of the sea at the risk of the orderer. So again, where, as in the case of *Ex parte Harris* (1), a person writes a letter and says, I offer to take an allotment of shares, and he expressly or impliedly says: If you agree with me send an answer by the post, there, as soon as he has sent that answer by the post, and put it out of his control, and done an extraneous act which clenches the matter, and shews beyond all doubt that each side is bound, I agree the contract is perfectly plain and clear.

Accordingly, there must be the usual decree for specific performance in a purchaser's action, with costs.

Judgment for plaintiff with costs.

Solicitors: *Godfrey Warr & Co.* (for the purchaser); *Nisbet, Drew & Loughborough*, agents for *Pearless, de Rougemont & Co.*, East Grinstead (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

COHEN v. COHEN.

[COURT OF APPEAL (Somervell, L.J., Hodson and Lynskey, JJ.), May 22, 1947.]

Divorce — Desertion — Continuance of desertion — Maintenance order — Non-cohabitation clause—Clause inserted through inadvertence—Effect of subsequent striking out.

A In 1937 a wife obtained a maintenance order against her husband and *per incuriam* the non-cohabitation clause in the printed form of order was not struck out. In Oct., 1944, the husband applied to have this clause struck out and this was done in the wife's presence. In Mar., 1946, the husband presented a petition for divorce on the ground of his wife's desertion for at least 3 years immediately preceding the presentation of the petition. The commissioner held that the existence of the non-cohabitation clause in the order, although left in *per incuriam*, prevented any desertion during the time the clause was in the order and that the subsequent striking out of the clause did not entitle the husband to rely on desertion during the period prior to the striking out. On appeal:—

B HELD: the correct order was the one orally pronounced in court by the magistrate, of which the written document was only evidence, and when the faulty written document had been corrected, provided neither party had relied on the mistake, the order took effect as originally orally pronounced, and consequently the husband could rely on desertion although the correction of the written document had been made less than 3 years before the presentation of the petition.

C [EDITORIAL NOTE. This case decides the point left undecided by the Court of Appeal in *Mackenzie v. Mackenzie* (3) ([1940] P. 81 at p. 88), namely, whether, when a non-cohabitation clause is left by mistake in an order of a magistrate's court and the order is corrected by striking out the offending clause, neither side having relied upon the clause, such striking out operates *nunc pro tunc*.

D AS TO NON-CO-HABITATION CLAUSE IN MAGISTRATE'S ORDER, see HALSBURY, Hailsham Edn., Vol. 10, p. 659, para. 969; and FOR CASES, see DIGEST, Vol. 27, pp. 320, 321, Nos. 2989-2999.]

Cases referred to:

- E (1) *Cooper v. Cooper*, [1940] 3 All E.R. 579; [1940] P. 204; 109 L.J.P. 126; 162 L.T. 228; Digest Supp.
 (2) *R. v. Lanyon* (1872), 27 L.T. 355; 3 Digest 403, 364.
 (3) *Mackenzie v. Mackenzie*, [1940] 1 All E.R. 256; [1940] P. 81; 109 L.J.P. 9; 162 L.T. 228; 104 J.P. 126; Digest Supp.
 (4) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest 321, 2995.
 (5) *Aron v. Aron* (unreported but noted at [1939] W.N. 402).

F APPEAL by the husband from a decision of Mr. Commissioner Grazebrook, K.C., dated Dec. 19, 1946, dismissing an undefended petition for dissolution of marriage on the grounds of desertion. The commissioner held that the existence of a non-cohabitation clause in a maintenance order, although left in *per incuriam*, prevented the period of desertion from running during the period the order remained uncorrected. The petition was presented on Mar. 11, 1946. The evidence showed that when the husband applied on Oct. 4, 1944, to have the non-cohabitation clause struck out, the wife's solicitor in her presence stated that it was "immaterial to her either way." Counsel for the husband, besides the cases quoted in the judgment (which set out the remaining relevant facts), also relied on *Cooper v. Cooper* (1).

Frank Whitworth for the husband.

H The wife did not appear.

SOMERVELL, L.J.: This is an appeal by the husband from a decision of Mr. Commissioner Grazebrook in an undefended case. The petition was based on desertion. The parties, both of whom are of the Jewish faith, were married in 1925. In 1937 trouble arose and the husband made complaints against his wife to a Jewish court, the Beth Din. At the same time, or shortly afterwards, the wife issued a summons in Old Street Police Court, alleging cruelty and neglect to maintain, but, according to the evidence, the cruelty charge was dropped. The document that was

signed by the magistrate as a result of these proceedings, which took place on Sept. 10, 1937, contained a non-cohabitation clause. There is more than one case in the reports in which that clause had been left in *per incuriam*. Here the magistrate did not intend to make a separation order, but the words were left in by the clerk. In 1944 the husband went back to the magistrate's court and applied to have the document altered by striking out the words of the separation order. The wife was present and was represented. There is an endorsement made on the order by the late Mr. Langley, a magistrate of that court, though not the magistrate who made the original order: "This formal order corrected by striking out the non-cohabitation clause which had been inadvertently left in." When this order was put in during the hearing in the court below there was handed in with it the court record of what took place on Sept. 10, 1937, and it is clear from the minutes of adjudication that all the magistrate did was to make a maintenance order for the wife and children.

It was laid down in *R. v. Lanyon* (2), a case dealing with a bastardy order, that what is effective is what the justices say and the order they announce at the conclusion of the proceedings. The written document subsequently drawn up is evidence, and normally accurate evidence, of what was said, but in that case by mistake an order was drawn up which was not accurate. It was held that the justices were entitled to draw up a second order embodying the correct terms of the original adjudication, and that the first order was a nullity.

It seems to me applying that principle that in the present case the non-cohabitation clause in the order was a nullity and that no separation order had been made. There is no evidence that anyone relied or acted on the order as at first drawn up. I must reserve my judgment as to what the result would have been if that had been the case. The commissioner took the view that the words were effective until they were struck out to prevent the necessary period of desertion from running, but for the reasons I have given I do not think that is right. I would add that the line which we are taking in this matter is that which *HODSON, J.* took in *Aron v. Aron* (5).

With regard to the question of desertion, there is no finding by the commissioner on this point and there is no satisfactory evidence of when or in what circumstances the wife left. I think it would be right in the circumstances to order a new trial and give the husband a chance of tendering evidence as to the desertion.

HODSON, J. : The commissioner, relying on *Mackenzie v. Mackenzie* (3), and applying *Harriman v. Harriman* (4), held that a non-cohabitation clause in a magistrate's order was sufficient to prevent desertion running as from the date of the order, although here it was subsequently struck out. In giving his decision the commissioner said :

It is said that a separation order was not asked for, but, whether it was or not, it is quite clear from the decision of the Court of Appeal in *Mackenzie v. Mackenzie* (3), that there can be no desertion while such an order exists.

He did not apply his mind to the vital question: "Was there a separation order at all?" On investigation, it is clear that no such order was made and that the clause in the printed form was included by mistake. In the circumstances, in my view, there never was a separation order, and the commissioner put an obstacle in the way of the husband which ought not to have been there. The commissioner, however, did not make any express finding as to desertion. We have been asked to make such a finding on the evidence of the husband. That evidence is entirely uncorroborated although there are signs that corroboration could have been obtained from members of the family. All the court knows is that in litigation undertaken at the time the wife was the successful party. It, therefore, seems fair that, since the commissioner has decided the case on the short point without considering the evidence in detail, there should be a rehearing.

LYNSKEY, J. : I agree. On Sept. 10, 1937, the magistrate made an order for maintenance. His order was not the order contained in the formal order, but the order in the court records which have been produced to us. That was the effective order, but when it came to be drawn up, by mistake there was included in the formal order a non-cohabitation clause. This was

brought to the notice of the magistrate's court in 1944, when the formal order was amended by striking out the non-cohabitation clause which ought never to have been in. The commissioner did not address his mind to this aspect of the matter, but took the view, based on *Mackenzie v. Mackenzie* (3), that the non-cohabitation clause would be a bar to proceedings for desertion so long as it was left in the order, even if it were rectified before the petition was brought.

A I desire not to be understood as saying that in every case where an order is amended by striking out a non-cohabitation clause the result will be the same, but only where the original order is included *per incuriam*. If the original order had been a separation order and subsequently the non-cohabitation clause had been struck out as a result of another application, then it may be that the original order would remain a good order until amended. The commissioner did not reach a conclusion on the question of desertion, and the court, therefore, orders a new trial at which it will be open to the husband to bring such further
B evidence as he can in support of his plea of desertion.

Order for new trial.

Solicitors: *Mackover & Co.* (for the husband).

[*Reported by D. H. STANSFELD, ESQ., Barrister-at-Law.*]

FINDLAY v. FINDLAY.

C [COURT OF APPEAL (Somervell, L.J., Hodson and Lynskey, JJ.), April 15, May 20, 1947.]

Divorce—Alimony—Arrears—Enforcement—Judgment summons—Debtors Act, 1869 (c. 62), s. 5—R.S.C. Ord. 41, r. 5—Matrimonial Causes Rules, 1947 (S.R. & O., 1947, No. 523/L.9), r. 62 (2).

D An order for alimony was in the form that the husband was to "pay or cause to be paid to the wife alimony pending suit at or after the rate of £118 less tax per annum to commence from the date of service of the petition," giving the date, and concluding "the said sums to be payable monthly." All preliminary steps having been taken, the wife sought to issue a judgment summons in respect of arrears under the order:—

E HELD: (i) to fall within s. 5 of the Debtors Act, 1869, an order must, on the face of it, show with sufficient clarity that certain sums which are either set out or which can be readily calculated from what is in the order are payable within certain dates;

(ii) the order in question fixed the time at which the various instalments were to be paid, and was, therefore, enforceable under the section without the necessity for any further steps being taken to obtain something in the nature of a four-day order to perfect the original order.

F [AS TO ENFORCEMENT OF ORDERS FOR ALIMONY BY JUDGMENT SUMMONSES, see HALSBURY, Halsham Edn., Vol. 10, pp. 820, 821, paras. 1312-1314; and FOR CASES, see DIGEST, Vol. 27, pp. 541, 542, Nos. 5911-5915.]

Cases referred to:

(1) *Kerr v. Kerr*, [1897] 2 Q.B. 439; 66 L.J.Q.B. 838; 77 L.T. 29; 4 Digest 300, 2811.

G (2) *Re Linton, Linton v. Linton* (1885), 15 Q.B.D. 239; 54 L.J.Q.B. 529; 52 L.T. 782; 49 J.P. 597; 4 Digest 300, 2815.

(3) *Re Hedderwick, Morten v. Brinsley*, [1933] 1 Ch. 669; 102 L.J.Ch. 193; 149 L.T. 188; Digest Supp.

(4) *Capron v. Capron*, [1927] P. 243; 96 L.J.P. 151; 137 L.T. 568; Digest Supp.

H APPEAL by the wife from an order of WALLINGTON, J., dated Dec. 10, 1946, dismissing an application for leave to issue a judgment summons which the wife had applied to issue in respect of arrears on an order for alimony *pendente lite*.

J. E. N. Russell for the wife.

Colin Duncan for the King's Proctor.

The husband appeared in person.

SOMERVELL, L.J.: This is an appeal from an order of WALLINGTON, J., given on Dec. 10, 1946, dismissing an application for leave to issue a judgment summons which the wife had applied to issue. We have no note of the reasons why the learned judge dismissed the application, but counsel for the wife told us

he understood that the learned judge either did not regard the procedure as appropriate, or, as I think more probable, took the view that something in the nature of a four day order ought to have been served before the wife was entitled to make the application to the court. The husband, who appeared in person before us and was also before the learned judge, understood that the judge was dismissing the application on the ground that the procedure was not appropriate. The appeal came before this court on Apr. 15 last and after some argument on behalf of the wife, was adjourned that the King's Proctor might instruct counsel to appear and assist the court. A

The wife sought to issue a judgment summons in respect of arrears on an order for alimony pending suit dated Apr. 18, 1944. Leave had been obtained under the Courts Emergency Powers Act, and the other preliminary steps had been taken. The order for alimony provided that the husband should "pay or cause to be paid to the [wife] alimony pending suit at or after the rate of £118 less tax per annum to commence from the date of the service of the petition in this cause," and then the date was given. The concluding words were: "the said sums to be payable monthly." There is also provision for maintenance of the two children. That is a usual form. We were referred to *Kerr v. Kerr* (1), where a form of order is set out which, like this one, provides for payment at an annual rate, the payments to be made monthly. B

There is authority on the question whether a judgment summons such as this, issued under s. 5 of the Debtors Act, 1869, is appropriate for sums claimed to be due under an order for alimony *pendente lite*. In *Linton v. Linton* (2), the matter came before the court. The main point there argued was a different one (the point being the position of sums due or to become due under an order of this court when the person against whom the order had been made was bankrupt), but, in the course of his judgment, BOWEN, L.J., said (15 Q.B.D. 246): C

It appears to me that arrears of alimony are, within the meaning of s. 5 of the Debtors Act, 1869, "a debt due in pursuance of an order or judgment of a competent court." D

BOWEN, L.J., then referred to the history of the matter and s. 5 of the Matrimonial Causes Act, 1857. He continues:

Since the Debtors Act was passed the proceeding by attachment has fallen into disuse, and, unless the payment of alimony can be enforced under s. 5 of the Debtors Act, there seems to be no way of enforcing it. E

The matter again came before the court in *Morten v. Brinsley* (3). In that case the husband, against whom the order had been made, had died, and the question was whether it could be enforced against his estate. In the course of deciding that matter (indeed, I think, it was the basis of their decision) the court held, following *Linton v. Linton* (2) that the only means by which a wife could enforce payment of arrears of alimony was under s. 5 of the Debtors Act, 1869. In the course of the judgment, LUXMOORE, J., said ([1933] 1 Ch. 675): F

In my reading of the cases the order for alimony does not create a legal debt, but a liability to pay which can only be enforced in one way, *i.e.*, by attachment under the Debtors Act.

Those cases seem to me to be authority for the proposition that arrears under an order of this kind are enforceable, when appropriate steps are taken, under s. 5 of the Debtors Act, 1869. It is unnecessary for us to consider the question whether, as is stated in the passages to which I have referred, that is the only means by which they can be enforced. Our attention has been drawn by counsel for the King's Proctor to some observations of BATESON, J., in *Capron v. Capron* (4) ([1927] P. 246, 247), where the learned judge expressed the view that an order of this kind fell within the rule which provided for action by sequestration. A possible conflict, if that ever arises, seems to me to exist between what was said in the first two cases and what was said by BATESON, J. G

It being clear, in my view, that the arrears in question in this case were enforceable within s. 5 of the Debtors Act, 1869, the only question that remains is whether some further step ought to have been taken such as the issue of what is generally called a four day order. Counsel for the King's Proctor, having investigated the authorities on this matter and the other material to which the King's Proctor has access, informed the court that in the past no such further steps have been required either when the matter was dealt with by the judges H

in bankruptcy or, thereafter, when the matter was transferred to the jurisdiction of the Probate, Divorce and Admiralty Division by the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932. Apart from that fact, it is necessary to see how the matter arises. What is called a four day order is usually issued in connection with R.S.C. Ord. 41, r. 5, which provides :

A Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be endorsed a memorandum in the words or to the effect following . . .

The four day order is the order which it is necessary to serve when the judgment or order omits to fix a time. The court makes a supplemental order and so regularises the matter.

B Rule 62 (2) of the Matrimonial Causes Rules, 1947, is in somewhat similar terms :

A decree or order requiring a person to do an act thereby ordered shall state the time within which the act is to be done, and the copy to be served upon the person required to obey the same shall be endorsed with a notice in accordance with Form 18 . . .

C In the view I take, the order in question here fixes the time at which the various instalments are to be paid. I think that that is involved in the decisions to which I have referred, deciding that these orders are enforceable under s. 5 of the Debtors Act, 1869. The relevant words of the section are :

D Subject to the provisions hereinafter mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court . . .

I think that, for an order to come within that section, it must, on the face of it, show with sufficient clarity that certain sums which are either set out or which can be readily calculated from what is in the order are payable within certain successive dates.

E That is the decision which I should have come to on the terms of the order, and it is also in accordance with what was said by BATESON, J., in *Capron v. Capron* (4).

For these reasons I think the learned judge was wrong here in dismissing this summons on the ground either that the procedure was inappropriate or that some further step ought to have been taken before the procedure under s. 5 of the Debtors Act, 1869, could be invoked. In my opinion, the appeal must be allowed.

F HODSON, J. : I agree. I would only add that it appears to me that the learned judge took the view, not that the procedure was wrong, but that, in view of the terms of the order for alimony, it was necessary, before the order could be enforced by this procedure, that some further order should be made to perfect the original order for alimony—something in the nature of a four day order. In that connection it is important to observe that in *Linton v. Linton* (2), a decision of this court, the court decided that the procedure under the Debtors Act was appropriate. It is noticeable that the form of order in *Linton's* case (2) was in terms similar to those of the order in this case, the material words being "permanent alimony at £1 15s. per week, payable monthly": see 15 Q.B.D. 240. No doubt seems to have been entertained by the members of the court that that order was capable of being enforced under the procedure of the Debtors Act.

H LYNKEY, J. : I agree.

Appeal allowed.

Solicitors : *Robbins, Olivey & Lake* (for the wife) ; *Treasury Solicitor* (for the King's Proctor).

[Reported by R. L. ZIAR, ESQ., Barrister-at-Law.]

Re WAKEMAN, WAKEMAN v. WAKEMAN.**[CHANCERY DIVISION (Jenkins, J.), May 9, 22, 1947.]**

Infants and Children—Maintenance—Discharge of order—Need of “fresh evidence”—Evidence not available when order made—Question for court—Confirmation of wife’s adultery—Guardianship of Infants Act, 1925 (c. 45), s. 3 (4).

Fresh evidence (i.e., evidence which could not reasonably have been made available at the date of the making of an order for the maintenance of an infant under the Guardianship of Infants Act, 1925, s. 3 (2)—*Johnson v. Johnson* ([1900] P. 19) applied—although its existence was then known to the party subsequently seeking to adduce it) is, as a general proposition, necessary to support an application under the Guardianship of Infants Act, 1925, s. 3 (4), to vary or discharge the order made under s. 3 (2): observations of SCRUTTON, L.J., in *R. v. Middlesex Justices, Ex parte Bond* ([1933] 2 K.B. 9) considered. But the stringency of the test to be applied in determining whether further evidence adduced in support of the application under s. 3 (4) should be treated as evidence which could not reasonably have been made available at the date of the order sought to be varied or discharged, and should, therefore, be admitted as fresh evidence, must vary greatly according to the circumstances of each case, and it is essentially a question of fact and degree for the justices who hear the application. The absence of any express reference to “fresh evidence” in s. 3 (4) suggests that the court is intended to have greater latitude in dealing with applications under this sub-section than it has under analagous statutory provisions which expressly require the production of fresh evidence as a condition of the variation or discharge of an order previously made.

In any case in which the hearing of an application under s. 3 (4) would involve the re-opening of a disputed issue of fact which was contested and decided on the previous occasion, justice to the previously successful party demands that the applicant should be required to satisfy the court with some strictness that it was not reasonably possible for him to adduce at the time of the previous hearing the further evidence on which he relies. Where, however, advantage of the legal presumption of legitimacy has been taken by the mother of the infant to obtain an order under s. 3 (2) which would never have been made if the undisputed facts relating to the paternity of the child, as known to both parties, had been brought to the notice of the court by admissible evidence, justice to the party against whom the presumption has been used demands that the court should view with relative indulgence a subsequent application by that party to adduce admissible evidence not previously before the court on what, after all, resolves itself into a mere matter of technical proof in which he has been outmanoeuvred by the opposite party.

The fact that a husband had condoned his wife’s adultery and allowed a child of hers, the father of whom was another man, to be registered as his, *held*, not to prevent him from applying to have discharged an order made under s. 3 (2).

[AS TO DISCHARGE AND VARIATION OF ORDERS, see HALSBURY, Hailsham Edn., Vol. 10, p. 843, para. 1345; and FOR CASES, see DIGEST, Vol. 27, pp. 565-568, Nos. 6237-6256.]

Cases referred to:

- (1) *Johnson v. Johnson*, [1900] P. 19; 69 L.J.P. 13; 81 L.T. 791; 64 J.P. 72; 27 Digest 567, 6252.
- (2) *Colchester v. Peck*, [1926] 2 K.B. 366; 95 L.J.K.B. 1038; 135 L.T. 32; 90 J.P. 130; Digest Supp.
- (3) *Underwood v. Underwood*, [1945] 2 All E.R. 561; [1946] P. 84; 115 L.J.P. 49; 173 L.T. 274.
- (4) *Timmins v. Timmins*, [1919] P. 75; 88 L.J.P. 78; 120 L.T. 544; 27 Digest 567, 6255.
- (5) *R. v. Middlesex JJ., Ex p. Bond*, [1933] 2 K.B. 1; 102 L.J.K.B. 432; 148 L.T. 544; 97 J.P. 130; Digest Supp.

APPEAL, under the Guardianship of Infants Act, 1925, s. 7 (3), from an order of Willesden justices, made on Mar. 27, 1947.

On June 20, 1946, on an application by the wife, the justices made an order, under s. 3 (2) of the Act, for custody and the payment by the husband to the wife of a weekly sum for the maintenance of the wife's infant child. On Mar. 27, 1947, this order was discharged by the justices on an application by the husband under s. 3 (4) of the Act, evidence being tendered on his behalf which could not have been made available at the previous hearing. The wife appealed to the High Court on the ground (*inter alia*) that this evidence was not admissible because it was not "fresh evidence." The facts appear in the judgment.

J. A. Brightman for the wife.

Seuffert for the husband.

Cur. adv. vult.

May 22. **JENKINS, J.**, read the following judgment. This is an appeal from an order of the Willesden justices made on Mar. 27, 1947, discharging an order made by them on June 20, 1946, under the Guardianship of Infants Acts, 1886 and 1925, for the payment by the respondent to his wife, the appellant, of the weekly sum of 10s. for the maintenance of the infant child of the wife while under the age of 16 years.

The undisputed facts of the case can be quite shortly stated. The wife and the husband were married on May 19, 1934. On Jan. 23, 1943, the husband (who was then in the army) left this country on foreign service and was thereafter continuously abroad until his arrival back in England on Oct. 5, 1945. During his absence abroad, the wife, by another man, had a son, born on Feb. 14, 1945. It appears that the husband forgave the wife for this lapse, and that they became reconciled and lived together from the husband's return to this country on Oct. 5, 1945, until Feb. 24, 1946, apart from a further brief absence of the husband during this period on foreign service with the army, from which he seems finally to have returned on Dec. 15, 1945. It further appears that the husband consented (though whether by correspondence during his absence or retrospectively on his return is not clear) to the entry of his own name as that of the father in the registration of the birth of the child. On or about Feb. 24, 1946, the husband, having, or believing himself to have, further grounds of complaint as to the wife's conduct, into the merits of which I need not enter, left her, and he has since that time remained separate from her.

The Guardianship of Infants Act, 1925, s. 3, provides :

(1) The power of the court under the Guardianship of Infants Act, 1886, s. 5, to make an order as to the custody of an infant and the right of access thereto may be exercised notwithstanding that the mother of the infant is then residing with the father of the infant. (2) Where the court under the said section as so amended makes an order giving the custody of the infant to the mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable. (3) No such order, whether for custody or maintenance, shall be enforceable and no liability thereunder shall accrue while the mother resides with the father, and any such order shall cease to have effect if for a period of 3 months after it is made the mother of the infant continues to reside with the father. (4) Any order so made may, on the application either of the father or the mother of the infant, be varied or discharged by a subsequent order.

By s. 7 of the same Act :

(1) For the purposes of the Guardianship of Infants Act, 1886, as amended by this Act, the expression "the court" shall include a court of summary jurisdiction . . . (3) Where on an application to a court of summary jurisdiction under the Guardianship of Infants Act, 1886, as amended by this Act, the court makes or refuses to make an order, an appeal shall, in accordance with rules of court, lie to the High Court . . .

It is obvious from the undisputed facts to which I have referred that no application by the wife for an order under s. 3 (2) of the Act of 1925 for the payment of maintenance by the husband, as the father of the child, could possibly have succeeded in the event of those facts being brought to the notice of the court by admissible evidence. In view, however, of the presumption of the legitimacy of a child born to a married woman and the inadmissibility of the evidence of either spouse to rebut that presumption, it was, nevertheless, possible that such an application might succeed merely on the strength of that

presumption in the event of the husband failing to provide himself at the hearing with sufficient admissible evidence to rebut it, and this appears to have been the course the matter actually took.

On June 20, 1946, the justices had before them two applications by the wife against the husband, the first in respect of his alleged desertion of the wife, and the second for the custody of the child and payment of maintenance under s. 3 (2) of the Act of 1925. The only evidence tendered was that of the wife, in the course of which she frankly (but inadmissibly) stated that another man was the father of the child. The justices held desertion not proved and dismissed the wife's summons in respect of that matter. They then proceeded to deal with the summons for custody and maintenance. This application was unopposed by the husband, who tendered no evidence. The order of June 20, 1946, was, accordingly, made. On Feb. 27, 1947, the justices had before them an application by the husband for the discharge of the order of June 20, 1946, on the ground that he was not the father of the child. On this occasion the husband tendered in support of his application the evidence of a man named Adcock, a friend of his who had served with him overseas. This evidence appears to have been sufficient to prove that the husband was abroad at all times material to the conception of the child, and, therefore, could not have been the father. It was not in any way challenged on behalf of the wife, whose solicitor, in the course of his submission to the court, said: "There was no dispute that Mr. Wakeman was not the father of the child."

The husband also gave evidence, which I ignore so far as it related to his movements before the birth of the child. Towards the end of his evidence in chief he said, with reference to the hearing on June 20, 1946: "I had no witness then." In the course of his cross-examination he said:

On June 20, 1946, I did not give evidence. I consented to an order under the Guardianship of Infants Act on advice from my solicitor. The circumstances to-day are different. Adcock was in England in June, 1946. I had a lieutenant in court on June 20, 1946.

At the conclusion of the husband's evidence it was submitted on behalf of the wife that there was no case to answer on the grounds (in effect) that, while there was no dispute that the husband was not the father of the child, the adultery was condoned, in law the child was a child of the marriage, the husband had agreed to the order of June 20, 1946, and there was no "fresh evidence" now before the court to support his application for the discharge of that order. The justices took time for consideration and, on Mar. 27, 1947, decided that there was a case to answer, and, the wife calling no evidence, stated their conclusion to the effect that the evidence called by the husband as to non-access was "fresh evidence within the meaning of this Act" (by which they presumably intended fresh evidence for the purposes of an application to vary or discharge an order under the Guardianship of Infants Act, 1925, s. 3, since s. 3 (4) contains no reference to "fresh evidence"), and that, being of opinion that "condonation did not go to the root of paternity," and having accepted the fresh evidence called on behalf of the husband, they, therefore, discharged the order of June 20, 1946. The order of Mar. 27, 1947, which is the subject of the present appeal, was made accordingly.

Although the husband, in his evidence, described himself as having "consented" to the order of June 20, 1946, I do not think that order should be treated as having been made by consent so as to preclude him from subsequently applying for its variation or discharge. There is certainly nothing in the terms of the order itself to suggest that it was a consent order, and the justices' note was merely to the effect that the application on which it was made was "unopposed." Nor, in my opinion, did the husband's condonation of the wife's adultery afford any valid ground of objection to the husband's application, and I think the justices were perfectly right in rejecting the argument founded on such condonation.

Counsel for the wife, however, attacked the justices' order of Mar. 27, 1947, before me on the grounds that (i) the subject-matter of the order of June 20, 1946, was *res judicata* except in so far as it could be varied or discharged under the Guardianship of Infants Act, 1925, s. 3 (4); (ii) that an order for such variation or discharge could not properly be made except on "fresh evidence"; and (iii) that the evidence adduced by the husband at the hearing

of Feb. 27, 1947, was not "fresh evidence" within the meaning of that term as defined in the authorities. As regards the meaning of the term "fresh evidence," I was referred to *Johnson v. Johnson* (1), a case under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, which provides that the court may "upon cause being shown upon fresh evidence to the satisfaction of the court, at any time alter, vary, or discharge" any order made under that Act or the Acts mentioned in the schedule thereto. In that case, according to the headnote, "fresh evidence" within the meaning of the section to which I have just referred :

... must be evidence which could not reasonably have been made available at the date of the order, or it must relate to something which has happened since the date of the order, and which affords ground for revision within the terms of the Act under which the order was made.

I advisedly refer to the definition as given in the headnote, because, although in a passage in his judgment ([1900] P. 21), SIR FRANCIS JEUNE, P., refers, not to "evidence which could not reasonably have been made available at the date of the order," but to "evidence which has come to the knowledge of the party applying" since the former hearing or trial "and which could not . . . have come to his knowledge before that time," it is obvious from the particular evidence held by the court to amount to "fresh evidence" in the case now before it, that the intention was to include in the definition evidence falling within the former and wider category, even though its existence might have been known at the time of the former hearing to the party subsequently seeking to adduce it. I was also referred to *Colchester v. Peck* (2), and *Underwood v. Underwood* (3), in both of which cases a definition of "fresh evidence," by reference to the passage in the judgment of SIR FRANCIS JEUNE, P., in *Johnson v. Johnson* (1), to which I have already referred, contained in the judgment of HILL, J. ([1919] P. 80) in *Timmins v. Timmins* (4), was cited with approval. I cannot, however, regard these cases as intending to exclude from the category of "fresh evidence" merely because its existence was then known to the party subsequently seeking to adduce it, evidence which could not reasonably have been made available at the time of the former hearing.

As to the necessity for "fresh evidence" in support of an application under the Guardianship of Infants Act, 1925, s. 3 (4), for the variation or discharge of an order made under that section, I was referred to *R. v. Middlesex Justices, Ex parte Bond* (5). The question in that case was whether the refusal by justices on two occasions to make an order on an application by a wife against her husband for custody and maintenance of a child of the marriage under the Guardianship of Infants Act, 1925, made the matter *res judicata* so as to preclude them from making an order for custody and maintenance when the application was renewed on a third occasion, and the Court of Appeal (affirming the Divisional Court) held that it did. SCRUTTON, L.J., said ([1933] 2 K.B. 9) :

It is quite clear that justices can upon fresh evidence alter, vary or discharge the order they had previously made . . . But it appears to me quite clear that the justices cannot alter their previous order when, as in this case, there is no evidence of any fresh circumstances.

This passage from the judgment of SCRUTTON, L.J., in *R. v. Middlesex Justices* (5), was strongly relied on on behalf of the wife in the present case as showing that fresh evidence is necessary to support an application under the Guardianship of Infants Act, 1925, s. 3 (4). With that, as a general proposition, I respectfully agree, but it seems to me that, if injustice is to be avoided, the stringency of the test to be applied in determining whether further evidence adduced in support of an application under the Guardianship of Infants Act, 1925, s. 3 (4), ought to be treated as evidence which could not reasonably have been made available at the date of the order sought to be varied or discharged must vary a great deal according to the circumstances of each particular case. I think, too, that the absence from s. 3 (4) of the Act of any express reference to "fresh evidence" suggests that the court was intended to have greater latitude in dealing with applications under that sub-section than it has under analogous statutory provisions which expressly require the production of fresh evidence as a condition of the variation or discharge of any order made.

In any case in which the hearing of an application under the Guardianship of Infants Act, 1925, s. 3 (4), would involve the re-opening of a disputed issue of fact which was contested and decided on the previous occasion, justice to the previously successful party, no doubt, demands that the applicant should be required to satisfy the court with some strictness that it was not reasonably possible for him to adduce at the proper time, *i.e.*, at the time of the previous hearing, the further evidence on which he relies, but where, as in the present case, advantage has been taken of the legal presumption of legitimacy to obtain an order which would never have been made if the undisputed facts, as known to both parties, had been brought to the notice of the court by admissible evidence. I think justice to the party against whom the presumption has been so used demands that the court should view with relative indulgence a subsequent application by him to adduce admissible evidence not previously before the court on what, after all, resolves itself into a mere matter of technical proof in which he has been outmanoeuvred by the opposite party. Further, I think that the question whether, in all the circumstances of a particular case, the further evidence sought to be adduced should be treated as evidence which could not reasonably have been made available at the previous hearing, and be admitted as fresh evidence accordingly, is essentially a question of fact and degree, and, as such, eminently a question for the appropriate tribunal of fact, *i.e.*, in the present case, for the justices who heard the husband's application.

Accordingly, in all the circumstances of the present case, and having regard to the wholly inconclusive character of the husband's cross-examination on this point, I find myself unable to hold that the justices were wrong in admitting the evidence of Adcock in support of the husband's application, and, having admitted it, I fail to see how they could have done otherwise than discharge the order of June 20, 1946.

I have only to add that counsel for the wife conceded in argument before me that the language of the Guardianship of Infants Act, 1925, s. 3 (4), should not be construed as precluding the husband from making an application under that sub-section on the ground that he was not the father. I am, accordingly, of opinion that this appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : Wilfrid Firth & Co. (for the wife) ; Ferres, Roberts, Thomas & Co. (for the husband).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re MILLER'S AGREEMENT, UNIACKE v. ATTORNEY-GENERAL.

[CHANCERY DIVISION (Wynn-Parry, J.), May 20, 21, 1947.]

Estate and other Death Duties—Estate duty—Annuity—“Interest arising on death”—Annuity payable from death of annuitant's father—Payment under deed made between annuitant's father and covenantors—Succession duty—Disposition of property—Whether annuitant “beneficially entitled”—Succession Duty Act, 1853 (c. 51), s. 2—Finance Act, 1894 (c. 30), s. 2 (1) (d).

On the sale of N.'s interest in a partnership firm to M. and V., a term of the sale was that M. and V. should undertake to pay certain annuities, and, by a deed dated Feb. 4, 1942, made between M., V. and N., M. and V. agreed to pay certain annuities to N.'s three daughters from the death of N. The deed provided, *inter alia*, that the annuities should be paid by quarterly payments to the persons “entitled thereto,” that each annuity should be paid exclusively out of income brought into charge to income tax, and that M. and V. charged “all their respective interests in the profits and assets of the partnership firm with payment of” the annuities. N. died on May 5, 1943, and the question was whether the daughters were liable for estate duty and succession duty in respect of the annuities provided to be paid by the deed :—

HELD : (i) on the true construction of the deed, notwithstanding the use of the word “entitled to,” the annuitants had no rights thereunder

either at common law or in equity, except the right to retain any sums paid to them.

Re Schebsman, Ex parte Official Receiver, Trustee v. Cargo Superintendents (London), Ltd. & Schebsman ([1943] 2 All E.R. 768) applied.

(ii) the effect of the Law of Property Act, 1925, s. 56 (1), was not to create rights, but to assist the protection of rights which already existed, and the annuitants did not, therefore, obtain rights under the deed by reason of this sub-section.

White v. Bijou Mansions, Ltd. ([1938] 1 All E.R. 546), *Re Sinclair's Life Policy* ([1938] 3 All E.R. 124), and *Re Foster, Hudson v. Foster* ([1938] 3 All E.R. 357) applied.

(iii) the word "interest" in the Finance Act, 1894, s. 2 (1) (d), meant such an interest in property as would be protected by the courts, and the annuities payable under the deed were, therefore, not annuities within the meaning of s. 2 (1) (d), and the annuitants were not liable to estate duty in respect of them.

(iv) since the annuitants had no right to sue for the annuities, they did not become "entitled" to them within the meaning of that phrase in the Succession Duty Act, 1853, s. 2, and, therefore, they were not liable to succession duty in respect of them.

[AS TO INTERESTS ARISING ON DEATH, see HALSBURY, Hailsham Edn., Vol. 13, p. 242, para. 233; and FOR CASES, see DIGEST, Vol. 21, pp. 15, 16, Nos. 73-80.

AS TO SUCCESSIONS UNDER DISPOSITIONS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 349, 350, para. 383; and FOR CASES, see DIGEST, Vol. 21, pp. 84-86, Nos. 601-623.]

Cases referred to :

- (1) *Re Schebsman, Ex p. Official Receiver, Trustee v. Cargo Superintendents (London), Ltd. & Schebsman*, [1943] 2 All E.R. 768; [1944] Ch. 83; 113 L.J.Ch. 33; 170 L.T. 9; Digest Supp.
- (2) *White v. Bijou Mansions, Ltd.*, [1937] 3 All E.R. 269; *affd.* [1938] 1 All E.R. 546; [1938] Ch. 351; 107 L.J.Ch. 212; 158 L.T. 338; Digest Supp.
- (3) *Re Ecclesiastical Comrs. for England's Conveyance*, [1936] Ch. 430; 105 L.J.Ch. 168; 155 L.T. 281; Digest Supp.
- (4) *Re Sinclair's Life Policy*, [1938] 3 All E.R. 124; [1938] Ch. 799; 107 L.J.Ch. 405; 159 L.T. 189; Digest Supp.
- (5) *Re Foster, Hudson v. Foster*, [1938] 3 All E.R. 357; Digest Supp.

ADJOURNED SUMMONS to determine whether the annuitants, to whom certain annuities were provided by a deed to be paid, were liable for estate duty and succession duty in respect of the annuities. The facts appear in the judgment.

Cyril King, K.C., and *Geoffrey Cross* for the plaintiffs (the annuitants).

J. H. Stamp for the Crown.

WYNN-PARRY, J. : The main question which arises on this originating summons is whether, on the true construction of a deed dated Feb. 4, 1942, and made between Dawson Risch Miller, to whom I shall refer as Mr. Miller, of the first part, George Henry Vos, to whom I shall refer as Mr. Vos, of the second part, and Thomas William Noad, to whom I shall refer as Mr. Noad, of the third part, the plaintiffs, who are the daughters of Mr. Noad and to whom annuities are provided to be paid by the deed, are liable for estate duty and succession duty in respect of those annuities.

By the deed to which I have referred, it was recited, first, that Mr. Noad had for many years past been the senior partner in the firm of Charles Taylor & Co. (thereinafter called the partnership firm) and had by a deed of even date with that deed sold and transferred to Mr. Miller and Mr. Vos the goodwill in the partnership firm as from Jan. 1, 1942, and had retired from the partnership firm. Secondly, it was recited that it was a term of the sale that Mr. Miller and Mr. Vos should enter into that deed, and should thereby undertake to pay the annuities thereinafter mentioned. The deed then proceeded to provide that Mr. Miller and Mr. Vos, subject to and in accordance with the provisions thereinafter contained, should, as from the death of Mr. Noad, pay the following annuities, *viz.*, to his daughter, Muriel, an annuity of £1,000 per annum for the remainder of her life and to each of the remaining two daughters, Kathleen and Eileen, an annuity of £500 per annum during the remainder of their joint lives, and an annuity of £1,000 per annum after the death of one of

them to the survivor for the remainder of her life. It was then provided that if Mr. Noad should die before Dec. 31, 1945—an event which occurred—£1,500 should be substituted for £1,000 and £750 should be substituted for £500 as regards the above annuities. By cl. (2), it was provided that each annuity should be deemed to accrue from day to day, and should be paid to the respective person or persons entitled thereto by stated quarterly payments. The last paragraph of the deed provided that Mr. Miller and Mr. Vos should procure that each annuity should be paid exclusively out of income brought into charge to income tax, and ends with these words :

Mr. Miller and Mr. Vos hereby charge all their respective interests in the profits and assets of the partnership firm with payment of the said several annuities.

Mr. Noad died on May 5, 1943, whereupon the annuities became payable in accordance with the document and have since been paid without interruption by Mr. Miller and Mr. Vos to the annuitants. The Estate Duty Office have, in due course, claimed that estate duty under the Finance Act, 1894, s. 2 (1) (d), and succession duty under the Succession Duty Act, 1853, s. 2, became chargeable on the death of Mr. Noad, in respect of the annuities payable under the deed, and that the annuitants are accountable for such duties. In October, 1944, the Court of Appeal held [in *Re Noad, Midland Bank Executor and Trustee Co., Ltd. v. Noad* ([1944] 2 All E.R. 470)] that, on the true construction of the will of Mr. Noad, the estate duty, if any, and the succession duty, if any, payable on the death of Mr. Noad in respect of the annuities should be borne by his residuary estate. Nevertheless, the annuitants are the persons who would be accountable for such duty to the revenue and, accordingly, this summons has been issued by them to have determined the validity of the claim put forward by the revenue.

As regards estate duty, the claim is based on the Finance Act, 1894, s. 2, which says :—

(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

The property in question in each case is an annuity, and is clearly in each case an annuity purchased or provided by Mr. Noad, the deceased. However, the vital question is : Did any beneficial interest, within the meaning of that phrase as used in the section, accrue to the plaintiffs on the death of Mr. Noad ? In my view, the word “interest” in the sub-section means such an interest in property as would be protected in a court of law or equity. In the present case, it is clear—and counsel for the Crown, does not contend to the contrary—that the effect of the deed of Feb. 4, 1942, is not to create any trust in favour of the annuitants. It further appears clear to me, from the reasoning of the Court of Appeal in *Re Schebsman, Ex p. Official Receiver, Trustee v. Cargo Superintendents (London), Ltd. & Schebsman* (1), that at common law the annuitants have no right to sue Mr. Miller or Mr. Vos under the deed. On the receipt by each of the annuitants of any payment in respect of her annuity, the property in the money so paid will pass to her, but she has no right to compel any payment. At common law, so far as each annuitant is concerned, the deed is *res inter alios acta*, and she has no right thereunder.

Reliance was placed on the Law of Property Act, 1925, s. 56 (1), which says :

A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

In *White v. Bijou Mansions, Ltd.* (2), SIMONDS, J., having reviewed the purpose for which the Real Property Act, 1845, s. 5, had been passed, said ([1937] 3 All E.R. 276) :

I think the important aspect of that section, for my present purpose, is this. It appears to me to be quite plain that that section has a limited operation. It is intended to confer a benefit only upon those persons to whom the deed purports to grant an estate or interest, or those persons with whom there purports to be a covenant or agreement. It is impossible, in my view, to regard this section as creating a benefit

in favour of any persons who may like to avail themselves of it and say : If we can take advantage of this it will be for our benefit.

SIMONDS, J., having read the section, said (*ibid*, 277) :

I think many difficulties may well arise on that section which do not fall to me to-day to solve. It appears to one at once that, so far as any other interest in land is concerned, the section is superfluous, because a person always could take another interest in land, though not a party. It is at least a question how far such a provision is necessary at all in the case of personality. Without deciding it, I should be disposed to think that equitable estates, even in land, were not subject to the old artificial rule, and it is very doubtful if an interest in personality was ever so subject. However that may be, for the purposes of the present case I think I am concerned with only one aspect of this question. Just as, under s. 5 of the Act of 1845, only that person could call it in aid who, although not a party, yet was a grantee or covenantee, so, under s. 56 of [the Act of 1925], only that person can call it in aid, who, although not named as a party to the conveyance or other instrument, is yet a person to whom that conveyance or other instrument purports to grant something, or by which some agreement or covenant is purported to be in his favour. To give it any other meaning appears to me to open the door to claims or assertions of rights which cannot have been contemplated by the legislature, for, if that be not the limitation which must be imposed on this section, it appears to me that there is no limit, and it will be open to anybody to come into this court and say : Here is a conveyance which, if enforced, will redound to my advantage ; therefore, I claim the benefit of the section, I claim that the general covenant condition is one that should be enforced in my favour, because it is for my benefit ; whether intended for my benefit or whether not intended for my benefit would not appear to matter. I cannot give to the section any such meaning as that. I interpret it as a section which can be called in aid only by a person in whose favour the grant purports to be made, or with whom the covenant or agreement purports to be made.

A similar reason underlies the judgment of LUXMOORE, J., in *Re Ecclesiastical Commissioners for England's Conveyance* (3), as was observed by SIMONDS, J., in *White v. Bijou Mansions* (2), where he said ([1937] 3 All E.R. 278) :

... although the judge [LUXMOORE, J.] has not considered the section so fully as I have had to do to-day, it is, I think, implicit in his decision, particularly in a passage ([1936] Ch. 438) beginning : "What it is necessary to consider" ... that the view of the section which I am taking is one that he also took.

The judgment of SIMONDS, J., was upheld in the Court of Appeal, where SIR WILFRID GREENE, M.R., said ([1938] 1 All E.R. 554) :

... whatever else s. 56 (1) may mean, it is, I think, confined to cases where the person seeking to take advantage of it is a person within the benefit of the covenant in question, if I may use that phrase. The mere fact that somebody comes along and says : "It would be useful to me if I could enforce that covenant," does not make him a person entitled to enforce it under s. 56 (1). Before he can enforce it, he must be a person who falls within the scope and benefit of the covenant according to the true construction of the document in question.

Section 56 was also considered in *Re Sinclair's Life Policy* (4), and in *Re Foster, Hudson v. Foster* (5). In the latter case CROSSMAN, J., said ([1938] 3 All E.R. 365) :

Mr. Stone contended that the effect of s. 56 is that any beneficiary under a contract can sue on the contract although he is not a party to it. That is substantially what his submission amounts to. In my judgment, s. 56 does not have this effect. I think that Mr. Stone's contention really amounts to saying that an agreement by A with B to pay money to C. gives C a right to sue on the contract. I think that it must go as far as that, and I am not prepared to hold that s. 56 has created such an enormous change in the law of contract as would be involved in that proposition, because there could be no doubt, that apart from the section, nobody could ever have suggested that a contract by A with B to pay C a sum of money enabled C to sue A on that contract. I hold, following what I understand to have been the view that LUXMOORE, J. expressed in *Re Ecclesiastical Commissioners for England's Conveyance* (3), ... and the view that SIMONDS, J., expressed in *White v. Bijou Mansions, Ltd.* (2) ... and the view of SIR WILFRID GREENE, M.R., expressed in the same case on appeal ... and of FARWELL, J., as expressed in *Re Sinclair's Life Policy* (4), that the Law of Property Act, 1925, s. 56, can be called in aid only by a person who, although not a party to the conveyance or other instrument in question, is yet a person to whom that conveyance or other instrument purports to grant something or with whom some agreement or covenant is thereby purported to be made.

Counsel for the Crown pointed out that, in both *Re Sinclair's Life Policy* (4), and *Re Foster* (5), the persons claiming the policy moneys were mere nominees, to such an extent that, if the policy moneys had been paid to them, they could not have kept them while the insurer could have intervened and intercepted them. I agree that these circumstances form grounds for distinguishing those cases from the present, which is, from this point of view, as it appears to me, on all fours with *Re Schebsman* (1). Nevertheless, in both cases the court expressed its view on the section, as will be seen from the extracts I have read from the judgment of CROSSMAN, J., in *Re Foster* (5). It will thus be seen that there exists a considerable body of judicial opinion showing that the courts have been constrained to limit the scope of the section. I think it emerges from these cases that the section has the effect, not of creating rights, but only of assisting the protection of rights shown to exist. Whether or not a right exists is the first question, and, in this case, that is a question on the construction of this deed.

Counsel for the Crown has put forward certain submissions with a view to showing that, on its true construction, the document purports to grant to the annuitants beneficial interests. If he is right on that, then, as he contends, s. 56 will operate, but he was constrained to admit that it is not possible to extract from the terms of the deed the conclusion that there is any purported agreement with the annuitants. He points out that the document is an especial document in the sense that its provisions were not incorporated, as they might have been, in the deed of even date which is recited in the document, providing for the sale and transfer to Mr. Miller and Mr. Vos by Mr. Noad of the goodwill of the partnership firm and for an annuity to Mr. Noad. Secondly, he points out the provision in the deed for an increase in the annuities in the event, which has happened, of Mr. Noad dying earlier, submitting that that points to a recognition by Mr. Miller and Mr. Vos that, were the annuities to the plaintiffs not raised in that circumstance, they would not have given full consideration for the benefits they received under the other deed. Thirdly, he points out that, in cl. (2) of the deed, the persons to whom the payment has to be made of the annuities are described as "respective person or persons entitled thereto." Fourthly, he points out that there is the provision that each annuity is to be paid exclusively out of income brought into charge to income tax, and, lastly, he relies, and relies strongly, on the existence of the charge by Mr. Miller and Mr. Vos of "all their respective interests in the profits and assets of the partnership firm with payment" of the annuities.

It does not appear to me that these circumstances, either separately or taken together, are sufficient for his purpose. The fact that these annuities were provided for by this separate deed is, in my view, an entirely colourless circumstance. It may be correct, or not, to draw the conclusion which is sought to be drawn from the provision for the increase of the annuities, but, in my view, it is not a circumstance which can have any decisive effect on the matter. The use of the phrase "person or persons entitled thereto" in cl. (2) is, I think, a loose use of the word "entitled." It is used there simply as a convenient way of describing those who are to receive the annuities, and is not of itself a decisive matter. As regards the provision that each annuity is to be paid exclusively out of income brought into charge to income tax, various things may be speculated on as to the reason for that clause, and I find nothing in it which can be used in favour of the argument of counsel for the Crown.

Lastly, there is the question of the charge. Counsel for the Crown sought to pray this in aid by pointing out that, by its language, the charge was, as he put it, at large, and that, taken in conjunction with the other circumstances which he put forward as internal evidence in the document, it showed that the intention was that the annuitants should be entitled to rely on this charge if their annuities should not be paid, and that it, therefore, followed that, on its true construction, the document did purport to grant a beneficial interest to the annuitants. I am unable to share this view. The essential function of a charge is to secure the performance of an obligation, and the charge is essentially ancillary. The obligation in this deed is the covenant of Mr. Miller and Mr. Vos, to pay the annuities in question, and I am unable to extract from the document any other result than that the charge is intended to stand as security for the performance of that obligation. On its true construction, I cannot find—

and this is really admitted—that the deed confers on any of the annuitants any right to sue, or anything more than a right to retain any sums which may from time to time be paid by Mr. Miller or Mr. Vos under the deed. In my view, the annuitants are not persons to whom the deed purports to grant something or with whom some agreement or covenant is purported to be made, and, in these circumstances, the annuities are not annuities within the meaning I place on the word as appearing in the Finance Act, 1894, s. 2 (1) (d).

A Counsel for the Crown has submitted that, on the true construction of that sub-section, relating it to the facts of this case and, particularly, praying in aid the definition of the expression “on the death” in s. 22 (1) (l) of the Act as including “at a period ascertainable only by reference to the death,” what one is dealing with, in this case, is a series of payments (*i.e.*, those payments which will, or may, actually, be received by the annuitants), and that the likelihood of the annuitants receiving payments must be estimated, B and a value placed on the interest so estimated on which estate duty will be due. In my view, that argument is not sound, because, on the view which I take of the document, the payments, if and when made, will be no more than voluntary payments and, as such, appear to me to be quite outside the scope of the section. Therefore, I hold that the annuitants are not liable to estate duty in respect of the annuities.

C As regards succession duty, I must refer to parts of ss. 1 and 2 of the Succession Duty Act, 1853. Section 1 provides :

The term “personal property” . . . shall include money payable under any engagement . . . The term “property” alone shall include real property and personal property.

Section 2 provides :

D Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer E on the person entitled by reason of any such disposition or devolution a “succession” . . .

It is clear that the annuities are “property” under s. 2, since they represent money payable under the engagement, namely, the deed. The material question, as it seems to me, is whether the annuitants became beneficially entitled to such property on the death of Mr. Noad. Nothing turns, to my mind, on the word “beneficially.” If they became entitled to the annuities, they became F entitled to them beneficially. The crucial question, therefore, is : Did they become entitled to the annuities on Mr. Noad’s death ? The word “entitled,” as used in this section, appears to me necessarily to carry the implication that, for a person to be entitled to property under this section, it must be capable of being postulated of her that she has a right to sue for and recover such property.

G For the reasons which I have already given in discussing the question of estate duty, I am of the opinion that it cannot be said of the plaintiffs that, on the death of Mr. Noad, they became “entitled to any property” within the meaning of that phrase as used in the Succession Duty Act, 1853, s. 2, and, therefore, that the plaintiffs are not liable to succession duty in respect of the annuities.

Declaration accordingly.

I Solicitors : *Blyth, Dutton & Co.* (for the annuitants) ; *Solicitor of Inland Revenue* (for the Crown).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

DORRINGTON v. LONDON PASSENGER TRANSPORT BOARD.
[KING'S BENCH DIVISION (Hilbery, J.), May 2, 22, 1947.]

Master and Servant—Common employment—Servant temporarily off duty—Injured by negligence of fellow servant—Liability of employer.

The plaintiff, an omnibus conductor employed by the defendant Board, having completed a journey, was standing, during her off-duty time, by her omnibus on the unenclosed forecourt of a station on the underground railway which was owned by the corporation. She was free to do as she liked until the time came for her to resume duty. An omnibus, driven by another employee of the corporation, drew up alongside, and was then backed and driven forward again so negligently that the plaintiff was crushed between the two vehicles.

HELD: although the plaintiff's work had brought her to the locality and created the opportunity for her to stand where she was at the time of the accident, at that time she was not doing the work which she had contracted to do, nor was she doing anything which was a natural or necessary consequence of her work or incidental thereto, and, therefore, she was not debarred by the doctrine of common employment from claiming damages from the Board for the negligence of their servant.

Coldrick v. Partridge Jones & Co., Ltd., ([1910] A.C. 77) *distinguished*.

[AS TO COMMON EMPLOYMENT AND A MASTER'S LIABILITY TO A SERVANT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328; and FOR CASES, see DIGEST, Vol. 34, pp. 207-220, Nos. 1697-1824.]

Cases referred to :

- (1) *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] 1 All E.R. 637; [1939] A.C. 215; 108 L.J.K.B. 320; 160 L.T. 420; 83 Sol. Jo. 337. H.L.; Digest Supp.
- (2) *Burr v. Theatre Royal, Drury Lane, Ltd.*, [1907] 1 K.B. 544; 76 L.J.K.B. 459; 96 L.T. 447; 34 Digest 210, 1728.
- (3) *Morgan v. Vale of Neath Railway Co.* (1865), L.R. 1 Q.B. 149; 5 B. & S. 736; 35 L.J.Q.B. 23; 13 L.T. 564; 30 J.P. 36; 34 Digest 212, 1750.
- (4) *Charles v. Taylor, Walker & Co.* (1878), 3 C.P.D. 492; 38 L.T. 773; 42 J.P. 724; 34 Digest 212, 1749.
- (5) *Graham or Miller v. Glasgow Corp'n.*, [1947] 1 All E.R. 1; [1947] L.J.R. 239; 176 L.T. 142.
- (6) *The Petrel*, [1893] P. 320; 62 L.J.P. 92; 70 L.T. 417; 7 Asp. M.L.C. 434; 34 Digest 213, 1757.
- (7) *Coldrick v. Partridge, Jones & Co., Ltd.*, [1910] A.C. 77; 79 L.J.K.B. 173; 101 L.T. 835; 34 Digest 211, 1741.

ACTION for damages for negligence. The facts appear in the judgment.

Bernard Lewis for the plaintiff.

Paull, K.C., and *John Harington* for the defendants.

Cur. adv. vult.

May 22. **HILBERY, J.**, read the following judgment. The defendant corporation is the owner of the land and premises at Morden station. The front of the station is composed of a line of shop premises, in the centre of which is the entrance to the booking hall. The pavement runs along in front of the shops and has on it three omnibus stop poles, stopping places for omnibuses belonging to certain numbered services, and at one point a passenger shelter for passengers waiting at that particular stop. In front of the pavement the corporation's land extends to a line of granite sets, which mark its boundary, and beyond is the open highway. There is no difference in level between the corporation's land and the open highway, and traffic from the highway to and from the station and the shops passes freely to and fro. This piece of land between the kerb and these sets has been referred to during the trial as the "forecourt," but, as I have indicated, it is not, as that expression might suggest, enclosed in any way or shut off from the highway by any wall or fence. On the side of this so-called "forecourt" nearest the London Road there are two passenger shelters, and at certain points on the "forecourt" itself there are some other omnibus stop posts used by the omnibuses belonging to certain services. Some of the services of omnibuses coming to Morden station are through services; for others it is a terminal point. Those for which it is a terminus stand alongside one another, if there happens to be more than one waiting between journeys, on the "forecourt" the property of the defendant corporation.

On July 27, 1945, the plaintiff was a conductor in the employment of the defendant corporation. Her omnibus completed a journey at Morden station and took up a position beside and next to the passenger shelters by the London Road, facing north-east. The plaintiff carried her surplus "coppers" to her driver and handed them over to him. To do this, she walked between the off side of the omnibus and the backs of the shelters. When she had so handed over her surplus coppers, she had completed her duties for the time being. It was then her "stand-off" time and she was free to do what she liked and to go where she liked until the time arrived for her to resume duty. Being off duty, she lighted a cigarette, strolled round the front of the omnibus, and paused by the near side of the driver's cab, chatting with the driver. While in this position, another omnibus was driven from the London Road round the north-east end of the passenger shelters and the front of the plaintiff's omnibus and along its near side. As the second omnibus did this, the conductor of it stepped off the platform and the plaintiff provided him with a light for his cigarette. He then stood beside the plaintiff, talking to her, for a moment or two. He thought that his omnibus, which had stopped just after he had got off, was in the position in which his driver intended it should stand. He did not anticipate his driver moving it again. It did not occur to him that his driver might back it, because it is a rule of the defendant corporation that an omnibus must not be backed without the conductor being on the platform and giving the appropriate signals to the driver. In the circumstances, this conductor, as he was no longer on the platform, but standing on the roadway; did not pay any further attention to his omnibus. What the driver of his omnibus did, however, was to back the omnibus in a north-easterly direction and then to drive forward again, taking a course which would bring the vehicle very much closer to the near side of what we may call the plaintiff's omnibus, and in so doing he drove so carelessly that his near side front wheel touched the foot of his conductor as he stood talking to the plaintiff and the near side front of his omnibus struck the plaintiff so that she was driven against the side of her stationary omnibus and was crushed between the two vehicles. It was broad daylight, and there was nothing to obscure the driver's view of these two people standing where they were. The manoeuvre which the driver made was not forced on him by any exigency created by the movement of other vehicles or people, nor was there the least reason for him to act hastily. How in such circumstances he so mis-managed his omnibus that he ran the plaintiff down is difficult to understand and impossible to excuse. In these circumstances, if the plaintiff is not by some peculiar doctrine of law deprived of her ordinary legal rights as a member of the public, the defendant corporation have no defence to her claim to be compensated for the injuries and damages which she has sustained. The defendant corporation does not contest the facts, it offers no excuse or explanation of the driver's negligence, and it has abandoned the plea put forward in the defence that the plaintiff was herself guilty of contributory negligence. The only answer on which the defendant corporation relies is a contention that the plaintiff's remedy is barred in law by that highly artificial and now unfashionable legal fiction known as the doctrine of common employment. Whether or not in the circumstances the plaintiff's claim is so barred is the sole question which I have to decide.

In 1939, in *Radcliffe v. Ribble Motor Services, Ltd.* (1), the House of Lords reviewed all the cases on common employment, and an examination of them, including the decision in that case, shows that whenever the doctrine has been applied the accident has happened in the course of the performance of the work undertaken by the injured workman under his contract of employment. The risk which the servant impliedly undertakes according to the doctrine is the risk involved by putting himself in juxtaposition with other persons employed by the same employer whose presence is incidental to the occupation in which he is engaged so that he cannot complain of that which is a necessary or reasonable incident of the situation in which he has voluntarily placed himself. Those are the words of SIR RICHARD HENN COLLINS, M.R., in *Burr v. Theatre Royal, Drury Lane, Ltd.* (2). In *Radcliffe's* case (1), LORD WRIGHT quotes them ([1939] 1 All E.R. 657) and compares them with the language of BLACKBURN, J., in *Morgan v. Vale of Neath Railway Co.* (3), where that judge said (5 B. & S. 580) :

There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the

risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages.

LORD WRIGHT goes on to pronounce his own opinion on the two passages, and says ([1939] 1 All E.R. 657) :

I think the words "natural and necessary" are more accurate than those of the MASTER OF THE ROLLS, "necessary or reasonable." I construe BLACKBURN, J.'s, words as meaning "necessary in the normal course of things," having regard to the service undertaken.

LORD WRIGHT then quotes BRETT, L.J.'s words in *Charles v. Taylor, Walker & Co.* (4), (3 C.P.D. 496) :

Where the service of each will bring them so far to work in the same place and same time that the negligence of one may injure the other. It is noteworthy that BRETT, L.J. . . . says "will bring," not "may bring."

Those passages all indicate, it seems to me, that it must be in the course of doing the work for which the servant contracts that he is exposed to the risk of negligence of another servant in the employment of the same master. LORD MACMILLAN, in the same case, says ([1939] 1 All E.R. 648) :

It is not enough, for the doctrine to apply, that the negligent employee and the injured employee should be in the service of a common master. They must be serving him in a common employment or, as it was put by LORD CRANWORTH, L.C., "engaged in a common work." The chauffeur who drives his master to the works is not in a common employment with his master's employees in the works, though they have a common employer. In the ordinary case of common employment, the nature of the employment is such as to bring the employees into association with each other in carrying on some activity in common, and it is from this association that there arises the risk that one of those so engaged may be injured by the negligence of another also so engaged.

Again, it is to be observed that, for the doctrine to apply, the risk from which the injured servant suffers must result from his association with the negligent servant in carrying on some activity in common for the common master. There is a passage in LORD SIMON'S judgment in *Graham (or Miller) v. Glasgow Corporation* (5) where the learned Law Lord says ([1947] 1 All E.R. 4) :

The criterion is often expressed by saying that, to make good the defence of common employment, it is not enough that the plaintiff was a fellow-servant of the person by whose fault he was injured, but it is also necessary that the two should have been engaged at the time of the injury in a "common work." But this last expression also needs definition, or at any rate, explanation. "Common work" is not limited to the sharing of the same task, like the task of two sawyers in a saw-pit, or of engine driver and stoker on the footplate of a locomotive. The phrase covers the case where the work of one is so related to the work of the other that the risk of injury to the one, due to the carelessness of the other, is not merely fortuitous, but is a special risk involved in the relationship itself, so that that risk must be deemed to have been in contemplation of the injured servant when he entered into his contract of service.

I observe and repeat the all-important qualifying words, "but it is also necessary that the two should have been engaged at the time of the injury in a 'common work.'" The risk from which the injured servant suffers if the doctrine is to apply is a special risk involved in the relationship brought about by doing and while doing the work which he has contracted to do.

In the now celebrated passage in "*The Petrel*" (6), ([1893] P. 320) SIR FRANCIS JEUNE, P., is obviously visualising the case of both the injured captain and the negligent captain being engaged at the time of the injury in their common work for the one shipowner. There is nothing in his judgment to suggest that, if one captain, going on shore-leave, was standing on the dock side with his luggage, waiting for a cab, and another captain in the service of the same shipowner negligently manoeuvred his vessel so that it crashed into the dock side and injured the captain where he stood, the doctrine of common employment would prevent that captain from recovering damages against the shipowners by whom both he and the negligent captain were employed. According to the doctrine, what the servant impliedly undertakes when he contracts to perform certain work for a master is the risk of injury through the negligence of other servants of the same master with whom, when doing his work, he will put himself in juxtaposition, and the nature of his employment may be such that this juxtaposition and risk of

injury will naturally and necessarily come about though the respective tasks of the negligent servant and the one injured through that negligence are entirely dissimilar, but the servant only impliedly undertakes this risk of injury by the negligence of a fellow servant because doing the work which he contracts to do will expose him to it. I see no reason why, when he is no longer doing his work or doing something which ought in the particular circumstances of the case to be regarded as naturally and necessarily incident to the doing of his contractual work, he should be said to have impliedly undertaken the risk of injury through the negligence of other servants of his master. There must be a point of time at which a conductor, at a terminus on an omnibus system, having finished his work, resumes his full rights as an ordinary member of the public and is entitled to a remedy when injured by the negligence of the driver of an omnibus belonging to the same system, in the service with him of the same master, even though the negligent act occurs at or near the terminal point in question and at a place where the master's omnibuses congregate.

The plaintiff at the time of her accident was not doing her work, nor was she doing anything which was a natural or necessary consequence of her work or incidental thereto. Having finished her work for the time being, her work as a conductor did not require her to be where she was or require her to take the risk of the negligent driving of another of the defendants' omnibuses. It is true that her work had brought her to the locality, but, having brought her to the locality, it had not either necessitated her standing where she was standing, nor were the circumstances of her employment such that the inference should be drawn that it was a normal incident of her work that she should stand where she did during her own free time off. No doubt, it was her work which created the opportunity for her to stand where she did stand on that particular afternoon in her leisure time, but it would be quite illogical to say that her work caused her to stand there. Her work did no more than produce an occasion when she might stand there or anywhere else she chose. I cannot believe that, if the facts had been that she had crossed the forecourt and been struck by an omnibus of the defendants negligently driven when she was standing on the pavement looking in one of the shops forming the front of the station, deciding which of several articles displayed there she would buy, it could have been successfully contended that the risk of being so injured was one which she impliedly undertook when she entered into a contract with the defendants to do the work of a conductor. It is true that in *Coldrick v. Partridge Jones & Co.* (7) the workman at the time of his accident had finished his work and that LORD LOREBURN, L.C., in the course of his speech, said that that fact was immaterial, but, read in the context in which that statement was made, it was no more than that on the facts in that case the workman, in riding to and from his work in the colliery, as he was doing at the time of his accident, on the train provided for that purpose by his employers, was doing something which was incidental to his work. There is, therefore, nothing in that decision which conflicts with the conclusions at which I have arrived in the present case. In my view, the plaintiff is entitled to succeed, and I give judgment for her for the sum of £670.

Judgment for plaintiff with costs.

Solicitors : *Pattinson & Brewer* (for the plaintiff) ; *A. H. Grainger*, Solicitor to the London Passenger Transport Board (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

EGERTON AND OTHERS v. ESPLANADE HOTELS, LONDON, LTD. AND ANOTHER.

[KING'S BENCH DIVISION (Morris, J.), May 7, 8, 9, 12, 13, 1947.]

Landlord and Tenant—Lease—Forfeiture—Breach of covenant—Notice of breach—Notice not containing requirement that breach should be remedied—Permitting premises to be used as a brothel—Validity—Relief—Law of Property Act, 1925, (c. 20), s. 146 (1) (2).

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The lease of certain premises contained a covenant by the tenants not to do, or suffer to be done, on the premises any act which might be an annoyance, damage or disturbance to the landlords or their tenants, and to use them as a private dwelling-house only, and there was a proviso for re-entry in the event of a breach of covenant. Under a licence from the landlords, the tenants were allowed to use the premises as a hotel, and, by the terms of this licence which were to be treated as though embodied in the lease, the premises were to "be kept and managed . . . so as not to contravene any of the laws of the land . . . and in a quiet orderly and proper manner." In March, 1945, the tenants allowed rooms in the hotel to be occupied by persons for the purpose of having illicit sexual intercourse. Pursuant to the Law of Property Act, 1925, s. 146 (1), the landlords served a notice on the tenants complaining that they had committed a breach of covenant by allowing the premises to be used as a brothel, but the notice did not contain any requirement that the breach should be remedied :—

HELD : (i) the premises had been used as a brothel (definition in *Winter v. Woolfe* ([1931] 1 K.B. 549) applied), and the tenants had committed a breach of their obligations under the lease and the licence, but the breach was not capable of remedy and there was no necessity for the landlords to have called on the tenants to remedy it, and the notice was, therefore, a valid and sufficient notice under the Law of Property Act, 1925, s. 146 (1).

Rugby School v. Tannahill ([1935] 1 K.B. 87) followed.

(ii) in the circumstances of the case, the tenants were not entitled to relief under s. 146 (2) of the Act.

[AS TO NOTICE OF BREACH, see HALSBURY, Hailsham Edn., Vol. 20, pp. 257-259, paras. 290, 291; and FOR CASES, see DIGEST, Vol. 31, pp. 483-486, Nos. 6322-6342, and Supplement.]

Cases referred to :

- (1) *Winter v. Woolfe*, [1931] 1 K.B. 549; 100 L.J.K.B. 92; 144 L.T. 311; 95 J.P. 20; Digest Supp.
- (2) *R. v. Holland, Lincolnshire JJ.* (1882), 46 J.P. 312; 15 Digest 754, 8133.
- (3) *Rugby School v. Tannahill*, [1935] 1 K.B. 87; 104 L.J.K.B. 159; 152 L.T. 198; Digest Supp.

ACTION for possession of premises on the ground of breach of covenant by the tenants, the first defendants. The relevant facts appear in the judgment.

Melford Stevenson, K.C., and *Sir S. Worthington-Evans* for the plaintiffs.

M. Turner-Samuels, K.C., and *Jessel Turner-Samuels* for the first defendants.

Ungoed-Thomas for the second defendants.

MORRIS, J. : The plaintiffs are the trustees for the time being of the Paddington estate and they claim possession of premises known as 37 Warrington Crescent, Paddington. Those premises are in the occupation of the first defendants, Esplanade Hotels London, Ltd., and form part of a hotel carried on by them at Nos. 2, 37 and 39, Warrington Crescent. By a lease dated Nov. 10, 1863, and made between the then trustees of the estate and a Mr. William Thompson, the premises, No. 37, were demised to Mr. Thompson for a term of 95½ years from Michaelmas, 1863. That term has become vested in the first defendants. The second defendants, Magnet Building Society, are parties to the action because, by a mortgage of Mar. 1, 1937, and a further charge dated Aug. 4, 1937, the first defendants, as beneficial owners, charged the premises to the society. The Magnet Building Society counterclaim for relief if circumstances arise making it necessary for them to do so.

The claim is brought by the plaintiffs because they say that there was a breach by the first defendants of an obligation contained in the lease and, also, a breach of a licence granted in July, 1937, by the plaintiffs to the first defendants, the terms of which were to be treated as though embodied in the lease. So far as the lease is concerned, there is a covenant which binds the first defendants that they :

... shall not nor will do or suffer to be done on the premises any act which may be or grow to be an annoyance damage or disturbance of the said Lord Bishop [*i.e.*, the bishop joined in the deed] or his successors or the said trustees or trustee for the time being or their or his tenants and shall and will keep and use the said messuage or tenement as and for a private dwelling-house only.

There was a proviso for re-entry and it provides that, in default of performance of any of the covenants, then it shall be lawful for the trustees for the time being to enter the demised premises. The licence that was granted permitted the premises to be used as a hotel and included in the terms of the licence was this provision :

(7) That the said premises shall be kept and managed only as specified in the schedule hereto and so as not to contravene any of the laws of the land for the time being in force and in a quiet orderly and proper manner.

The schedule set out that the user was by Leon Shapiro, and Marie Davidova of 2 Warrington Crescent, Paddington, called the licensed users

... whilst being directors of Esplanade Hotels London, Ltd., and whilst personally supervising managing and keeping up the said premises and attending upon the persons therein with a competent resident manager or manageress and a staff of servants in style and manner appropriate to the character of the said premises as and for a high class private residential hotel for persons of good class and social position suitable to the character aforesaid but so that and only so that the provisions and conditions hereinbefore set out are fully observed fulfilled and kept.

Clause I of the licence was in these terms :

That throughout the term of the said lease and the subsistence of this licence all the lessee's covenants and the conditions contained in the said lease (subject to any subsisting licence previously given by us or our predecessors in title) be applicable to and enforceable in respect of the premises comprised therein and generally operate and have effect as if the user and any other things hereby licensed or permitted had been licensed or permitted by the said lease and the provisions and conditions herein had been embodied therein but so that in all other respects and subject as aforesaid the said lease shall continue in full force.

The plaintiffs say that the first defendants, in breach of the covenant and of the condition in the licence, used the premises and suffered them to be used as a brothel between Mar. 2, 1945, and Mar. 6, 1945. The plaintiffs say that they have complied with the necessities of the Law of Property Act, 1925, s. 146 (1), and that, therefore, they are entitled to exercise their right to re-enter, and are, in consequence, entitled to possession of the premises. The first defendants deny that they have broken the covenant or the term of the licence to which I have referred. They say, secondly, that no notice that was sufficient or satisfactory to comply with s. 146 of the Act of 1925 was ever served on them. In the alternative, if a breach is proved and if a valid and sufficient notice was given, they ask that relief be granted to them under the provisions of s. 146 (2).

The first issue is clearly one which depends on the facts. [After reviewing the evidence, HIS LORDSHIP found that rooms in the hotel had been occupied by persons for the purpose of having illicit sexual intercourse. He said that, following a raid by the police on the hotel on Mar. 11, 1945, one Westermann, who was one of the directors of the first defendants and was at the relevant time largely responsible for the management of the hotel, and one Lienhard, a porter at the hotel, were convicted for that they between Mar. 2 and 6, 1945, at the Esplanade Hotel had unlawfully assisted in the management of a brothel. HIS LORDSHIP continued :—] The plaintiffs have alleged their breach in the way in which I have indicated and, therefore, they must prove that breach. In *Winter v. Woolfe* (1), in the Divisional Court, AVORY, J., said ([1931] 1 K.B. 555) :

I am content to accept the definition of a brothel given by GROVE and LOPES, JJ. [46 J.P. 312, 313] in the case of *R. v. Justices of Parts of Holland, Lincolnshire* (2).

GROVE, J., said: "The sole question is whether there was any evidence to support this conviction before the justices for permitting these licensed premises to be a brothel . . . I don't think that the matter of nuisance is of any importance, for it is too well known that these places are often kept in such a way as to be no nuisance at all, but kept perfectly private. But what needs only to be proved is this, namely that the premises were kept knowingly for the purpose of people having illicit sexual connection there." LOPES, J., said: "Now, the sole question before the justices was whether the applicant permitted his premises to be a brothel. What is the meaning of permitting the premises to be a brothel? I think my brother GROVE has given a very apt definition, namely, that it is permitting people of opposite sexes to come there and have illicit sexual intercourse. That is a very complete and satisfactory definition of the whole matter."

AVORY, J., added (*ibid.*):

There was in this case evidence upon which the only reasonable inference was that these men and women were resorting to these premises habitually for the purpose of having illicit sexual intercourse, and of this, on the evidence, it is not really disputed that the respondent must have known.

I accept the evidence that the three police officers gave in this case. In my judgment, it leads overwhelmingly to the conclusion that the covenant in the lease and the conditions in the licence were broken by the first defendants, since, between Mar. 2 and 6, 1945, the premises were used as a brothel in the sense in which that expression has been referred to, and is referred to, in the courts, and were, therefore, used in such a way as to violate the obligations binding on the first defendants as assignees of the lease and licensees under the licence.

That being my clear conclusion on the first issue, *viz.*, that there was a breach of covenant, the next matter which arises is the question whether the plaintiffs served a notice under the provisions of the Law of Property Act, 1925, s. 146, so as to comply with statutory necessities. There has been much discussion at the Bar in regard to the wording of s. 146 (1) and, therefore, I think it necessary to read the words of the sub-section:

A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice (a) specifying the particular breach complained of; and (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and (c) in any case, requiring the lessee to make compensation in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

The notice that was served on behalf of the plaintiffs was dated Aug. 3, 1945. The breach complained of is the breach pleaded in the statement of claim, the breach which I have already said I find to be established. The notice does not contain any requirement that the breach should be remedied. It is, therefore, submitted on the part of the first defendants that the notice is not a good notice and that a right of forfeiture cannot be exercised, for it is said by counsel for the first defendants that the breach was one capable of being remedied. It is said by counsel for the plaintiffs that this breach was not one capable of being remedied. I think it is clear that the phrase "remedy the breach" cannot mean, and was not intended to mean, that the breach was to be wiped out, for that clearly would be an impossibility. That which has taken place cannot be obliterated as an event or as a fact. Counsel for the second defendants submitted that a useful way in which to approach the phrase "remedy the breach" would be to consider whether the consequences of the breach were capable of remedy.

I think that the section is precise in its language and that it is necessary to look at the facts of each case where there has been a breach of covenant and to say whether the breach was, or was not, capable of remedy. I do not think that it would be desirable to lay down or suggest that there are certain categories, or groups, or types, of breaches of covenants which are incapable of remedy, and I propose to approach the facts in this case and to consider them and them alone. I think I am entitled to get as much guidance as possible from *Rugby School v. Tannahill* (3), a decision of the Court of Appeal which is, of course, binding on me. In that case a lessee committed a breach of her

tenancy not to use the premises for illegal or immoral purposes. The notice that was served on her did not require her to remedy the breach or to make compensation in money, and it was held by the Court of Appeal (approving the decision of MACKINNON, J., but not entirely indorsing everything that he said) that ceasing to commit the breach was no remedy, that the breach was not capable of remedy, and that, consequently, an omission to require it to be remedied did not invalidate the notice. GREER, L.J., said ([1935] 1 K.B. 90, 91) :

The first point is, whether this particular breach is capable of remedy. In my judgment MACKINNON, J., was right in coming to the conclusion that it was not. I think perhaps he went further than was really necessary for the decision of this case in holding that a breach of any negative covenant—the doing of that which is forbidden—can never be capable of remedy. It is unnecessary to decide the point on this appeal; but in some cases where the immediate ceasing of that which is complained of, together with an undertaking against any further breach, it might be said that the breach was capable of remedy. This particular breach, however—conducting the premises, or permitting them to be conducted, as a house of ill-fame—is one which in my judgment was not remedied by merely stopping this user. I cannot conceive how a breach of this kind can be remedied. The result of committing the breach would be known all over the neighbourhood and seriously affect the value of the premises. Even a money payment together with the cessation of the improper use of the house could not be a remedy.

MAUGHAM, L.J., said (*ibid*, 93, 94) :

The second thing to be gathered from the section is that the breach must be capable of remedy within a reasonable time. The lessor is not to be kept out of his right of action for an unreasonable time. If, for example, the breach is of such a character that many months or perhaps years must elapse before the breach can be remedied to the satisfaction of the lessor, such a case would not be as regards remedy within the section at all. The importance of that in this case is that merely ceasing to use the premises for an illegal or immoral purpose is not in any true sense to remedy the breach. The phrase in the covenant is of course negative; it is not to permit the premises to be used for an illegal or immoral purpose. In a sense the lessee ceases to permit the premises to be used for such a purpose if during a week she complies with the covenant; but that is not sufficient to establish that in the particular case the breach is capable of remedy. The use of the premises for a long period for an immoral purpose seriously tends to damage their value and to give them a bad name, as indeed is shown by the common designation of such premises—namely, a house of ill-fame; and merely ceasing for a reasonable time, perhaps a few weeks or a month, to use the premises for an immoral purpose would be no remedy for the breach of covenant which had been committed over a long period.

The matter which I have to consider is whether, on the facts of this case, the breach was capable of remedy. The breach was in March. The notice was served in August, but that, presumably, was because, after the proceedings in court as a result of the police raid on Mar. 11, 1945, there were appeals, and, doubtless, the result of those appeals, which were heard in July, was awaited before the notice was served. In any event, no complaint is made by anyone that the notice was not served earlier. Was this breach a breach capable of remedy, which means a breach capable of remedy within a reasonable time of the date in August on which the notice was served? There were the convictions of two individuals, and the dismissal of their appeals. Inevitably there would be some publicity, though I cannot assess the amount of it in regard to those proceedings, but, in my judgment, the breach was of such a nature that it must cast a stigma on the premises and impose a taint which can only be removed if those who have brought it about are no longer associated with the premises. There are, of course, always the beneficent effects of time in effacing the memory of unhappy and unpleasant things, but this was not, in my opinion, a breach which was capable of remedy within a reasonable time. I think I am entitled, when considering this matter, to have regard to the whole amenity of the neighbourhood and what must be the repercussions of events of this kind and their effect on property in the neighbourhood. Under the contract, which existed between the plaintiffs and the first defendants, the first defendants covenanted not to use the premises in the way in which they have used them. Merely desisting from the wrongful user or not continuing to commit further breaches is not, in my judgment,

on the facts of this case, a way of remedying the breach. In my view, the conclusion on this second issue that arises is that these breaches were not capable of remedy and that there was no necessity for the plaintiffs to have called on the first defendants to have remedied the breaches of which the plaintiffs complain. It follows, therefore, that the notice that was given was a valid and sufficient notice.

The result of these findings, unless the powers of the court can successfully be invoked, is that the plaintiffs are entitled to re-enter these premises, but the first defendants ask the court for relief under s. 146 (2) of the Act of 1925, which reads :

Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief ; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit ; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

Without reference to any of the authorities on this matter, a mere reading of those words shows that the discretion in the court is very wide, and, indeed, is unfettered, subject to this, that it must be exercised judicially and having regard to all the circumstances. [His LORDSHIP reviewed the evidence on this part of the case, and continued :] I have no doubt that in Mar., 1945, many proprietors of hotels had particular difficulties. Clearly a man who runs a hotel cannot be responsible if, without his knowledge, unmarried couples resort to his hotel to have illicit intercourse. I think it is right to make every possible allowance for those who were running hotels during the difficult days of the war. When all these matters are taken into account I think the inquiry is raised : Did or did not those who were running this hotel know what was happening ? Did they or did they not tolerate what was happening ? Did they or did they not profit deliberately and without regret as the result of what was happening ? I think it is reasonable also to bear in mind that, although the breaches complained of are stated to refer only to five days, when considering the general circumstances it would be unreasonable to say that one must have regard to those five days only. It further seems to me that the sort of events that were occurring on Mar. 11, and between Mar. 2 and 6, could not have taken place on the scale on which they were taking place without many of the people responsible for running the hotel, who were managing it and deriving their income from it, having a pretty shrewd idea what was happening and of the source of a good many of their receipts. I have no doubt that this hotel was conducted for a great many years quite properly, but, nevertheless, for the reasons that I have stated, it seems to me that it would not be right for me to grant relief in this case on any terms which permitted the first defendants to continue, beyond some reasonable time, to be in occupation.

Judgment for the plaintiffs against the first defendants. The question of relief to the second defendants to be dealt with later.

Solicitors : Trower, Still & Keeling (for the landlords) ; Kerly, Sons & Karuth (for the tenants) ; Wright, Son & Pepper (for the mortgagees).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

MINISTER OF PENSIONS v. WILLIAMS.

[KING'S BENCH DIVISION (Denning, J.), May 5, 9, 1947.]

War Injury—Pension—Burden of proof—Test of causation—Personal Injuries (Civilians) Scheme, 1944 (S.R. & O. 1944, No. 369), arts. 2 (2), 6.

On May 20, 1944, the claimant, while out walking, picked up a small object of uncertain origin, resembling a piece of piping of dull lead colour. The following evening he was examining the object and at the same time holding a lighted cigarette, when an explosion occurred by which he was injured. He claimed a pension under the Personal Injuries (Civilians) Scheme, 1944, made under the Personal Injuries (Emergency Provisions) Act, 1939.

HELD : (i) there was no burden on the claimant to prove that his injury was a war injury, and the pensions appeal tribunal had rightly given him the benefit of the doubt and found that the object was a missile discharged by the enemy.

(ii) the fact that the claimant was examining the object and not taking it to a police station might mean that he was guilty of negligence, but did not break the chain of causation, because he was not doing a deliberate act in relation to the object, nor was the chain of causation broken by his holding a lighted cigarette near the object.

Minister of Pensions v. Chennell ([1946] 2 All E.R. 719) *applied*. *Smith v. Davey, Paxman & Co. (Colchester), Ltd.* ([1943] 1 All E.R. 286), *distinguished*.

(iii) there was evidence on which the tribunal could find that the injuries were caused or contributed to by the serious negligence or misconduct of the claimant for the purposes of art. 6 of the scheme and the Pensions Appeal Tribunals Act, 1943, s. 4, under which an award may be withheld or reduced.

[FOR THE PERSONAL INJURIES (CIVILIANS) SCHEME, 1944, arts. 2 (2), 6, see HALSBURY'S STATUTES, Vol. 37, pp. 849, 851.]

Cases referred to :

(1) *Smith v. Davey, Paxman & Co. (Colchester), Ltd.*, [1943] 1 All E.R. 286 ; 36 B.W.C.C. 60 ; Digest Supp.

(2) *Minister of Pensions v. Chennell*, [1946] 2 All E.R. 719 ; [1947] K.B. 250 ; 176 L.T. 164.

APPEAL by the claimant from a decision of a pensions appeals tribunal dismissing his appeal in respect of a claim for a pension made by him under the Personal Injuries (Civilians) Scheme, 1944, the ground for the decision of the tribunal being that the claimant's injuries were caused or contributed to by his own serious negligence or misconduct. The facts appear in the judgment.

H. L. Parker for the Minister of Pensions.

The claimant did not appear.

Cur adv. vult.

May 9. DENNING, J., read the following judgment. The claimant, when out walking on May 20, 1944, in Carmarthenshire, picked up a small object which he described as like a piece of piping of a dull lead colour, and placed it in the pocket of an old Army tunic he was wearing at the time. On the following evening, May 21, when he was in a field near his home in the company of two friends, he took the object from his pocket and was examining it, at the same time holding a lighted cigarette, when an explosion occurred. As a result, he received lacerated wounds of the face and the right hand and fingers of the left hand. He claimed a pension under the Personal Injuries (Civilians) Scheme, 1944, made under the Personal Injuries (Emergency Provisions) Act, 1939. If his incapacity for work or disablement is caused by a "war injury" he is *prima facie* entitled to a pension.

In considering whether it was a "war injury," the first question is whether this was a missile discharged by the enemy, or in combating the enemy, or in repelling an imagined attack by the enemy. There is no evidence that there had been any bombs dropped by the enemy in this vicinity, or that any of our troops had been in action against the enemy there, or, indeed, of any "incident" in the locality. All that the evidence showed was that the object was lying

in a field on the top of a mountain about 50 yards from a pillbox. Its appearance was like a piece of dull, lead-coloured piping. It was two to two and a half inches long and about one and half inches in diameter. One end was milled; the other end was smooth. There was no fuse attached to it. In the field where the explosion took place, police found portions of some metal object marked "P.O.B.W.2209." They were found some few yards from the place where the explosion took place, and they were of a dull coloured alloy. They were inspected by a major of the Home Guard who stated that they were not portions of anything used by the Home Guard. They were also inspected by an inspector of the War Emergency Department, Llanelly, by the bomb disposal unit at Swansea, and by the garrison engineer at Llanelly. None of these investigations produced any definite results. The policeman who found the missile said that he was satisfied that it had not been buried, but it was free from rust and appeared quite new. The police told the claimant that the object was not of British origin.

On this part of the case much depends on the burden of proof. By art. 2 (2) of the scheme :

In no case shall there be an onus on any claimant . . . to prove that incapacity for work or disablement was caused by, or that death was the direct result of, a qualifying injury, and the benefit of any reasonable doubt on those questions shall be given to the claimant.

That article corresponds to art. 4 (2) of the Royal Warrant concerning Retired Pay, etc. (Cmd. 6489) and to similar articles in the schemes relating to the merchant navy and other persons under the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939. These articles must be read with ss. 1, 2 and 3 of the Act of 1943. The similarity of wording shows that on the questions that come before the tribunals under those sections there is to be no burden of proof on the claimant and the benefit of any reasonable doubt is to be given to him. On the narrow question whether the incapacity for work or disablement was caused by the injury, it is plain there is no burden on the claimant, but the real question is whether the injury was a "war injury." Where is the burden on that question? A "war injury" is defined as a physical injury caused by the discharge of any missile by the enemy. It seems to me that on that question there is also no burden on the claimant. If the benefit of art. 2 (2) were confined to the narrow question, it would have little or no practical effect.

Applying that test in this case, the evidence is very inconclusive. It may be that the object was a missile discharged by the enemy, but there is a reasonable doubt on the point. The tribunal were right to give the claimant the benefit of the doubt and to find that it was a missile discharged by the enemy.

Assuming that the missile was discharged by the enemy, the next question is whether the injuries to the claimant were caused by it being so discharged. That depends on whether it falls within the decision of *Smith v. Davey, Paxman and Co. (Colchester), Ltd.* (1) or that of *Minister of Pensions v. Chennell* (2). As I stated in *Chennell's* (2) case, intervening negligence or misconduct does not of itself break the chain of causation. The Personal Injury Scheme, indeed, and the Pensions Appeal Tribunals Act, 1943, both contemplate that even serious negligence and misconduct may not break the chain of causation, because, under art. 6 of the scheme and s. 4 of the Act, serious negligence or misconduct is made a ground on which the Minister may withhold, cancel or reduce an award, a question which would not arise unless the chain of causation was intact. This leads to a just result, because, if the chain of causation is broken, innocent passers-by who are injured would have no recompense under the scheme, whereas so long as the chain of causation is intact, they may be compensated, but the person who is guilty of serious negligence or misconduct may not. The distinction between the two cases cited is this. In *Smith v. Davey, Paxman & Co. (Colchester), Ltd.* (1) everyone concerned knew that the cannon shell was from an enemy aeroplane. The man who sawed it at his bench was doing a deliberate act in which the origin of the shell was only part of the history. It would have been all the same if it had been an explosive coming from a source unconnected with the war. In *Chennell's* (2) case, however, the intervening action was that of children acting in the irresponsible way in which children do act. In the present case, the claimant was not doing a deliberate act such as the workman in *Smith v. Davey, Paxman & Co. (Colchester), Ltd.* (1) was doing. He was

only examining a strange object in the way in which a careless man might do. If he had been taking it to the police station and was examining it on the way when it exploded, both he and any passers-by would have been entitled to compensation. The fact that he was not taking it to the police station, but was examining it in a field, may mean that he was guilty of negligence, but does not break the chain of causation. The fact that he was also holding a lighted cigarette may render his negligence so serious as to disentitle him to any compensation, but, again, it does not break the chain of causation so as to prevent an innocent person who may have been injured by the explosion from recovery. I hold, therefore, that on this point this case falls within *Chennell's* (2) case rather than that of *Smith v. Davey, Paxman & Co. (Colchester), Ltd.* (1). The tribunal found that it was a war injury, and I see no error in law in that finding.

The remaining question is whether the injuries were caused or contributed to by the serious negligence or misconduct of the claimant. The tribunal found that they were. There was evidence on which they could come to that conclusion, and there is no ground on which I should interfere. The result is that I uphold the decision of the tribunal on all points.

Appeal dismissed.

Solicitor : *Treasury Solicitor* (for the Minister of Pensions).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*]

Considered. HADLUM *v.* HADLUM.
[1948] 2 All E.R. 412.

WOOD *v.* WOOD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Jones, J.), April 16, 1947.]

Divorce—Evidence—Adultery—Period of gestation—Three hundred and forty-six days.

A husband and a wife ceased to cohabit on Aug. 8, 1945, and on July 20, 1946, the wife bore a child which appeared to be at least fully grown. The husband adduced no evidence of any adulterous association by the wife, nor any medical evidence, but he contended that, having regard to the lapse of time between his last cohabitation with his wife and the date of the birth of the child, the wife must have committed adultery.

HELD : (i) the court declined on the information before it to hold that the wife had committed adultery.

Gaskill v. Gaskill ([1921] P. 425) *discussed.*

(ii) although the husband believed that the wife had committed adultery and that he was not the father of her child, he must nevertheless be considered to have deserted her because his belief was not induced by such an act on her part as would lead a reasonable person to believe that she was guilty of adultery.

Glenister v. Glenister ([1945] P. 30) *distinguished.*

[AS TO PERIOD OF GESTATION, see HALSBURY, Hailsham Edn., Vol. 10, p. 663 n.; and FOR CASES, see DIGEST, Vol. 27, pp. 298, 299, Nos. 2753, 2754.]

Cases referred to :

- (1) *Gaskill v. Gaskill*, [1921] P. 425; 90 L.J.P. 339; 126 L.T. 115; 27 Digest 298, 2753.
- (2) *Clark v. Clark*, [1939] P. 228.
- (3) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; Digest Supp.
- (4) *Russell v. Russell*, [1924] A.C. 687; 93 L.J.P. 97; 131 L.T. 482; Digest Supp.

APPEAL by a husband from a decision of Prescott (Lancashire) justices.

The justices found desertion of the wife by the husband proved, and made a maintenance order in her favour, holding that the fact that for the husband to have been the father of a child born to the wife the period of gestation must have been 346 days was not a ground for inferring that the wife had committed adultery. The facts appear in the judgment of LORD MERRIMAN, P.

H. B. Grant for the husband.

LORD MERRIMAN, P. : On Jan. 17, 1947, on a summons by the wife on the ground of desertion, the justices, finding desertion proved as from Aug. 25, 1946, the date on which the husband wrote a letter indicating very plainly his intention to abandon his wife, made an order for the maximum amount in respect of the wife and the child. The ground of the appeal is that the justices rejected the husband's defence that he was not bound to continue cohabitation with his wife because she had committed adultery, and the case raises rather a curious point. The parties were married in Mar., 1945, and were able to live together only so far as was permitted by the fact that the wife was serving in the Land Army and he was a chemist. There is evidence sufficient to show, if the justices chose to accept it (as I am assuming that they did) that the last date on which the husband and wife actually cohabited was on or about Aug. 8, 1945. A child was born on July 20, 1946, which appeared to be at least fully-grown, and, if anything, rather over the average weight. There is not a shred of evidence adduced by the husband of any sort of association between the wife and any other man named or unnamed, but the husband has charged the wife with adultery solely on the length of what would have been the period of gestation if the conception had been the result of their last cohabitation.

On the assumption which the husband was putting forward, counting from the latest possible date, Aug. 8, 1945, the period of gestation was 346 days, and it is said that that is proof positive that this child was not his, and, therefore, the wife has committed adultery. The magistrates state in the reasons for their decision that the wife denied on oath the alleged adultery, and that her conduct was not called in question, but that the period extended far beyond the normal length of gestation, which, according to the usually accepted average and the evidence of a midwife, is 280 days. They continue :

We considered that an allegation of adultery was a serious allegation which must be strictly proved, and that we could not, on that evidence alone, assume the wife's adultery and that it was impossible that the husband could be the father of the child. In these circumstances we accepted the evidence of the wife, and found that she had not committed adultery.

They refer to LORD BIRKENHEAD's judgment in *Gaskill v. Gaskill* (1), where LORD BIRKENHEAD was dealing with facts whereby it was fixed that the last possible date for sexual intercourse was 331 days before the birth of the child. In the converse case of *Clark v. Clark* (2), I was dealing with a matter in which the earliest possible date on which sexual intercourse could have occurred was 174 days before the birth of a prematurely born child. In both cases, both LORD BIRKENHEAD and I were pointing out the necessity of attempting, but the difficulty of achieving, some reconciliation between the notional reckoning of the normal period of gestation and a period in which the earliest or the latest date, as the case might be, from which conception could possibly exist was fixed and known. It is, at least, clear that it is fallacious to attempt to mix the notional and the actual in the period of calculation.

I am not going to say any more about the present case than that we have been asked to say that there comes a point at which any judge must take judicial knowledge of the fact that the period is altogether outside what is possible. I agree. Of course, there must come such a point, and the whole question is whether, in a case in which we have had no advantage of medical evidence or of argument on the other side, we are bound to say that that stage has come at a point 15 days longer than the period with which LORD BIRKENHEAD dealt in 1921 in a case in which, as here, there is not a shred of evidence of any adulterous or improper association between the wife and any man.

One can add grains of corn together, and there must come a time when they become a heap. It may be said to be impossible to know where to draw the line, yet it can plainly be seen that one case or another must be on the wrong side of any line that can possibly be drawn. With that I agree, but I absolutely decline, on the information before us in this case, to say that we are judicially bound to hold that this period of 346 days is on the wrong side of any line which can possibly be drawn, that we are judicially bound to hold that this wife has committed adultery, and that the magistrates were wrong in rejecting the husband's contention.

There remains the alternative point on which it is said that, even if the wife did not commit adultery and the primary case is rejected, nevertheless the circumstances were such that the husband had every right to believe that she had committed adultery, and, therefore, on the authority of *Glenister v. Glenister* (3), he cannot be held to be a deserter. *Glenister v. Glenister* (3), however, turned on the finding that the wife had so misconducted herself as to lead any reasonable husband to suppose that she had committed adultery.

A One of the suspicious circumstances was that she had been caught at night by her husband with men in her room, and, in addition, there was the birth of a child. In my judgment I said ([1945] 1 All E.R. 518) :

Take a hypothetical case, in which, short of actual and direct proof of adultery, the wife so conducts herself to the knowledge of the husband as to warrant the inference that adultery has been committed, though, (I am supposing), that is ultimately held not to be a fact.

B I then call attention to the dilemma in which a husband might be placed, the simplest illustration of which would be a circumstantial confession of adultery by the wife herself, made for some purpose of her own, which confession proved afterwards to be false. The dilemma of the husband is that either he remains with the wife, in which case he condones her adultery, or he goes away and leaves her because of the confession, in which case he is held to be a deserter. I ended this passage by saying (*ibid.*) :

C It seems to me to put the husband in an almost impossible position, if that is the law. But the question is whether it is the law. I do not think it is. If the wife has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, the husband, becoming aware of the facts and honestly drawing that inference and leaving the wife on that ground ought not to be held to have left her without reasonable cause.

D The whole point is that it is the wife's misconduct which induces the reasonable belief on the part of the husband.

E That brings me back again to the case of *Gaskill v. Gaskill* (1), where, at the conclusion of his judgment ([1921] P. 434), LORD BIRKENHEAD called attention to the fact, in expressing the hope that there might be a reconciliation, that the young couple in that case had both been "the sport of nature," words which seem to me to be applicable exactly to this case. It seems to me to be impossible to apply the principle and the reasoning on which *Glenister v. Glenister* (3), is based to a case where the wife has done nothing wrong herself, but has been the victim of a freak of nature. That being so, this appeal fails, and must be dismissed.

JONES, J. : I agree.

Appeal dismissed.

Solicitors : *G. Houghton & Son* (for the husband).

F [Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

CAMPBELL v. PROUD'S ENGINEERING CO., LTD.

[COURT OF APPEAL (Tucker and Evershed, L.JJ., and Macnaghten J.), June 5, 1947.]

G Workmen's Compensation—Accident—"Arising out of employment"—Workman going to employers' pay office to draw pay—Jumping on passing lorry—Collision between lorry and trucks—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).

H A workman was working on a ship in a dock, and, in the course of his employment, he had to go to his employers' pay office, which was a little over a mile away, to receive his pay. While on his way there, he jumped on the near side of a passing lorry which was going in the same direction. The lorry swerved to avoid another lorry, collided with some railway trucks, and the workman was crushed to death between the trucks and the lorry. In a claim by his widow for compensation under the Workmen's Compensation Act, 1925, s. 1, the employers contended that, although the accident happened in the course of the workman's employment, it did not arise out of it because the act which he was doing was different in kind from that which he was employed to do :—

HELD : there had been no deviation by the workman from the journey

he set out to take, his act in jumping on the lorry instead of proceeding on foot did not render his journey to the pay office different in kind from what it would have been had he used a safer method, and the accident, therefore, arose out of the employment.

Harris v. Associated Portland Cement Manufacturers, Ltd. ([1938] 4 All E.R. 831) *applied*.

[AS TO ACCIDENTS ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 822-836, paras 1160-1169; and FOR CASES, see DIGEST, Vol. 34, pp. 276, 277, Nos. 2332-2340, pp. 284-293, Nos. 2389-2439, and pp. 321-323, Nos. 2627-2641.]

Cases referred to:

- (1) *Stephen v. Cooper*, [1929] A.C. 570; 98 L.J.P.C. 97; 141 L.T. 300; 22 B.W.C.C. 339; Digest Supp.
- (2) *Harris v. Associated Portland Cement Manufacturers, Ltd.* [1938] 4 All E.R. 831; [1939] A.C. 71; 108 L.J.K.B. 145; 160 L.T. 187; 31 B.W.C.C. 434; Digest Supp.
- (3) *Noble v. Southern Ry. Co.*, [1940] 2 All E.R. 383; [1940] A.C. 583; 109 L.J.K.B. 509; 33 B.W.C.C. 176; Digest Supp.
- (4) *Wilson & Clyde Coal Co. v. M'Ferrin, Kerr v. Dunlop (James) & Co.*, [1926] A.C. 377; 95 L.J.P.C. 130; 135 L.T. 164; 19 B.W.C.C. 1; 34 Digest 301, 2499.
- (5) *Seivior v. Somerset Collieries, Ltd.*, [1940] 1 All E.R. 649; 162 L.T. 403; 33 B.W.C.C. 62; Digest Supp.
- (6) *Thomas v. Ocean Coal Co., Ltd.*, [1933] A.C. 100; 102 L.J.K.B. 142; 148 L.T. 219; 25 B.W.C.C. 436; Digest Supp.
- (7) *Hawker v. Doncaster Amalgamated Collieries, Ltd.*, [1938] 4 All E.R. 577; 160 L.T. 31; 31 B.W.C.C. 472; Digest Supp.

APPEAL by the widow of a deceased workman from an award of His Honour JUDGE L. C. THOMAS, made at Cardiff County Court, and dated Dec. 4, 1946, refusing her claim to compensation under the Workmen's Compensation Act, 1925, s. 1, on the ground that, at the time of the accident, the workman was doing what he was not employed to do, and, therefore, the accident did not arise out of his employment. The facts appear in the judgment of TUCKER, L.J.

Roderic Bowen for the appellant.

Beney, K.C., and *G. Owen George* for the employers.

TUCKER, L.J.: This is an appeal from a decision of His Honour JUDGE L. C. THOMAS sitting as arbitrator under the Workmen's Compensation Acts, whereby he made an award in favour of the employers on a claim made by the widow of the deceased workman against the employers, Proud's Engineering Co., Ltd., by whom the deceased man had been employed.

The deceased man, Campbell, was a boiler worker, and he had been working on a ship at the Bute East Dock at Cardiff. His employers had been carrying out work on this ship and he had been working for them. The accident which caused his death occurred on Friday, June 21, 1946. The normal practice was for the men to go at the conclusion of work on Friday and draw their pay from the employers' pay office which was situated to the west of the Bute West Dock. The normal way of getting there would be for the employee to pass down Bute East Dock on the east side, cross that dock and the Bute West Dock on the south side of those docks, and then proceed northwards along the Bute West Dock until he got to the pay office. The distance from the ship on which the men had been working to the pay office was approximately one mile and 200 or 300 yards. Campbell left his work shortly after 4 p.m., walked across the south end of the docks, and then turned north to go to the pay office. When he was some 200 or 300 yards from the pay office, he saw a lorry travelling in the direction in which he desired to go, and he jumped on the near side of it as it was in motion. Shortly afterwards the lorry swerved to avoid an on-coming lorry, collided with some railway trucks on its near side, and Campbell was crushed and killed. The county court judge states that the facts were not in dispute, and continues:

The pay-out took place from 4.45 to 5, and there was no question that he could not make the journey on foot quite comfortably within the time. As he was passing along Collingdon Road, however, on the way to the pay office, he jumped on to a passing

lorry. . . . Almost immediately after he came into contact with a railway wagon or wagons and such contact caused his death.

That the county court judge regarded what Campbell did as an imprudent and wrong thing to do there can be no doubt when we come to the rest of his judgment, but I cannot read into it anything more than that making use of the lorry was a method whereby he tried to get to the pay office. The county court judge then applies the law to those facts and says :

A In my view the accident cannot be said to arise out of and in the course of the employment. If the act he was doing which caused the accident was an act he was employed to do, then the fact that he did it negligently does not bar a claim for compensation. I apply, however, the *dictum* of LORD WARRINGTON OF CLYFFE [in *Stephen v. Cooper* (1)] cited with approval by LORD WRIGHT in *Harris' case* [*Harris v. Associated Portland Cement Manufacturers, Ltd.* (2)] that what the workman did was a thing he was not employed to do and was not in the contemplation of either party to the contract. I might, perhaps, put it in another way by saying that when he jumped on the passing lorry there was a deviation from the normal course of his employment.

I do not think there is any dispute that the county court judge applied the right test to the facts. The question is whether, on those facts, it was possible to come to the conclusion at which he arrived. I think that it was impossible, as a matter of law, to arrive at the decision at which he did arrive.

C It is not necessary to refer in detail to any of the authorities. The judge cited the passage from LORD WRIGHT's speech in *Harris v. Associated Portland Cement Manufacturers, Ltd.* (2) where LORD WRIGHT said ([1938] 4 All E.R. 844, 845) :

D With the greatest respect to the opinions of the Court of Appeal, I think that these expressions tend to obscure the real distinction between the manner of doing an act which in its nature is within the employment and the doing of an act which in its nature is different in kind from any contemplated by the employment. It is not easy to reconcile all the expressions which have been used in judgments on the question of whether the application of s. 1 (1) of the Act [the Workmen's Compensation Act, 1925] depends on fact or law. In one sense, it is both fact and law. The facts have to be found and the words of the Act then applied to the facts according to their true construction, which is a matter of law. For reasons already stated, I do not think that, on the true construction of the section, an act which in its nature is within the section ceases to be so because it is recklessly or improperly performed, or that mere degree of negligence or impropriety, such as is found in this case, changes the intrinsic character of the act and makes it different in kind.

F In two other cases which have been cited to us this matter is referred to. *Noble v. Southern Railway Co.* (3) was a case where the Workmen's Compensation Act, 1925, s. 1 (2), fell to be considered, but sub-s. (1) was also referred to in its relation to sub-s. (2). LORD MAUGHAM propounded the questions which an arbitrator has to ask himself in dealing with sub-s. (2), but I do not think I need refer to that because, in my view, this is a case which falls to be decided under s. 1 (1) and not under s. 1 (2). LORD PORTER drew a distinction between the two classes of case which arise under this section. He said ([1940] 2 All E.R. 398, 399) :

G The distinction now to be made between cases in which s. 1 (2) is applicable and those in which it is not is perhaps best illustrated by the decision in *Wilsons & Clyde Coal Co. v. M'Ferrin, Kerr v. Dunlop (James) & Co.* (4), in which your Lordships' House considered the cases of two separate workmen, one of whom returned to a shothole in the mistaken belief that a shot which he had fired had exploded, and was injured. In so returning, he was acting contrary to a statutory regulation, but was nevertheless held entitled to recover. The other, who was a miner, coupled an electric cable to a detonator for the purpose of firing a shot. This act was also contrary to a statutory regulation, but, in any case, was no part of the duty of a miner. The first man recovered because the only ground for refusing compensation was that his act was prohibited. The second failed to recover, because, quite apart from the prohibition, he had arrogated to himself the duties of a fireman, which duties were not his, in any case, to perform. Indeed, in the course of the argument before us, both sides accepted the position laid down by VISCOUNT DUNEDIN in *Wilsons & Clyde Coal Co. v. M'Ferrin* (4)—namely, that one ought to disregard the fact that the workman, at the time when he met with his accident, was acting in contravention of a regulation, and to determine, without reference to that fact, whether the accident arose out of and in the course of his employment.

That shows that even in considering a case under sub-s. (2) it is always necessary, in the first instance, to decide whether or not, apart from sub-s. (2), the accident would have been one which arose out of and in the course of the man's employment. LORD PORTER then said (*ibid*, 399) :

No doubt this question may often be a matter of some nicety, and a question of degree. I can imagine an employee ordered to proceed to France at the present day arguing that he was entitled to travel by steamer, or train-ferry, or even by air, but I should not think it permissible for him to cross by row-boat, or to proceed by canoe. Whether, if he had ample time, it would be permissible for him to proceed by sailing boat might be a matter of more doubt.

There is only one other passage in the cases cited to us to which I wish to refer, and that is in the judgment of GODDARD, L.J., in *Seviour v. Somerset Collieries, Ltd.* (5). In that case, GODDARD, L.J., dealing with the test which is to be applied in these cases, said ([1940] 1 All E.R. 656, 657) :

For myself, I find no assistance at all in considering cases merely because they deal with tubs, nor do I find any assistance, or very much assistance, in considering cases which were decided before the alteration of the section in 1923. That remark applies equally to the cases which were decided before *Thomas v. Ocean Coal Co., Ltd.* (6), which is really a landmark in this branch of the law.

He then referred to certain other cases and said (*ibid*, 657) :

... I think those cases lay down one or two principles which, if borne in mind, make this class of cases comparatively simple—much more simple, at any rate, than they were before. I ventured to say, in *Hawker v. Doncaster Amalgamated Collieries, Ltd.* (7) that that case was reasonably clear. What one has to do is to see what the man was employed to do—find what the contract of employment was, and what he was employed to do—and then see whether he was doing something which he was not employed to do at all, or whether he was doing what he was employed to do in a way in which he had been forbidden to do it.

The last few words from that judgment are not applicable in the present case because we are not dealing with a case in which there was any express prohibition, but counsel for the employers says that the award of the county court judge should be upheld because Campbell was doing something which he was not employed to do and not merely doing something which he was employed to do in a wrongful or negligent manner. It is conceded by counsel for the employers that this accident happened in the course of the man's employment, but he argues that it did not arise out of the employment because the act which he was doing was different in kind from that which he was employed to do. I agree that in all these cases it is a question of degree, and that there is a border-line on one side or the other of which each case falls, but, in the view which I take of this case and in view of the facts as set out in the judgment, I think that there is no doubt that this matter clearly falls on one side of the line, and that it is impossible to say that the claim has not been made out. Campbell was going to draw his pay. He was using a method of conveyance of which his employers might not have approved, but I find it impossible to say that he was doing something which rendered his whole journey of a different nature from what it would have been if he had been proceeding on foot or on a bicycle, or if he had got into a stationary lorry which was waiting for him when he left the ship. In my opinion, he was using a method of conveyance in, no doubt, a dangerous and negligent manner, but his act did not render his journey different in kind from that which it would have been if he had been using some safer method. For these reasons I think that the appeal succeeds.

EVERSHED, L.J. : I agree. The question resolves itself into this : Was Campbell's act in jumping on the lorry on his way to the pay office one so beyond the contemplation of the contract that it was different in kind from the work he was engaged to do—that the act and the subsequent accident were taken out of the sphere of his employment ? If the county court judge had found that the act of jumping on the lorry was so irrational and acrobatic as to be outside the contemplation of the contract, or if he had found that the claimant had failed to prove the contrary—and on the evidence he might, I think, have so found—we in this court would not have disturbed that finding. Counsel for the employers has argued that the proper view of the judgment is that the former of the two alternatives I have posed was the conclusion of the county court judge. I have reached the view that that contention is not right. As I read

his judgment, the county court judge has laid no emphasis on the particular object in view. He has not suggested that the workman, by jumping on the lorry, was not seeking to pursue his object of getting his pay. It seems to me that the fair and only proper reading of the judgment is that the county court judge thought, having regard to the time which remained to the workman and the distance, that to take advantage of the "lift" which was offered was in itself—whether or not having regard also to the risk of jumping on a moving vehicle—outside the contemplation of the contract, and, as such, a sufficient deviation from the normal course of the employment, so that the test which he applied from LORD WRIGHT's *dictum* resulted in a conclusion adverse to the claimant. If that is the right view of the judgment, I am of the opinion that the county court judge misdirected himself as a matter of law.

MACNAGHTEN, J.: I am of the same opinion. It is not disputed that it was in the course of the deceased's employment that he left the ship in which he was working in the Bute East Dock to go to the pay office to receive his pay, and that under the contract between him and his employers the time spent in taking that journey was included in the time for which he was to be paid. The action which led to his death was not that of jumping on the lorry. His death was due to the fact that, after he had got on the lorry, it swerved to avoid a collision with another lorry, and came so close to some trucks on its near side that the deceased was crushed between the trucks and the lorry. In my opinion, there was no evidence on which the county court judge could find that there was any deviation by the deceased from the journey which he had set out to take from the ship at which he was working to the pay office where he was to receive his pay. The accident, therefore, arose out of and in the course of his employment.

Appeal allowed with costs.

Solicitors: *Bell, Brodrick and Gray*, agents for *Buchanan, Giles & Evans*, Cardiff (for the workman); *Theodore Goddard & Co.*, agents for *T. S. Edwards & Son*, Newport, Mon. (for the employers).

[*Reported by R. L. ZIAR, Esq., Barrister-at-Law.*]

BRANCA v. COBARRO.

[COURT OF APPEAL (Lord Greene, M.R., Tucker and Asquith, L.JJ.), May 21, 22, 1947.]

Sale of Land—Agreement for sale—"Provisional" agreement "until" formal agreement executed—Whether immediately binding.

By an agreement dated July 15, 1946, the vendor agreed to sell the lease and goodwill of a mushroom farm for £5,000, payable as follows:—a deposit of £500 on July 15, 1946, £2,500 on July 18, 1946, and the balance within six months from the date of the agreement. In the event of default by the purchaser in the conditions of payment the farm was to "go back" to the vendor "as his full property" and the purchaser was to have no claim in the £3,000 already paid. The agreement concluded: "This is a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed":

HELD: the language of the final clause, and more especially the word "until," implied that the agreement was intended to be immediately fully binding and to remain so unless and until superseded by a subsequent agreement of the same tenor but expressed in a more precise and formal language.

[EDITORIAL NOTE.] The case under the Companies Act, 1900, to which ASQUITH, L.J., refers, would appear to be *Re "Otto" Electrical Manufacturing Co. (1905) Ltd.* [1906] 2 Ch. 390).

AS TO AGREEMENTS CONTEMPLATING EXECUTION OF MORE FORMAL DOCUMENT, see HALSBURY, Hailsham Edn., Vol. 29, p. 237, para. 321; and FOR CASES, see DIGEST, Vol. 12, pp. 83-89, Nos. 490-546.]

APPEAL from DENNING, J.

In an action by the purchaser for the return of the deposit money paid by him in connection with the purchase of a farm, DENNING, J., construing the word

"provisional" in the agreement as "tentative," ordered the return of the deposit money. The vendor appealed.

W. A. Fearnley-Whittingstall and P. Zeigler for the vendor.

E. N. Winterbotham for the purchaser.

LORD GREENE, M.R.: This case raises the familiar question whether an informal document constitutes a contract or whether it is evidence of mere negotiation in contemplation of a contract coming into existence at some future date.

The purchaser sues for the return of £500 which he paid as a so-called deposit on account of the purchase price of a mushroom farm. The document which has given rise to the question is dated July 15, 1946, and is signed by both parties in the presence of a witness. I will read the whole document :

Jose Cobarro Yelo, of "Martyns," Langley Lane, Crawley, agrees to sell to Alfredo Branca, of 71, Walsingham Gardens, Ewell, Surrey, the lease and goodwill of the mushroom farm known as "Martyns," Ifield, near Crawley, and all the appliances of his property for the said business at present there, for the sum of £5,000. Alfredo Branca undertakes to pay the above mentioned sum of £5,000 sterling as follows:—£500 deposit on July 15, 1946; £2,500 cash on Thursday, July 18, 1946; and the remaining £2,000 within six months' time as from today. In the event of Alfredo Branca's default of the conditions of payment the farm, goodwill and appliances above mentioned go back to Jose Cobarro as his full property. In this case of default by Alfredo Branca, he will have no claim on the £3,000 already paid to Jose Cobarro.

Now come the words that give rise to the question :

This is a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed.

The £500 was paid, but on a date not precisely ascertained, either July 18 or 19, the purchaser repudiated the bargain and he now demands the return of his £500.

There are one or two preliminary points to which I may refer about this document. First, it is expressed as an agreement. The provision for payment by the purchaser is worded in this way: "Alfredo Branca undertakes to pay," and in the concluding clause the word "agreement" is used to describe the document. It is perfectly true that words such as "agree" are by no means conclusive of the question whether the parties were intending a contract or had only arrived at a state of negotiation. Too much weight must not be attached, therefore, to the words I have mentioned, but I think that in the particular context of this document they are not without importance.

One other matter is that the terms of payment were £500 on July 15—i.e., the date when the document was signed—and £2,500 cash on July 18. Though this is a small point and I do not attach too much importance to it, it is, I think, consistent with the view that I take as to the construction of this document. July 18 was the date on which a large sum of money, £2,500, was to be paid. Of course, the parties may have contemplated, as counsel for the purchaser contends, that what they call "a fully legalised agreement drawn up by a solicitor" would have been prepared, agreed and signed before July 18. If that were not done and if the purchaser did not pay the £2,500, the fully legalised agreement could not contain all the terms of this document. It would have to be something different. They may have contemplated that the whole thing could be done in three days, but one would have thought that even these gentlemen might have hesitated before coming to such a conclusion. That is only an indication, but it does throw, I think, some little light on the intention of the parties. The decision must turn on the last paragraph and, in my opinion, that last paragraph does not indicate that the drawing up and signature of a formal document was to be a condition of there coming into existence a binding contract.

Down to the end of the paragraph preceding the final paragraph there can be no question that the document is a contract. If that final paragraph had not been there, no question could have been raised about it. The sole question is whether that paragraph introduces an element which destroys any contractual efficacy in the rest of the document. It is in rather an unusual form: "This is a provisional agreement until..." That the parties contemplated and wished that there should be what they call "a fully legalised agreement" drawn up

A and signed is clear, but the first thing to notice about these words is that they are not expressive of a condition or stipulation to that effect. The familiar words "subject to contract" and many other forms of words that one has come across in this class of case are words of condition, but these are not words of condition or stipulation. The word "until" in this context, to my mind, clearly means that what is called "a provisional agreement" is going to have some efficacy until a certain event happens. The efficacy of the document is not made in any sense conditional on the happening of that event. The event puts a term to the operation of what is described as "a provisional agreement" and it is noticeable that the parties describe the thing which is to have that operation until that event happens as "an agreement."

B Counsel for the purchaser says: "You must not attach too much importance to the word 'agreement,'" and I have already expressed my agreement with that proposition, but it is significant that in this very clause, which is supposed to negative the existence of an agreement, the parties have chosen to use the word "agreement," an agreement which is to have some operation until a certain event happens. If this paragraph is read in its ordinary meaning, if that event does not happen, the document will continue to have for an indefinite period the operation which the parties are giving to it. In other words, the happening of the event, *viz.*, the drawing up of the fully legalised agreement, is not a condition of the operation of this document. On the contrary, it is something which, when it happens, will bring to an end a document which the parties clearly treat as being an operative document. I have used the word "operative" deliberately as a neutral word. The words "fully legalised agreement" must, I think, mean, and I do not think it is disputed, what we generally call a formal agreement. It is an argument which has got to embody "all the conditions herewith stated." No other terms or conditions are to appear in that fully legalised agreement.

D DENNING, J., decided this case on the construction which he gave to the word "provisional." He said that, in his opinion, it meant "tentative." With the greatest deference, "tentative" is not, I should have thought, the meaning in ordinary English of "provisional." It certainly is not the meaning that is to be found in the Oxford Dictionary, and I should have thought that in this context to change the word "provisional" and substitute "tentative" would be introducing something which is really not contained in "provisional." The idea expressed by "tentative" is something quite different with all respect from that expressed by "provisional." The ordinary meaning of "provisional" is something which is going to operate until something else happens. If I am right that these words are intended to show that the parties regarded themselves as entering into an agreement which was to last only until something else took its place or superseded it, the word "provisional" would be the proper and apt word to describe that intention. An agreement which is only to last until it is replaced by a formal document containing the same terms and drawn up by a solicitor could be described by no more apt word than the word "provisional." If the word "provisional" is linked up with the word "until," the whole thing seems to me to fall into shape.

E My reading of this document is that both parties were determined to hold themselves and one another bound. They realised the desirability of a formal document as many contracting parties do, but they were determined that there should be no escape for either of them in the interim period between the signing of this document and the signature of a formal agreement, and they have used words which are exactly apt to produce that result and do not, in my opinion, suggest that the fully legalised agreement is in any sense to be a condition to be fulfilled before the parties are bound, because, as I have said, the word "until" is certainly not the right word to import a condition or a stipulation as to the event referred to. In my judgment, if the parties never signed a fully legalised agreement, the event putting an end to the provisional operation of this agreement would never occur and this document would continue to bind the parties. In the result, with all respect to the learned judge, I take a different view of this document from that which he took for the reasons I have given, and the appeal must be allowed.

H TUCKER, L.J.: I agree with the construction that has been put on this document by the MASTER OF THE ROLLS and for the reasons which he has stated.

I will content myself with saying that the two matters which, I think, turn the scale in favour of the vendor are, first, and most important of all, the use of the word "until" and, secondly, the fact that by this document the sum of £2,500 had to be paid in cash by July 18, 1946, and on the failure of such payment, the £500 would be forfeited. The fact that that might occur at a time when the fully legalised agreement had not been drawn up is, I think, a factor to be taken into consideration. It is worthy of note that these foreign gentlemen, when drawing up this agreement, had it witnessed by a third party. That tends to indicate that they were entering into a formal and binding agreement. I agree that the appeal succeeds. A

ASQUITH, L.J.: I also agree. I do not think the authorities assist much. On any view, the term "provisional," as applied to an agreement, imports some restriction of its efficacy which it would not have possessed in the absence of that epithet. The restriction may simply be a time limit within which the agreement is binding and beyond which it is not to go, or it may be some other sort of condition. This I should have thought was the meaning of "provisional" as applied to an agreement. It is true that in one case cited to us a provisional agreement was held to be an agreement inoperative until a condition precedent had been fulfilled, but there the language of the Companies Act, 1900, was such as to make any other construction impossible. In the present case the language of the material clause in the so-called provisional agreement of July 15, and more especially the word "until," seems to me plainly to imply that that agreement is to be immediately fully binding unless and until superseded by a subsequent agreement of the same tenor, but expressed in more precise and formal language. I agree that this appeal should be allowed. B

Appeal allowed with costs.

Solicitors: *Chapman-Walkers* (for the vendor); *Hughes Minton & Barker* (for the purchaser). D

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re EASTERN TELEGRAPH CO., LTD.

[CHANCERY DIVISION (Jenkins, J.), June 4, 5, 1947.] E

Companies—Winding-up—Compulsory winding-up—Cessation of business—Power to "amalgamate" with company carrying on same business—Share capital acquired by company carrying on same business—Sale of physical assets to third company—Failure of substratum—Winding-up order just and equitable—Compulsory acquisition of shares by Treasury—Companies Act, 1929 (c. 23), s. 168 (3) (6).

A company was incorporated in 1872, and in 1929 its authorised and issued share capital was £7,000,000 divided into £2,000,000 preference stock and £5,000,000 ordinary stock. The objects were, *inter alia*: "The acquiring of the undertakings, telegraph lines, property [etc., of four companies] . . . the establishment of telegraph stations, and, generally, carrying on the business of a telegraph company; . . . the subscribing for and acquiring shares of, or amalgamating with and sharing in the business or undertakings of, any other telegraph company or companies. . . ." In 1929 Cable and Wireless, Ltd. (later called Cable & Wireless (Holding) Ltd.) acquired the ordinary share capital of the company. On Dec. 30, 1929, Imperial and International Communications, Ltd. (later called Cable and Wireless, Ltd.) bought the whole of the physical assets of the company for shares in Imperial and International Communications, Ltd. On Nov. 6, 1946, the Cable and Wireless Act, 1946, became law, providing for the compulsory acquisition by the Treasury of the shares in Cable and Wireless, Ltd. On a petition brought, before the assessment and payment of compensation in respect of the compulsory transfer, by certain preference stockholders for the compulsory winding-up of the company on the grounds that (a) the company had ceased to carry on its business for more than a year, *i.e.*, since 1929, when Imperial and International Communications, Ltd., had acquired the physical assets of the company; (b) that the substratum of the company had gone. F

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A HELD : (i) the case did not fall within the principle that, where the memorandum of association of a company provides that the company has a specific main object followed by general words, the general words should not be construed as enabling the company to throw its main object over altogether and embark on some new venture, but, on the true construction of the memorandum, the transaction carried out in 1929 by which Imperial and International Communications, Ltd., acquired the ordinary share capital of the company was an amalgamation into which the company had power to enter, and, consequently, the company had since continued to carry on one of the main forms of business authorised by the memorandum, because, although not operating a telegraph or cable business itself, it had participated, through the medium of its shareholding, in the proceeds of operation of the business carried on by Cable and Wireless, Ltd. The reference in the memorandum to amalgamation did not constitute general words ancillary to the company's main object, but comprised a specific object ranking on a par with all preceding objects.

B (ii) there had been no failure of the contemplated objects of the company *ab initio*, nor any suggestion that the directors should adventure the money of the company on some object which was not contemplated when the company was formed, nor any confiscation of the property of the company, but the transfer to the Treasury of the shares in Cable and Wireless, Ltd., was a transaction which the company was bound to carry out by the Act of 1946, that transaction was not yet complete, and, in view of the desirability of having the directors act on behalf of the company in the matter of compensation, and the risk of detriment to the company's foreign concessions if a winding-up order were made, it would not be just and equitable, although advantageous to the preference shareholders, for the company immediately to be wound-up on the ground that its substratum was gone, for such a winding-up order would be premature.

Re Baku Consolidated Oilfields, Ltd., [1944] 1 All E.R. 24 distinguished.

[AS TO GROUNDS FOR WINDING UP, see HALSBURY, Hailsham Edn., Vol. 5, pp. 543-548, paras. 882-885; and FOR CASES, see DIGEST, Vol. 10, pp. 817-819, 822-825, Nos. 5326-5334, 5358-5374.]

Cases referred to :

- E** (1) *Re Haven Gold Mining Co.* (1882), 20 Ch.D. 151; 51 L.J.Ch. 242; 46 L.T. 322; 10 Digest 822, 5359.
 (2) *Re German Date Coffee Co.* (1882), 20 Ch.D. 169; 51 L.J.Ch. 564; 46 L.T. 327; 10 Digest 823, 5361.
 (3) *Re Red Rock Gold Mining Co., Ltd.* (1889), 61 L.T. 785; 1 Meg. 436; 10 Digest 823, 5363.
 (4) *Re Baku Consolidated Oilfields, Ltd.*, [1944] 1 All E.R. 24; Digest Supp.
F (5) *Re Kitson & Co., Ltd.*, [1946] 1 All E.R. 435; 175 L.T. 25.
 (6) *Re Amalgamated Syndicate*, [1897] 2 Ch. 600; 66 L.J.Ch. 783; 77 L.T. 431; 4 Mans. 308; 10 Digest 822, 5357.

PETITION by preference stockholders of the Eastern Telegraph Co., Ltd., for the compulsory winding-up of the company on the grounds (1) that the company had ceased to carry on its business for a whole year or more, and (2) that the substratum of the company had gone. The facts appear in the judgment.

G *Harman, K.C.*, and *E. Milner Holland* for the petitioners.

Sir Cyril Radcliffe, K.C., *Gordon Brown* and *Charles Russell* for the company.

JENKINS, J. : This is a petition by certain preference stockholders of the Eastern Telegraph Co., Ltd., for the compulsory winding-up of the company. The petition is supported by holders of preference stock to an aggregate amount of £365,000, or thereabouts, out of a total issue of £2,000,000 of such stock. The grounds on which the compulsory order is sought are two. First, it is said that the company has ceased to carry on its business for a whole year or for more than a year, an allegation which, if substantiated, would make good one of the grounds for compulsory winding-up specifically mentioned in the Companies Act, 1929, s. 168. Secondly, it is said that the *substratum* of the company has gone, an allegation which, if substantiated, might bring the case within that class of cases in which it is just and equitable that the company should be wound-up within the meaning of the same section and having regard to the series of cases commonly known as the *substratum* cases.

The company was incorporated in 1872, and the authorised and issued share capital became, at all times material for the purposes of this case, £7,000,000, divided into £2,000,000 of 3½ per cent. preference stock and £5,000,000 of ordinary stock. Be it noted that, as the preference stock carried a cumulative preference dividend at the fixed rate of 3½ per cent., but (as I propose to assume for the purposes of this case) an unlimited right of participation in assets in a winding-up, the amount receivable by the preference stockholders in the event of a winding up would be proportionate to the assets available, and they would be entitled to go against those assets *pari passu* with the holders of the ordinary stock. Even under present conditions of cheap money, it is fairly obvious that preference stock carrying a rather unusual and hybrid right of that character, with a fixed dividend as low as 3½ per cent. and unlimited rights of participation in assets, might, should the break-up value of the assets be anything substantially over the nominal amount of the issued capital, be much more valuable, as one might say, dead than alive, or, in other words, much more valuable in a winding-up than it would be if the company continued to exist. Therefore, one can appreciate that it might well be greatly to the advantage of the holders of the preference stock to procure an immediate winding-up of the company and division of its assets.

I must now refer to the objects clause in the memorandum of association of the company. In 1872 it was not customary to draft object clauses in the ample, not to say diffuse, form which has since become the rule, and the objects were, therefore, relatively concisely expressed, and it is practicable for me to read them *in extenso* :

The objects for which the company is established are : The acquiring of the undertakings, telegraph lines, property, privileges, effects, obligations, and liabilities of the following four companies, namely, the Anglo-Mediterranean Telegraph Co., Ltd., the British Indian Submarine Telegraph Co., Ltd., the Falmouth, Gibraltar and Malta Telegraph Co., Ltd., and the Marseilles, Algiers and Malta Telegraph Co., Ltd., and, subject to the previous sanction of an extraordinary general meeting, of any other telegraph company or persons whose lines of telegraph may, in the opinion of the company, be conveniently worked in connection or alliance with any lines of the company ; the working, maintaining, renewing, leasing, selling and dealing with the lines of telegraph from time to time belonging to or in the possession of the company ; the contracting for, constructing, acquiring, leasing, or taking on lease, maintaining, selling, dealing with, and working any lines of telegraph whatsoever, which the company from time to time determine to contract for, construct, acquire, lease, or take on lease, sell, deal with, or work ; the establishment of telegraph stations, and, generally, carrying on the business of a telegraph company ; the applying for, acquiring, selling, leasing, using, and disposing of such lands, telegraph lines, vessels, concessions, leases, privileges, licences, and letters patent, and any shares or interest therein respectively, as may be useful or desirable for the purposes aforesaid, or any of them ; the doing of all or any of those matters or things in conjunction with any other company or person ; the registration or constitution of the company abroad as a *societe anonyme* or otherwise ; the subscribing for and acquiring shares of, or amalgamating with and sharing in the business or undertakings of, any other telegraph company or companies, and the making and carrying into effect of working, traffic and other agreements with governments, railway, postal, steamboat, telegraph, and other companies and authorities, and the doing of all such other things as are incidental or conducive to the attainment of the above objects.

It should be noted that this objects clause concludes with a general provision as to "the doing of all such other things as are incidental or conducive to the attainment of the above objects," and that, while the earlier part of the objects contemplates that the company will itself operate telegraph installations, the latter part clearly provides that the company may amalgamate with any other telegraph company or companies and subscribe for and acquire the shares of any telegraph company or companies.

In 1928, or thereabouts, there was an Imperial Conference on the subject of telecommunication, and as a result a scheme, dated May 14, 1929, for merger between the company and other companies was evolved. That scheme provided for the acquisition by a new company, which had been formed in the previous April under the name of Cable and Wireless, Ltd., of substantially the whole of the ordinary share capital of the company, the Eastern Extension Australasia & China Telegraph Co., Ltd., and the Western Telegraph Co., Ltd., and also the preference and ordinary shares of Marconi's Wireless Telegraph Co., Ltd. It will be noted that the preference stock of the company was not brought

A into this arrangement. The plan was duly implemented and the company then known as Cable and Wireless, Ltd., became the holder of substantially all the ordinary stock of the company and also of substantially all the share capital of the other three companies which I have mentioned. That plan necessitated certain consequential alterations in the articles of association of the company, and the articles dealing with the directorate were altered so as to ensure the identity of the personnel of the board of the various companies in the merged group of companies. The position, therefore, was that, as a result of the plan, Cable & Wireless, Ltd., controlled these four companies, including the company with which the present petition is concerned, from June 27, 1929.

B On Apr. 8, 1929, a new company called Imperial & International Communications, Ltd., had been formed, and on Dec. 30, 1929, that company entered into an agreement with the company for the acquisition, broadly speaking, of the whole of the physical assets of the company for shares in Imperial and International Communications, Ltd. Clause 18 of this agreement provided :

C On completion of the sale and purchase (a) the cable company shall covenant with the communications company that it will not at any time thereafter directly or indirectly carry on or (except as a member of the communications company) be concerned or interested in any business of any kind which the communications company is by its present memorandum of association empowered to carry on except (1) (so long as the cable company holds the same) to the extent of the cable company's present investments in present or future telegraph or wireless telegraph companies as the communications company may with the consent of the latter company's advisory committee sanction in writing ; and except (2) as in this agreement otherwise provided.

D That agreement was duly carried out, so that instead of the physical assets comprised in it, the company as from the date of completion held 10,626,601 fully paid ordinary shares of £1 each in the communications company, as it was called in the agreement, i.e., in Imperial & International Communications, Ltd. In addition to holding those shares as beneficial owner, it continued to have vested in it various assets which, owing to conveyancing or legal difficulties, could not conveniently be transferred. The effect of the agreement was to convert the company from an operating telegraph and cable company into a company holding shares in an operating company with like objects, formed by the fusion of the undertakings of the company and of the other companies in the group.

E When one looks at the balance sheet and accounts of the company from that time on one finds that its operations were very much what one would expect in the case of a holding company. There is no sign, nor is it, I think, to be expected that there would be any sign, of any telegraph operations by the company on its own behalf. It would have been in breach of the agreement if it had continued to operate as a telegraph company. Nor is there any sign F in the accounts of the carrying on by the company for the purchasing company's account of the excepted parts of its business. That does not seem to me to be in the least surprising, because it would be carrying on such business, not for its own benefit, but for the benefit of its purchaser. If the assets in question had been shown as assets in the balance sheet of the company that would have been simply misleading unless the entry on the assets side was balanced by a precisely similar entry on the other side of the account, which would seem to me to have led simply to a duplication of entries which would serve no useful purpose.

J The merger transaction and sale to Imperial & International Communications, Ltd., which formed part of the scheme which I have now briefly described, is obviously a transaction which was widely canvassed and carefully considered, and it was one of great public importance and public interest. It was carried out in the way that I have described, so far as I am aware, without objection I on anybody's part, and the company remained in existence and carried on as a holding company for upwards of 17 years thereafter. The upshot of all the transactions seems to have been that the company which was originally known as Cable & Wireless, Ltd., but which changed its name in 1932 to Cable & Wireless (Holding), Ltd., became the holder of substantially the whole of the share capital—excepting always the preference stock of the company—of the company, the Eastern Extension Company, the Western Company, and, through Eastern and Western respectively, of one subsidiary of Eastern, two subsidiaries of

Western and one subsidiary which was apparently controlled in equal proportions by Eastern and Western. These companies were all, in effect, holding companies whose principal asset—apart from what is not related at all to the telegraph business, that is to say, ordinary investments—consisted of holdings of shares in Imperial and International Communications, Ltd., whose name was afterwards changed to Cable and Wireless, Ltd.

On Nov. 6, 1946, the Cable and Wireless Act, 1946, became law. That was an Act to provide for the nationalisation of the imperial telecommunications system. It provided by s. 1:

(1) On the appointed day all the shares of Cable and Wireless Ltd. (hereafter in this Act referred to as "the operating company") other than shares already held on behalf of the Treasury shall, by virtue of this section, be transferred, free of all trusts, liabilities and incumbrances, to such persons respectively as the Treasury may by order nominate, to be held by those persons on behalf of the Treasury. (2) Compensation for the transfer of the said shares shall be made to the companies mentioned in schedule I to this Act (which companies on Apr. 18, 1946, held between them all the said shares and respectively held the number of shares specified in the second column of that schedule) and shall, in the case of each company, be satisfied—(a) by the issue to the company of such amount of government stock as is, in the opinion of the Treasury, of a value equal, on the date of the issue, to the amount of the company's compensation having due regard to market values of other government securities existing at such date; and (b) by the payment to the company of a sum by way of interest on the amount of the company's compensation for the period beginning with the appointed day and ending immediately before the date of issue of the said stock at such rate or rates as the Treasury may determine in relation to that period or different parts thereof.

It is plain that the effect of that Act was to sever compulsorily for good and all the connection of the company with the business of cables and telecommunications, with which it had been previously concerned. It was a compulsory acquisition of the shares of Cable & Wireless, a transaction enjoined by Act of Parliament, and, therefore, a transaction which the company was bound by law to carry out. The position now is that the shares in Cable & Wireless have all been transferred to the Treasury or its nominees, but the compensation to be paid or provided in the form of government stock and divided among the constituent companies, if I may so describe them, remains to be assessed. There is evidence, which I accept, that the business carried on by the company in Portugal and concessions from and agreements with the Portuguese Government, which were not conveyed under the sale agreement of 1929, are still vested in the company. It is said that it has not proved practicable to obtain the necessary consent for transfer, and it is also said in evidence, and I have no doubt genuinely believed, although it is not a matter, as far as I can see, that is susceptible of proof, that the winding-up of the company might jeopardise the position in Portugal as the government concerned might take that event as a pretext for revoking the concession or insisting on less advantageous terms.

The allegation that the company has ceased to carry on its business for more than a year, that is to say, since 1929, depends entirely on the agreement of Dec. 30, 1929, under which Imperial & International Communications, Ltd., acquired the physical assets of the company. It is said that from and after the completion of that sale, the company ceased to carry on its business. Obviously, it could not be said absolutely that the company ceased to carry on any business, because it continued in business as a holding company, but it is contended that on the true construction of the memorandum of association of the company, while it had power to subscribe for shares in other similar companies and to effect amalgamations, it could not do these things except as subsidiary to the objects relating to the operation of telegraph services, and so forth, stated earlier in the memorandum, and if it did so otherwise than in a manner ancillary to those objects, although it would not be acting *ultra vires* and would be doing something that it had power to do under its objects clause, it would bring about a state of affairs in which it would be obliged to go into voluntary liquidation. That is an argument which I have some difficulty in following. To my mind, the question whether the company ceased in consequence of the 1929 sale agreement to carry on its business must depend on the true construction of the memorandum of association. If one finds in the memorandum of association, fairly construed, power to do that which was done under the 1929 sale agreement, then it seems to me that the company has certainly

continued to carry on its business ever since, albeit in a different way from the way in which its business had previously been carried on or, putting it rather differently, albeit with the substitution of one for another of the various forms of business contemplated by the memorandum. It will be remembered that the memorandum contains this passage :

A the subscribing for and acquiring shares of, or amalgamating with and sharing in the business or undertakings of, any other telegraph company or companies, and the making and carrying into effect of working, traffic and other agreements . . .

B So, it says expressly that the company may subscribe for shares of or amalgamate with other telegraph companies. It seems to me that the transaction carried out by the sale agreement of 1929 in conjunction with the arrangements made with the other telegraph companies in the group was exactly an amalgamation. That is a perfectly accurate description of it, and the company carried it out by acquiring shares of the communications company in exchange for its physical assets, the upshot of the whole transaction being that, instead of operating a telegraph or cable business itself, it participated, through the medium of its shareholding, in the proceeds of operation of a business carried on by the communications company, which combined the undertakings of the companies in the group. In those circumstances, I am unable to hold that the company ceased to carry on its business in 1929. It continued to carry on one of the

C businesses, and one of the main businesses or of the main forms of business, authorised by the memorandum by virtue of its holding of shares in the amalgamated concern. I appreciate that it has been laid down in various cases that where a company has a specific main object followed by general words, the general words should not be construed as enabling the company to throw its main object over altogether and embark on some fresh venture on the strength of the general words, but I do not think that any such difficulty arises here. I do not see why the object which comprises amalgamation should not rank on a par with all the other objects which have preceded it, simply as a matter of construction. Furthermore, I fail to see how an amalgamation properly so called could be effective in conjunction with the continued operation by the company of a telegraph undertaking. In that case there would not have been an amalgamation properly so called. There would have been only some partial amalgamation of some part of the company's business. In my judgment, therefore, the first of the grounds on which an order is sought cannot be supported.

E The second ground is that it is just and equitable that the company should be wound-up because its *substratum* has gone. On this branch of the case I was referred to a number of authorities. I do not think that I need refer to them in any detail. The first was the well-known case of *Re Haven Gold Mining Company* (1) (20 Ch.D. 151). The principle laid down by that case is, I think, sufficiently stated in the first paragraph of the headnote :

F Where the court is satisfied that the subject-matter of the business for which a company was formed has substantially ceased to exist, it will make an order for winding-up the company, although the large majority of the shareholders desire to continue to carry on the company.

G That, I take it, means that, if a shareholder has invested his money in the shares of the company on the footing that it is going to carry out some particular object, he cannot be forced against his will by the votes of his fellow shareholders to continue to adventure his money on some quite different project or speculation. It is a matter on which the individual consent of every person who will be effected by the change of plan ought to be obtained. In *Re German Date Coffee Company* (2) the main object of the company was to exploit a German patent H for making coffee from dates and the patent was never obtained. It was held, accordingly, that the *substratum* of the company had failed, and that it was impossible to carry out the objects for which it was formed. Consequently, it was just and equitable that the company should be wound-up. In the course of the case the limitations placed on general words describing the objects of the company were considered, and I think that the upshot of the discussion was broadly as I have already stated. In *Re Red Rock Gold Mining Company, Ltd.* (3) a company had been formed to purchase and work the Red Rock Mine. The headnote says (61 L.T. 785) :

There were further objects mentioned in the memorandum, namely, to purchase and otherwise acquire mines and other properties in the colony of New South Wales and elsewhere, and generally to carry on the business of milling and mining in all its branches.

In the following year the directors reported to the shareholders that the Red Rock Mine was a failure, and that the company must either go into liquidation or employ the unexpended capital in other ways. At a meeting of shareholders the majority passed a resolution requesting the directors to find some suitable mode of investing the money, and the court held, following *Re Haven Gold Mining Co.* (1) and *Re German Date Coffee Co.* (2) that the main object for which the company was formed had failed, and that, although there were large subsidiary powers in the memorandum of association, there must be a winding-up order. KAY, J., thus stated the principle (61 L.T. 787):

The principle of this court is, that where an association is formed for a particular purpose, it does not matter that it has large powers in addition to that particular purpose; if that particular purpose fails, any shareholder has a right to say "Put an end to it, pay me my money."

Re Baku Oilfields, Ltd. (4) was a case of a company formed to acquire the undertakings of four other companies carrying on an oil business in Russia. The headnote says ([1944] 1 All E.R. 24):

Before the undertakings could be acquired, they were confiscated and since 1920 the company had been engaged in an endeavour to substantiate a claim against the government in Russia. It had not otherwise carried on any business and had considerable assets:—Held: in the circumstances the whole substratum of the company had gone and a compulsory order ought to be made. Such claim as the company had against the authorities in Russia could be equally well enforced by a liquidator.

It was clear in that case, and BENNETT, J., held, that the purpose for which the company was originally formed was gone. *Prima facie* there was a case for a winding-up order. The order was resisted on the ground that the claim against the Russian government might be prejudicially affected by a winding-up. The judge held that that had not been made out, and he made the order. *Re Baku Oilfields, Ltd.* (4) was cited, not only on the general question of *substratum*, but also as regards the effect or possible effect of a liquidation in the present case on the Portuguese and other concessions. It was said that, if the liquidation of the company in *Re Baku Oilfields, Ltd.* (4) was thought not to prejudice any possible claim against the Russian government, therefore, by parity of reasoning, the liquidation of the company in this case could not be said to be likely to prejudice the position in regard to the Portuguese concession. It seems to me that the two cases are entirely different. *Re Baku Oilfields, Ltd.* (4) was a case of an alleged accrued right to damages, or something of the kind, and a right such as that could, no doubt, be pursued as well by a liquidator or by the company in liquidation as it could be by a company which was a going concern. I completely fail to see how one can adduce from that that the position in regard to the foreign concessions here would not be prejudiced if a winding-up supervened.

In *Re Kitson & Co., Ltd.* (5), the question was whether the *substratum* of the company had gone. On a consideration of the memorandum and on the facts of that particular case it was held by the Court of Appeal that the *substratum* had not gone. In the course of his judgment, LORD GREENE, M.R., said ([1946] 1 All E.R. 438):

It must be remembered in these *substratum* cases that there is every difference between a company which on the true construction of its memorandum is formed for the paramount purpose of dealing with some specific subject-matter and a company which is formed with wider and more comprehensive objects.

He goes on to state how the memorandum should be construed in a case of that sort. Finally, I was referred on behalf of the company to *Re Amalgamated Syndicate* (6), which dealt with a company the principal object of which was an adventure in seats for the Diamond Jubilee. After the Jubilee there was a shareholders' petition for a winding-up order on the ground that the whole of the syndicate's *substratum* had gone. It was held in the circumstances of that case that it was just and equitable that the company should be wound-up. In the course of the judgment, VAUGHAN WILLIAMS, J. ([1897] 2 Ch. 604) said:

I do not think the court could, or would if it could, make a winding-up order merely

because there was nothing left to be done besides dividing the surplus assets and adjusting the rights of the shareholders. But it is said that it is "just and equitable" that the court should in this particular case take upon itself to wind-up the company, because the principal business which the company was formed to carry on has come to an end, and the directors, instead of setting about to divide the assets, are contemplating entering on fresh business.

The judge came to the conclusion that there was sufficient ground for making the order.

The cases to which I have been referred to do nothing more than enunciate the well-settled principles that it is in general just and equitable that a company should be wound-up when its *substratum* is shown to have gone, and that the question whether the *substratum* of a company has gone or not is one which depends, or may depend, on the construction of the memorandum of association. I should add that I do not think that any of the principles of construction which these cases enunciate displaces the conclusion at which I have arrived as regards the construction of the memorandum of association in this case in relation to the petitioners' first ground for claiming a winding-up order.

It is plain that the result of the Act of 1946 was to put an end entirely to the company's connection with the business or businesses with a view to carrying on which it was formed. Its only connection with those businesses now is that it still has vested in it all or some of the assets not conveyed under the 1929 sale agreement. The question is whether it necessarily follows that a case has been made out for an immediate order for the compulsory winding-up of the company. It is material to remember that in the present case there is no allegation of any improper conduct. There is no allegation that the directors are going to adventure the moneys of the company on some speculative undertaking of which nobody ever thought when the company was formed or when the shares were subscribed for. It is not a case of the contemplated object failing *ab initio*, nor is it a case of confiscation of a foreign concession, or discovery that a believed title to property abroad had no existence. The company here has been expropriated on terms of receiving compensation by a supervening act of the legislature. That was an event to which the company had necessarily to bow. It had no option but to comply with the terms of the Act.

When the compulsory acquisition has been finally completed, and the compensation has been assessed and received, it may be that difficult questions will arise as to the company's future, whether it should be wound-up or whether, owing to difficulties about some of the foreign concessions, and so on, it should be kept in existence with some suitable scheme of arrangement to dispose of the capital in excess of its wants, and so forth, but the question before me is whether it is just and equitable that a compulsory winding-up order should be made today in the circumstances which exist at present.

As I have said, this statutory transaction was obviously one which by force of the statute the company was entitled and bound to carry out. The Act certainly contemplated that it would carry it out, and by implication empowered it to carry it out. That transaction is not yet complete. The compensation has to be assessed and received. The amount of compensation is a matter of great importance, and it is obviously desirable in everybody's interests—both in the interests of the preference stockholders and of the ordinary stockholders—that the company's case as to the amount of compensation should be cogently and effectively put in order that the compensation received may be as large as possible. It seems to me that the proper people to look after that matter are the directors of the company, who are directors also of all the other companies in the group, and who are well acquainted with the undertaking of Cable and Wireless, Ltd. It seems to me that it would be wrong at this juncture to make a compulsory order which would have the effect of removing them from office, and which would bring in a liquidator who, capable and expert as he might be, would not have the same knowledge as the directors have. Furthermore, it seems to me that a great detriment might ensue if the company were wound-up, on account of the foreign concessions which it still holds. That is a matter which is stated in evidence to be one that is causing anxiety. I have no reason to regard the anxiety as being otherwise than *bona fide*, and it seems to me that it may be well founded. Therefore, whatever the position may be after the government stock has been issued, and after the outstanding foreign concessions

have been got in by Cable & Wireless, Ltd., it does seem to me that, as the matter stands at present, the compulsory order would be premature.

Counsel for the petitioners challenges that view, and contends that, owing to the particular rights attached to the preference stock, it would be inequitable to the preference stockholders to delay the winding-up for one moment, because so long as the company goes on, dividends can be paid, the preference stockholders can get only $3\frac{1}{2}$ per cent., and the directors will be quite in order in distributing the balance of the profits among the ordinary stockholders. With respect to counsel, it does not seem to me that that is really a ground for holding that a compulsory order ought to be made. No doubt, it provides the motive for presenting the petition, but it seems to me that one has to decide from the point of view of the general body of corporators—and I think also from the point of view of those to whom the company is under obligations, such as the obligations with regard to foreign concessions—whether a position has been reached in which it is just and equitable that the order should be made. It would, no doubt, be advantageous to the preference stockholders in this case, but the preference stockholders have no monopoly of equity. Here, again, I think it should be borne in mind that this is a case of expropriation by a supervening act of legislature. If this act of nationalisation had not supervened, there is no reason to suppose that the company would not have continued indefinitely as a holding company until such time as the ordinary stockholders, who have a monopoly of the voting rights, might choose to have it wound-up, and so long as it continued the preference stockholders would get $3\frac{1}{2}$ per cent. only and the ordinary stockholders the balance of the divisible profits. I do not see why the fact that this compulsory acquisition for the purpose of nationalisation has supervened should be regarded as giving the preference stockholders an equity to compel an immediate winding-up of the company in order that they may secure for themselves a windfall which they would not have obtained in any foreseeable period of time if the Act had not been passed.

For all these reasons, while saying and deciding nothing about the position as it may be after the government stock has been issued and the various concessions now remaining vested in the company have been got in, it seems to me that at the present time this petition is premature, and that it fails and should be dismissed with costs.

Petition dismissed with costs.

Solicitors : *Rubinstein, Nash & Co.* (for the petitioners) ; *Linklaters & Paines* (for the company).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

DE RENEVILLE (COMTESSE) (otherwise SHERIDAN) v. DE RENEVILLE (COMTE).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Jones, J.), May 20, 22, 1947.]

Divorce—Nullity—Jurisdiction—Domicil—Marriage in France—Petitioner born in England of English parents, and resident in England when petition presented—Respondent domiciled and resident in France.

In a suit brought by a wife for the dissolution of her marriage on the ground of non-consummation owing to the incapacity or wilful refusal of the husband, the husband entered an appearance under protest against the jurisdiction of the court. The wife was born in England, of English parents, and was now resident in England, but the husband, a Frenchman, was domiciled in France and had resided there at all material times. The marriage had taken place in Paris in 1935 and until 1939, except for a few months, the parties had resided together in France :—

HELD : (i) since the wife had married the husband in France and had lived with him there, she had acquired his domicil by the marriage ; as she was seeking to have the marriage annulled on the ground of non-consummation, the marriage was merely voidable and not void, and, until a decree had been pronounced, the parties had the status of married people ; and, therefore, since the marriage was still subsisting, the wife had never

lost the husband's domicile and she was not domiciled within the jurisdiction of the court.

Turner v. Thompson (1888) (13 P.D. 37) *followed*. *Fowke v. Fowke* ([1938] 2 All E.R. 638) and *Adams v. Adams* ([1941] 1 All E.R. 334) *applied*. *Stathatos v. Stathatos* ([1913] P. 46) and *De Montaigu v. De Montaigu* ([1913] P. 154) *distinguished*.

(ii) the husband being domiciled and resident abroad and there being no special circumstances or hardship, the court had no jurisdiction to entertain the suit even though the wife was resident within the jurisdiction.

Roberts v. Brennan ([1902] P. 143) *discussed*. *White* (otherwise *Bennett*) v. *White* ([1937] 1 All E.R. 708) *distinguished*. *Robert* (otherwise *De La Mare*) v. *Robert* ([1947] 2 All E.R. 23) *not followed*.

[AS TO VOIDABLE MARRIAGES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 640, 641, para. 937; and FOR CASES, see DIGEST, Vol. 27, pp. 265, 266, Nos. 2326-2338.

AS TO JURISDICTION OF ENGLISH COURTS IN NULLITY SUITS, see HALSBURY, Hailsham Edn., Vol. 6, p. 303, para. 357; and FOR CASES, see DIGEST, Vol. 11, p. 428, Nos. 924-926, and Supplement.]

Cases referred to :

- (1) *Turner v. Thompson* (1888), 13 P.D. 37; 58 L.T. 387; 52 J.P. 151; 11 Digest 332, 214.
- (2) *Salvesen (or von Lorange) v. Austrian Property Administrator*, [1927] A.C. 641; 96 L.J.P.C. 105; 137 L.T. 571; Digest Supp.
- (3) *Newbould v. A.-G.*, [1931] P. 75; 100 L.J.P. 54; 144 L.T. 728; Digest Supp.
- (4) *Fowke v. Fowke*, [1938] 2 All E.R. 638; [1938] Ch. 774; 107 L.J.Ch. 350; 159 L.T. 8; Digest Supp.
- (5) *Adams v. Adams*, [1941] 1 All E.R. 334; [1941] 1 K.B. 536; 110 L.J.K.B. 241; 165 L.T. 15; Digest Supp.
- (6) *Stathatos v. Stathatos*, [1913] P. 46; 82 L.J.P. 34; 107 L.T. 592; 11 Digest 425, 905.
- (7) *De Montaigu v. De Montaigu*, [1913] P. 154; 82 L.J.P. 125; 109 L.T. 79; 11 Digest 425, 906.
- (8) *White* (otherwise *Bennett*) v. *White*, [1937] P. 111; [1937] 1 All E.R. 708; 106 L.J.P. 49; 156 L.T. 422; Digest Supp.
- (9) *Robert* (otherwise *De La Mare*) v. *Robert*, [1947] 2 All E.R. 22.
- (10) *Roberts v. Brennan*, [1902] P. 143; 71 L.J.P. 74; *sub nom. Brennan* (otherwise *Roberts*) v. *Brennan*, 86 L.T. 599; 18 T.L.R. 467; 11 Digest 428, 926.
- (11) *Niboyet v. Niboyet* (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 11 Digest 423, 894.
- (12) *Graham v. Graham*, [1923] P. 31; 92 L.J.P. 26; 128 L.T. 639; 27 Digest 392, 3867.
- (13) *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest 422, 885.
- (14) *Hutter v. Hutter* (otherwise *Perry*), [1944] 2 All E.R. 368; [1944] P. 95; 113 L.J.P. 78; 171 L.T. 241; Digest Supp.
- (15) *Easterbrook v. Easterbrook* (otherwise *Jervis*), [1944] 1 All E.R. 90; [1944] P. 10; 113 L.J.P. 17; 170 L.T. 26; Digest Supp.

PRELIMINARY ISSUE on an application by the husband (the respondent) to determine whether the court had jurisdiction to entertain a suit brought by the wife for the nullity of the marriage on the ground of the incapacity or wilful refusal of the husband to consummate it. The wife was born in England of English parents and was now residing in England, but the parties were married in France and the husband, a Frenchman, was domiciled in France and had resided there at all material times. The facts appear in the judgment.

Karminski, K.C., and *Victor Russell* for the wife.

R. J. A. Temple for the husband.

JONES, J. : In the suit in which this issue has been directed the petitioner is the wife, and she prays that the marriage be declared null and void on the ground that it has not been consummated owing to the incapacity or wilful refusal of the husband to consummate it. The husband at first entered a general appearance on July 15, 1946, but, pursuant to an order dated Aug. 27, 1946, his appearance was amended on Aug. 30, 1946, to an appearance under protest to the jurisdiction on the ground that the court has no jurisdiction to entertain the petition. The husband contends that the allegations of non-consummation by wilful refusal or incapacity, if established, would render the marriage voidable, but not void *ab initio*, that, consequently, the marriage

still subsists, and that the wife's domicile is that of the husband, who at all material times was, and now is, domiciled in the republic of France. On Oct. 8, 1946, it was ordered that an issue be tried whether the court has jurisdiction to entertain this petition, and by her answer to the husband's amended appearance the wife very clearly raises the points that I have to decide. She says, first :

If the allegations either in para. 7 or in para. 8 of the petition are established, the court will declare the marriage had and solemnised between the [husband] and the [wife] on Aug. 1, 1935, to have been and to be absolutely null and void to all intents and purposes in law whatsoever. The effect of the said declaration will be that the [wife] was never married to the husband, and, therefore, never acquired the husband's domicile, which was French, but retained her own domicile, which was and is English.

Secondly, the wife says that she "admits that the [husband] was at all material times domiciled in France, but contends that the domicile of the husband is not an essential ingredient to found the jurisdiction of this court," and, further, that she :

... has never at any time lost but has retained and still retains her domicile of origin in England and is and was at all material times resident in England and this court has jurisdiction to entertain her suit.

The following facts have been either proved or admitted. The husband is a Frenchman. His domicile has always been French, and he appears to have been resident for many years in the republic of France. The wife was born in England of English parents, and lived in England until her marriage. The marriage was solemnised in Paris, at the mairie of the Sixth Arrondissement, and after the marriage the parties lived for six months in Paris, where the husband held a military appointment. They then went to the French Congo, where they lived for two years. In 1938 they returned to France for a few days, and then they spent a few months in England staying with friends or relations until Sept., 1938, when they returned to Paris, the husband having been recalled to military duty. They then went to Biskra, in Algeria, in the republic of France, and they lived together there until the outbreak of war in 1939, when the wife returned to England, the husband remaining at Biskra. In April, 1940, she went to Biskra because her husband was seriously ill, and stayed there for six weeks. Then she returned to England, and she has lived in England ever since apart from the husband. It is admitted, therefore, that the husband has always been domiciled in France and has been resident there except during the months he was in England in 1938 ; that he was resident in the republic of France when the petition was presented ; and, apparently, that he is resident there now.

I do not think that it can be disputed that the wife acquired the domicile of her husband by her marriage to him. There is considerable authority that that must be so. I refer only to a passage in the judgment of SIR JAMES HANNEN, P., in *Turner v. Thompson* (1), where he said (13 P.D. 41) :

A woman when she marries a man, not only by construction of law, but absolutely as a matter of fact, does acquire the domicile of her husband if she lives with him in the country of his domicile.

That was approved by VISCOUNT DUNEDIN ([1927] A.C. 662, 663) in *Salvesen (or von Lorang) v. Administrator of Austrian Property* (2) where he said : "On this point I would cite the words of SIR JAMES HANNEN in the case of *Turner v. Thompson* (1) . . ." and then he cited the passage which I have just read. There is no doubt that the wife did *prima facie* acquire the domicile of her husband at the time of her marriage. In view of the facts that she married the husband in Paris and lived with him there and afterwards lived with him in other parts of the republic of France, I hold that she did, in fact, acquire his domicile.

If a decree of nullity on the ground of the husband's incapacity is pronounced in this case, the marriage would be declared always to have been null and void. For that *Newbould v. Attorney-General* (3) is an authority. This is a voidable marriage, and there is some doubt whether for this purpose there is a distinction between a void and a voidable marriage. *Fowke v. Fowke* (4) and *Adams v. Adams* (5), cited by counsel for the husband, appear to indicate that there is a considerable difference between a void and a voidable marriage. In *Fowke v. Fowke* (4), FARWELL, J., said ([1938] 2 All E.R. 645, 646) :

The difference between that case and the case of persons who are married but whose marriage has never been consummated is quite plain. In the case of persons who,

being (apart from physical disability) free to marry, have gone through a ceremony of marriage, and are living together, those two persons are, so far as everyone in the world is concerned, except themselves, man and wife, in the sense that no one can be heard to say that they are not legally married. To allege of two such persons, before any degree of nullity has been made, that they were living in sin would, I apprehend, be slanderous, and would be an allegation which might give rise to a cause of action for damages on the part of one or other of the parties, or on that of both parties. Moreover, their position is that of man and wife from all material points of view. The husband, for instance, is bound to maintain the wife, and the wife, if she is not maintained, is entitled to pledge his credit, and, if she pledges his credit, and a tradesman then sues the husband for the amount, it is not open to the husband in those proceedings to set up that the lady is not his wife at all, nor is it open to the tradesman to set up that there never has been a marriage at all. So long as neither the husband nor the wife has taken proceedings in the Divorce Court and got a decree of nullity pronounced, those two persons are . . . to all intents and purposes married people. The moment the decree of nullity is pronounced, however, the position becomes wholly different. There is then no marriage, and never has been a marriage.

In *Adams v. Adams* (5) SCOTT, L.J., said ([1941] 1 All E.R. 337, 338) :

Before discussing the interpretation of the separation agreement, upon which, in my opinion, the appeal really turns, it is desirable to clear the ground on two points. In the first place, no impossibility supervened, either in fact or in law, to prevent performance by the appellant of his promise to pay the respondent £1 per week. If he was by the decree relieved of that obligation, it was on some other ground. In the second place, until the decree absolute, the status of husband and wife continued to attach to the appellant and respondent, and, although, from the time when he first discovered her incapacity to consummate, he possessed a legal right to get the marriage annulled, it remained in law an effective marriage until he got his decree. Some confusion has been caused, in legal discussion upon the difference between a decree of nullity and a decree of divorce in regard to their retrospective effects upon the pre-existing marriage, by the use of the words "void" and "voidable." It has been said that, in the case of divorce, it is good law to speak of the marriage as having been voidable, but that it is not so in the case of nullity, for there the decree pronounces the marriage to have been "void" from the outset. Primarily, the use of those two words is a metaphor from the law of contract, and is not truly appropriate to the law of status, but the use of both terms in connection with the status of marriage has received judicial sanction, and is consonant with the ordinary English meaning of the words, although it lends itself to misuse and may cause confusion.

GODDARD, L.J. said (*ibid.*, 342) :

The decree was granted by reason of the incapacity of the wife to consummate the marriage and it was, therefore, a case of what has always been described as a voidable, and not of a void, marriage. Such a marriage is good and valid unless and until the assistance of the court is sought, or, as would have been said before 1857, the office of the judge had been promoted, and a decree obtained. A sentence or decree always has been, and is, as necessary to annul a marriage on this ground as to dissolve it for adultery or cruelty. Until decree, the parties have the status of married people, with all the rights and liabilities consequent thereon.

It appears to me that there is very clear authority for a distinction for this purpose between marriages which are void and marriages which are voidable, but counsel for the wife argues that, although this marriage has not yet been declared void, it really is non-existent, because it may at some future time, if these proceedings are successful, be declared to be a void marriage. I am not convinced by that argument. It appears to me that there must be a distinction between a void and a voidable marriage. At the present moment this marriage is a subsisting marriage. If it were a bigamous marriage, no doubt, it might be said to be already void, but, as it is a marriage which is perfectly good until there is a decree saying it is to be voided on the ground of the incapacity which is alleged in the petition, it seems to me that at the present moment it is a subsisting marriage and that I ought to treat it as such.

In *Stathatos v. Stathatos* (6) and *De Montaignu v. De Montaignu* (7) it was held that the wife was entitled to bring proceedings for dissolution of marriage in this country although the husband was domiciled abroad, but those were cases in which the wife had been placed in an intolerable situation, as one of the judges said, by the husband obtaining a decree of nullity in the courts of his foreign domicile, and the ground on which jurisdiction was assumed by the court in each case was that the wife was in that intolerable position and it was right that

the court should assume jurisdiction and treat her as having a domicile of her own sufficient to support a suit for dissolution of the marriage.

I come to the conclusion, therefore, that the wife has failed to establish that she has a domicile other than that of her husband, that she acquired the domicile of her husband by the marriage, that she has never lost it, and that at the present time she is not domiciled within the jurisdiction of this court.

The other contention on which the wife relies is that when the petition was presented she was resident here, that she is still resident here, and that, therefore, the court has jurisdiction to entertain the petition. It appears to be established that in suits for nullity this court follows the practice of the Ecclesiastical Courts, and that the jurisdiction of the Ecclesiastical Courts in such suits was based on the residence of the parties, though it may be based also on domicile. Until the decision in *White v. White* (8) it appears to have been considered that it was essential to the jurisdiction that both parties should be resident within the jurisdiction of the court, but in that case BUCKNILL, J., held that the wife never acquired the domicile of the husband and that the court had jurisdiction, although the respondent husband was in Australia. That decision has been followed by BARNARD, J., in *Robert v. Robert* (9).

In *White v. White* (8), BUCKNILL, J., followed *Roberts v. Brennan* (10), which was a case decided by SIR FRANCIS JEUNE, P., the headnote to it being:

Matrimonial residence within the jurisdiction is sufficient to give the court power to declare a bigamous marriage null and void, even though the domicile of the respondent be Irish and the *de facto* marriage celebrated in the Isle of Man.

In his judgment SIR FRANCIS JEUNE, P. ([1902] P. 144) said:

Although *Niboyet v. Niboyet* (11) is now of discredited authority as applied to suits for dissolution of marriage, the judgment in that case in the Court of Appeal still applies in such a case as this. In my view, residence—not domicile—is the test of jurisdiction in a nullity case. The jurisdiction of the Ecclesiastical Courts was based on the residence of the parties, and in suits for nullity this court follows the practice of the Ecclesiastical Courts, as prescribed by the Matrimonial Causes Act, 1857, s. 22.

He pronounced a decree *nisi*. In *Graham v. Graham* (12), HORRIDGE, J., expressed great doubt whether the report of *Roberts v. Brennan* (10) in the LAW REPORTS could be correct. He said ([1923] P. 37):

I was very much pressed on behalf of the petitioner with the case of *Roberts v. Brennan* (10) in which SIR FRANCIS JEUNE, P., stated that, in his view, residence and not domicile was the test of jurisdiction in a nullity case, because it was said in that case on the report there was no evidence of either party having been resident within the jurisdiction; but on production of the original citation which I sent for it appeared that the wife had given an address within the jurisdiction. The report in this case is not to my mind satisfactory as to the evidence of residence before the court, and I cannot think I ought to rely on it if it is inconsistent with the authorities I have already referred to.

Counsel for the wife to-day referred me to the report of *Roberts v. Brennan* (10) at 18 T.L.R. 467, where the headnote is:

The court has jurisdiction to grant a decree of nullity where the matrimonial residence is within the jurisdiction, though the domicile is not.

The report of the judgment in this report is as follows:

The PRESIDENT said that although the judgment of the Court of Appeal in *Niboyet v. Niboyet* (11) had been practically over-ruled and held to be wrong as applicable to suits for dissolution (*vide Le Mesurier v. Le Mesurier* (13)), yet the reasoning in that case would still apply to suits for nullity of marriage. In his opinion, in cases of nullity the doctrine of domicile did not apply, but that of residence did. It seemed clear that a case such as the present one could have been brought before the Ecclesiastical Courts, as their jurisdiction would have depended upon the matrimonial residence of the parties, and that being so this court also would have jurisdiction to entertain it.

It does not appear to me to be clear from that report that the petitioner only was resident within the jurisdiction. SIR FRANCIS JEUNE, P., referred to matrimonial residence and said that residence, not domicile, was the test of jurisdiction, but it does not appear to be clear, though it may be the fact, that he was deciding that the residence of one party—i.e., the petitioner only—was enough to give the court jurisdiction. BUCKNILL, J., followed that case in *White v. White* (8) and decided that residence of one party was enough—i.e., that the residence of the petitioner was enough.

There are many points of distinction, I think, between *White v. White* (8) and the present case. Very careful attention must be given to *White v. White* (8). The headnote is as follows :

On a petition by a woman for nullity of a form of marriage contracted in a foreign country on the ground of the bigamy of the man, the domicile of the man is not an essential ingredient to found jurisdiction. A woman, petitioner for nullity, went through a form of marriage abroad with a man whose wife was living, and two days later left the place of the marriage without consummation. The petitioner was domiciled and resident in England ; the man, the respondent, was domiciled either in Malta, his domicile of origin, or Australia, his domicile of choice, and had never resided here. The man was served with notice to appear. He acknowledged service, but did not enter appearance. He also signed a written admission that when he went through the form of marriage with the petitioner he was a married man. Held, that the woman never acquired the domicile of the man and that in the circumstances of the case the court had jurisdiction and the woman was entitled to a decree *nisi* of nullity. *Quære* whether the court would have had jurisdiction if the man had entered appearance under protest.

In his judgment, BUCKNILL, J., said ([1937] P. 124, 125) :

Though a defendant may usually reside out of the jurisdiction, yet if he is served with a citation within the jurisdiction of an Ecclesiastical Court in England in a suit for nullity of marriage, that court has jurisdiction to try the validity of the marriage, wherever it may have been contracted. *Roberts v. Brennan* (10) decided that in a case such as the present it is not the so-called husband's domicile which is an essential ingredient to found jurisdiction, and that residence within the jurisdiction of the parties at any time since the marriage is sufficient. The present case, however, goes one step further, so far as the respondent is concerned. On the other hand, it is in one respect a stronger case, in that the petitioner is domiciled and resident here. If, as in this case, the respondent has never resided in England, but the petitioner is domiciled and resident here, is it necessary for her to proceed to whatever part of the world the respondent may happen to reside in, in order to get her status established by a decree of nullity ? This would impose a heavy burden indeed on the petitioner, for the respondent may move about from place to place and have no fixed residence. Counsel on behalf of the King's Proctor argued that in a case of nullity such as this, jurisdiction must be based on the residence or domicile of the respondent within the jurisdiction. He also argued that the decree asked for in this case was not merely declaratory, but that the statutory jurisdiction of the court was invoked and that certain consequences might flow from such a decree (although not in fact asked for in this case) such as custody of children, orders for maintenance or variation of settlements. He further argued that there was a general principle that this court would not exercise jurisdiction in a case where the respondent has not subjected himself to the jurisdiction by residence or domicile or by submission to it. I appreciate the weight of these arguments, and if the respondent had entered an appearance to the petition under protest against the exercise of jurisdiction, I should have had serious doubts whether this court had jurisdiction over the matter. But I do not think I have to decide that question in this case. In my view, the respondent, by his conduct and by his admissions, has so acted as to justify the court in exercising jurisdiction. He has not in terms submitted to the jurisdiction, but he has, I think, made it clear that he has no objection to its exercise. In my view, under the special circumstances of this case, the court has jurisdiction to make the decree sought by the petitioner.

There are many points of difference, as I have said, between that case and the present case, and one of the most important points is that in that case the respondent had not entered an appearance. Counsel for the wife observed that he was not able quite to appreciate the judge's view that that was a matter of importance, but the judge said that, if the respondent had entered an appearance against the petition under protest against the jurisdiction, he would have a very serious doubt whether or not the case came within the jurisdiction of the court. Moreover, in that case the respondent lived with the wife only two days after the marriage, he was already married at the time of the marriage, and her petition for nullity was based on the ground that he was married at the time when she went through a form of marriage with him. It appears to me that BUCKNILL, J., came to the conclusion that those circumstances amounted to special circumstances which, in his view, justified the court in exercising jurisdiction.

In my view, the present case can be distinguished from *White v. White* (8), as none of those special circumstances exists here. The story in this case is a simple one—that of a marriage in the French republic, the parties living together in the French republic, the husband being domiciled there and always having lived

there except for a few months in 1938. There are no special circumstances of hardship in this case such as existed in *White v. White* (8). In *Robert v. Robert* (9), BARNARD, J., held that the fact that the petitioner was resident within the jurisdiction at the time of her suit gave the court jurisdiction to entertain it, although both parties were domiciled in Guernsey and the respondent was resident there. In that case there was no protest against the jurisdiction, and I have not been referred to any case in which there has been a protest against the jurisdiction and it has been decided that the court has jurisdiction to entertain a suit of nullity where the respondent was domiciled and resident abroad and the petitioner was domiciled abroad, although resident within the jurisdiction. I have been referred to *Hutter v. Hutter* (14), which, also, was a case of hardship. The parties to that suit were resident within the jurisdiction, and the respondent was also domiciled within the jurisdiction. In *Easterbrook v. Easterbrook* (15), the respondent was domiciled and resident in England. The difficulty about the present case is that the husband is both domiciled and resident in France. The French court can pronounce a decree of nullity that would be binding here. Consequently, there would not appear to be any special circumstances such as there were in *White v. White* (8), and it does not appear to me that the authorities which have been cited to me establish that the court has accepted jurisdiction when the respondent was both resident and domiciled out of the jurisdiction and where there is no case of hardship or any special circumstances such as there were in *White v. White* (8). For these reasons I have come to the conclusion that the wife has failed to make out the contentions set out in her answer to the husband's amended appearance, and I hold that this court has no jurisdiction to entertain this suit.

Judgment for the husband on the issue. No order as to costs.

Solicitors: *Charles Russell & Co.* (for the wife); *Peacock & Goddard* (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

KIRK v. KIRK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Jones, J.), April 17, 30, 1947.]

Husband and Wife—Maintenance order—Application to revoke—Decree of divorce granted to wife by Scottish court—Discretion of justices.

In 1929, a wife obtained in England a maintenance order against her husband, who was domiciled in Scotland. In 1946, she obtained in Scotland a decree of divorce. The husband thereupon applied for revocation of the maintenance order.

HELD: in view of the rights of relief available to the wife in the Scottish court and of the fact that it was doubtful whether the order could be enforced in Scotland, it was proper to terminate the order.

Per LORD MERRIMAN, P.: The court in *Mezger v. Mezger* ([1936] 3 All E.R. 130) did not lay down that in no circumstances whatever could it be right to keep a maintenance order alive when the parties had been divorced by a foreign court.

[AS TO DISCHARGE OF MAINTENANCE ORDERS, see HALSBURY, Hailsham Edn., Vol. 10, p. 843, para. 1345; and FOR CASES, see DIGEST, Vol. 27, pp. 565, 566, Nos. 6237-6250.]

Cases referred to:

- (1) *Bragg v. Bragg*, [1925] P.20; 94 L.J.P. 11; 132 L.T. 346; 27 Digest 565, 6242.
- (2) *Mezger v. Mezger*, [1936] 3 All E.R. 130; [1937] P. 19; 106 L.J.P. 1; 155 L.T. 491; 100 J.P. 475; Digest Supp.
- (3) *Forsyth v. Forsyth*, [1947] 1 All E.R. 406; 111 J.P. 247; 176 L.T. 507.
- (4) *McQueen v. McQueen*, [1920] 2 Sc. L.T. 405.

APPEAL by a husband against a decision of Great Yarmouth justices on Jan. 22, 1947, refusing to revoke an order for maintenance made on Sept. 3, 1929, in favour of the wife. The facts appear in the judgment of LORD MERRIMAN, P.

Jukes for the husband.

The wife was not represented.

LORD MERRIMAN, P. : It is not suggested that when the order was made in 1929 the justices had not jurisdiction to make it, but reference is made to the fact that it was made against a husband who was a domiciled Scot and that on Mar. 20, 1946, in the Court of Session the wife obtained a divorce against her husband, and it is argued on behalf of the husband that it is inapt to continue an English order against him, notwithstanding the decision in *Bragg v. Bragg* (1), the validity of which is not disputed. The husband argues that the justices should have revoked the order, and have left the wife to whatever her remedies may be in Scotland. The argument was put in two ways. First, it is said that the decision of this court in *Mezger v. Mezger* (2) shows that in the case of a divorce by a foreign court (which for this purpose includes the Court of Session), there is no jurisdiction in justices to keep alive a maintenance order under the authority of *Bragg v. Bragg* (1). Alternatively, it is said that, if it is a matter of discretion, the justices should have exercised their discretion in favour of the revocation of the order.

Assuming that the justices had jurisdiction, in their discretion, to keep the order alive, manifestly one of the matters which would guide them and this court in considering the exercise of that discretion notwithstanding the decree of divorce would be whether the wife had any alternative rights in Scotland where she had obtained her decree, and it is right to say that the justices obviously had that point in mind, for, in the course of their reasons, they say :

(b) but for the maintenance order the wife would have been entitled to apply in the divorce proceedings for an order for her maintenance, and (c) that the husband ought not to be relieved of his responsibility for supporting his wife if she should fall out of work.

With counsel's consent we thought it right to address an enquiry to the proper officer of the Court of Session to ascertain whether the wife still had whatever rights might follow in Scotland from the decree of divorce which she had obtained, and we have received a reply stating that the effect of divorce in Scotland is that the innocent party is entitled to the legal rights to which he or she would have been entitled if the guilty spouse had died at the date of the decree, but that any award of alimony automatically ceases at that date. That really disposes of the first of the two reasons which I read. The wife would not have been entitled to obtain a maintenance order in Scotland on the decree. The Principal Clerk of Session goes on to say :

In the present case we have no information as to what these rights would be, but, as there are no children of the marriage and on the assumption that the matter was not regulated by an ante-nuptial marriage settlement, Mrs. Kirk would probably be entitled, in name of *jus relictæ*, to one half of the free moveable estate of her former husband. Whether he has any moveable estate is another matter. The Scottish courts would, if necessary, enforce such rights, but would not entertain any application for alimony after the decree of divorce.

That shows two things : (1) that the rights which the wife may have in Scotland are rights, to be asserted once and for all, to a certain share in her husband's personal estate, and (2) that there is no such thing as an award of alimony or maintenance after the decree has become effective. In other words, she has rights in Scotland, but they differ from her rights under this maintenance order. Moreover, as we know from *Forsyth v. Forsyth* (3), a recent decision of this court as at present constituted, it is, to put it at the lowest, very doubtful, on the authority of *McQueen v. McQueen* (4), which was cited in that case, whether, if this maintenance order were allowed to subsist, it would be enforced in Scotland.

I wish, in passing, to dispose of one matter which appears on the face of the reasons given by the justices. The statement of their reasons begins with these words :

The solicitors for the parties having agreed that the decision in *Bragg v. Bragg* (1) should be followed, the justices, in the exercise of the discretion vested in them, decided to refuse the husband's application for revocation of the order on the following grounds. . .

Two of the grounds I have already read ; the other is a statement of the fact of the decree of divorce. That might be read as meaning that the solicitors had agreed that the justices had jurisdiction and ought to exercise it in the way in

which it was exercised in *Bragg v. Bragg* (1). I do not think it would be fair to impute any such meaning to the statement. Assuming the justices had no jurisdiction to keep this order alive, no admission by the solicitors could give them jurisdiction. All that was meant, I think, was (and I think this is the way in which it was treated by the justices) that the effect of the decision in *Bragg v. Bragg* (1) is that in proper circumstances justices have a discretion to keep a maintenance order alive, notwithstanding the fact that the parties have been divorced since it was made. I do not think the admission precluded the husband's counsel from arguing that there was no jurisdiction to keep alive the order in question here because the decree of divorce was made by a foreign court. Accordingly, he relied on the decision of this court in *Mezger v. Mezger* (2).

I do not think that it is necessary for us to decide positively whether in any circumstances in the case of a foreign divorce justices have jurisdiction to keep an earlier maintenance order alive. *Mezger v. Mezger* (2) was a very strong case. Since the making of the maintenance order the parties had been divorced in Germany after a trial in which both sides took part and the wife made certain allegations (among others, the allegation of failure to maintain her) on every one of which she was defeated. The whole case went in favour of her husband, and this court was not concerned to enquire into the merits of that decision which was a decision of a court of competent jurisdiction. The justices had given reasons which this court thought were hopelessly wrong and indicated that, if they had a discretion to deal with such a case, they had not exercised it judicially. Although it is true that in that case both members of the court said, in effect, that they could not imagine any circumstances which would justify the continuance of that order, I do not find that they laid it down that in no circumstances whatever could it be right to keep a maintenance order alive, on the authority of *Bragg v. Bragg* (1), when the parties had been divorced by a foreign court. I should prefer to leave it entirely open whether there might be circumstances in which such a course would be right. I can imagine, for example, though I am not expressing any opinion about it, a case of another character, where, after a divorce, say, in Scotland, the husband acquired an English domicile while the order was still running and at a time, as in this case, when he was continuing to pay under the order. I do not know what the proper decision would be, but I am not prepared to say absolutely that there could never be jurisdiction in the justices to keep the order alive whatever the circumstances might be, and I do not think that the decision in *Mezger v. Mezger* (2) obliges us to say so.

I think, however, that this is a case in which the justices ought to have exercised their discretion, and we ought to exercise our discretion, in favour of terminating this order. The wife necessarily had to resort to the Scottish court to get her decree of divorce. She has rights in that court, as we are informed, which are still available, whatever they may be. It is plain that they differ essentially from the relief to which she is entitled under this order, and it is, as I have said, very doubtful whether there is any means of enforcing this order in Scotland. In these circumstances, it seems to me, everything points to the propriety of terminating this order, and leaving her to assert her rights in Scotland. That being so, in my opinion, this appeal should be allowed.

JONES, J. : I agree.

Appeal allowed.

Solicitors : *Bartlett & Gregory*, agents for *Lucas & Wyllys*, Great Yarmouth (for the husband).

[Reported by R. HENRY WHITE, Esq., Barrister-at-Law.]

BRIGHTSTEIN v. BRIGHTSTEIN.

[COURT OF APPEAL (Tucker, Somervell and Evershed, L.JJ.), June 9, 17, 1947.]

Divorce—Appeal—Security for wife's costs—Application for new trial by unsuccessful husband petitioner—Jurisdiction of court to order security—Evidence to be considered on hearing of wife's application for security—Need for evidence of wife's means—Failure of husband to pay costs of hearing of petition—Stay of hearing of appeal.

On an application to the Court of Appeal by a husband for a new trial of a divorce petition which he had brought against his wife and which had been dismissed, the wife asked (i) that his application should be stayed until he had paid the costs of the hearing of the divorce petition; (ii) that he should be ordered to give security for her costs of the hearing of his application. The application for a new trial was to be based on allegations by the husband that, after the date when the petition was served, but before the hearing, the wife had committed adultery with two men in addition to the co-respondent named in the petition. The wife contended that the husband's affidavits containing these allegations were not admissible at the hearing of her applications for security and for a stay of the husband's application, but the allegations were not contradicted by her and insufficient evidence was given by her in regard to her means:—

HELD: (i) the fact that the costs of the first trial had not been paid might sometimes be relevant when the court was asked to order security on the ground of an appellant's inability to pay the costs of an appeal, but the mere refusal of an unsuccessful party to pay the costs in the court below was not, in itself, sufficient ground for ordering him to give security, and certainly not for staying the hearing of his application for a new trial.

Waite v. Waite and Muir (1916) (32 T.L.R. 432) *distinguished*.

(ii) where the marriage had not been dissolved in the court below, the Court of Appeal had jurisdiction to order the husband to give security in appropriate circumstances: *King v. King* ([1943] 2 All E.R. 253) *followed*; but where there was insufficient evidence of the wife's means the court would refuse her application for security on the ground of lack of material on which it could act.

(iii) in considering whether the case was an appropriate one for ordering security for the wife's costs, the court was entitled and bound to look at the evidence; the husband's affidavits were, therefore, admissible; and, in view of the *prima facie* evidence, which remained uncontradicted, the court would not order the husband to give security.

[AS TO SECURITY FOR WIFE'S COSTS OF APPEAL, see HALSBURY, Hailsham Edn., Vol. 10, pp. 780, 781, para. 1234, and Supplement; and FOR CASES, see DIGEST, Vol. 27, pp. 206, 207, Nos. 1787-1797, pp. 421, 422, Nos. 4277-4281, and Supplement.

Cases referred to:

- (1) *Waite v. Waite and Muir* (1916), 32 T.L.R. 432; 27 Digest 490, 5225.
- (2) *King v. King*, [1943] 2 All E.R. 253; [1943] P. 91; 112 L.J.P. 89; 169 L.T. 251; Digest Supp.
- (3) *Ottaway v. Hamilton* (1878), 3 C.P.D. 393; 47 L.J.Q.B. 725; 38 L.T. 925; 42 J.P. 660; 27 Digest 207, 1796.
- (4) *Williams v. Williams*, [1929] P. 114; 98 L.J.P. 40; 140 L.T. 383; Digest Supp.
- (5) *Johnstone v. Johnstone*, [1929] P. 165; 98 L.J.P. 76; 140 L.T. 451; Digest Supp.
- (6) *Vidal v. Vidal and Wilson* (1921), *The Times*, Oct. 13.

MOTIONS by the wife (i) for security for her costs of the husband's application for a new trial of his divorce petition; (ii) for a stay of the application for a new trial pending payment by the husband of the taxed costs of the hearing of the divorce petition. The facts appear in the judgment of TUCKER, L.J.

F. E. H. Gibbens for the wife.

Platts Mills for the husband.

TUCKER, L.J.: These are two applications, which have been heard together, by the wife, Sophie Brightstein, asking, in the one case, that her husband, Simon Jimmy Brightstein, should be ordered to give security for her costs of the hearing of an application by him that there should be a new

trial of the divorce petition which he has unsuccessfully brought against her and one Jack Kagan as co-respondent, and, in the other case, that the husband's application to this court for a new trial should be stayed until he has paid the costs of the hearing of the divorce petition which were taxed and amounted to £69 17s. 10d. which he has not paid.

I will deal, first, with the last of those applications, namely, the application to stay this appeal, as I call it for convenience, until the costs of the first hearing have been paid. The fact that the costs of the first trial have not been paid may sometimes be a relevant matter to be taken into consideration when the court is asked to order security on the ground of the appellant's inability to pay the costs of the appeal, but, apart from that, the mere refusal of an unsuccessful defendant or plaintiff or petitioner or respondent to pay the costs in the court below is not in itself a sufficient ground for giving security, and certainly not, in my view, for staying the hearing of his appeal. Authority has been cited to us in *Waite v. Waite and Muir* (1), where a Divisional Court of the Divorce Division refused an application for the re-hearing of a divorce petition until the costs of the first hearing had been paid. I think, in the first instance, that that case can be distinguished by the fact that the Divisional Court of the Divorce Division was there applying its own practice, whereas we are dealing with an appeal to the Court of Appeal, and, secondly, the nature of the application there was different. It was an application in the Divorce Division for a re-hearing, not an appeal to this court asking for an order for a new trial. However that may be, I do not think that we should follow the practice, if it be applicable to appeals to this court, which was adopted by the Divorce Division in that particular case. Therefore, the application to stay on the ground of non-payment of the wife's costs of the husband's petition before HODSON, J., fails.

Then there is the further application that the husband should be ordered to give security for his wife's costs of the appeal and that the appeal should be stayed pending the giving of such security as we may order. With regard to that, two affidavits were relied on by the wife—one by her solicitor and one by herself. The solicitor's affidavit merely sets out the failure to pay in the court below and exhibits correspondence showing that the husband has refused to give security. The affidavit of the wife states that the costs have not been paid. In para. 3 she says :

After the dismissal of the [husband's] suit I was informed by him and verily believe that he was employed by his parents as the manager of a hairdressing business, and that he earns a good salary. The [husband] lives at home with his parents.

Then she says :

I am employed as a typist by Rex Meters, Ltd., Kingsbury Works, Kingsbury Road, Kingsbury, N.W.9, at a salary of £4 per week, leaving me the weekly sum of £3 17s. 5d. after deduction of insurance contributions.

That is the only information that this court has with regard to the means of the wife. There is no suggestion that the husband lacks means to pay for this appeal if he loses it, and there is a complete absence of information with regard to the wife's means or ability to pay, save the bald statement that she is earning £4 a week as a typist. On that ground alone (*i.e.*, lack of material on which this court could act) it would, I think, be sufficient for this court to say that it must refuse this application for security. If the court is to act on the basis that, if an order is not made, the wife will be unable to maintain her case in this court, it is most relevant to be informed as to her possession of means to pay for her case. Her affidavit, in my view, is lacking in that respect, but another matter has been gone into, and we must deal with it. It is of a rather exceptional nature. This application for a new trial is going to be based on allegations that the wife has committed adultery with two men in addition to the co-respondent, Jack Kagan. The acts of adultery which are to be relied on are alleged to have taken place after Nov. 1, 1945, when the petition was served, but before the hearing of the divorce petition on Jan. 31, 1947. I express no opinion whether the statements in those affidavits will be admissible or relevant on the hearing of the application for a new trial, but counsel for the husband asked leave to read those affidavits and to rely on certain paragraphs in them by way of resisting this application for security. When these applications were last before

the court, we adjourned the matter for a week to enable counsel for the wife to consider (i) the admissibility, on an application of this kind, of those affidavits, and (ii) whether, if we decided to admit them, he desired to answer them. After a lapse of several days the case has come into the list, and counsel for the wife has been content to rest on his submission that those affidavits are inadmissible and has not filed any affidavit by the wife or any one else denying the allegations of adultery made against the wife in those affidavits.

A We decided to entertain those affidavits and look at those allegations, reserving our decision whether they were admissible, and I think it becomes necessary, in view of the attitude of counsel for the wife, to state our decisions with regard to their admissibility.

In *King v. King* (2), a full Court of Appeal, consisting of six members, considered the jurisdiction of the court to order a husband to give security for the costs of his wife in an appeal by him against the dismissal by a judgment of the Divorce Division of a petition for divorce brought by him against his wife. B The decision of the court was that the court has jurisdiction in such a case and will order security in appropriate circumstances. The court also decided that security will not be ordered as a matter of course merely because the wife has no means of her own for financing her costs of the appeal. As I read that case, it clearly shows that this court will approach applications of this kind from a different angle from that from which they approach, for example, an C ordinary application for security in an appeal from the King's Bench Division. The court there considered the history and basis of the practice for ordering security in the Divorce Division in the first instance, and the judgment of the court is expressed as follows ([1943] 2 All E.R. 254) :

We do not think it necessary to discuss the second proposition [*i.e.*, an alternative proposition put forward by Serjeant Sullivan for the basis for this practice], as the first was plainly enunciated in 1878 by the Court of Appeal (consisting of BRAMWELL, D BAGGALLAY and THESIGER, L.JJ) in *Ottaway v. Hamilton* (3), an action in which a wife's solicitor sued the husband for her costs in obtaining her divorce. That decision is sufficient to establish the common law rule that the wife has authority to employ legal help at the expense of the husband in such a case as the present. It is true that the reason for the rule of practice giving the wife security for her costs was evolved in the old ecclesiastical court and continued by the court created by the Act of 1857 at a time when the wife had no property (other than settled property) of her own out of which E to defray such expenditure, and that, as HILL, J., said in *Williams v. Williams* (4) the Married Women's Property Acts have greatly modified the position of the wife. The practice, however, both before and after the [Matrimonial Causes] Acts of 1857 and 1873, has always been only to give the wife security in cases where she has not sufficient estate to pay her own costs. This practice was recently recognised as still right and proper by the Court of Appeal in *Johnstone v. Johnstone* (5), where LORD HANWORTH, F M.R., said ([1929] P. 172) : "The old rules of the Ecclesiastical Courts were preserved by s. 22 of the Matrimonial Causes Act, 1857 (20 and 21 Vict., 85), and are now reproduced by s. 103 of the Supreme Court of Judicature (Consolidation) Act, 1925. The result is that the old rule as to the costs of the spouses is still applicable to costs in the Divorce Division, and the husband has to make provision for costs of the wife to enable her to contest the issue."

The Court of Appeal decided that that was the basis of the rule, and, I think, nothing more. The court went on to say ([1943] 2 All E.R. 255) :

G We expressly limit our decision to cases like the present because, where the judge, exercising divorce jurisdiction, makes a decree of dissolution on the ground of the wife's adultery against the wife, the doctrine of a common law agency of necessity would seem to be excluded.

After stating other considerations which would require consideration, they then stated (*ibid*) : "That question we keep open." Thus, they expressed no final view as to what the position would be where the marriage has been H dissolved in the court below on the ground, *e.g.*, of the wife's adultery. In an earlier part of the judgment, after referring to *Vidal v. Vidal* (6), the Court of Appeal said (*ibid*, 254) :

The report does not state the reasons given by the Court of Appeal when ordering security for the wife's costs, and the case, therefore, does not establish the proposition that security in this court will be ordered as a matter of course merely because the wife has no means of her own for financing her costs of the appeal, but the case is a clear authority for the proposition that this court has jurisdiction to make such an order and will do so in appropriate circumstances.

I think this last sentence shows the real decision of the court in that case, subject to the limitation, as I have already indicated, that the court reserved for future consideration what the position might be if the marriage had been dissolved as the result of a finding of adultery in the court below. Therefore, that case shows that, in the present case, we clearly have jurisdiction to give security. I think the case further shows that we do not approach a case of this kind solely from the angle from which we should approach an application for security in an appeal from the King's Bench Division, but it leaves it completely at large as to what are the appropriate circumstances in which security should be ordered.

In our view, it was relevant to take into consideration the allegations that the wife, at the moment when she came before this court asking for security, was living in adultery with a man, that she had, on her own admission, given birth to a child of which the husband was not the father, and that during a period of time subsequent to the filing of the original petition she had also been living in adultery with another man. Those allegations remain uncontradicted, and I think it is impossible to say that this court is bound to shut its eyes to that uncontradicted evidence—evidence which, if true (and I am assuming for the moment that it is true without, of course, coming to any final decision on the matter) shows that the wife had no authority to pledge her husband's credit. I think it is permissible for the court to look at evidence of that kind and to take it into consideration in deciding whether, in the exercise of its discretion, it considers a particular case an appropriate one for the granting of this relief. In this case, I particularly stress the fact that those allegations remain uncontradicted, and I do not suggest for one moment that, where there is an issue before the court with evidence on both sides whether or not a wife has committed adultery, or is at the moment living in adultery with a man, this court should seek to solve such an issue. It might well be that in a case of that kind the court would think it proper, if the other circumstances in the case made it appropriate, that they should order security and refuse to try out an issue of that kind. In the present case, where there is very clear *prima facie* evidence which remains uncontradicted, I think that this court is entitled and bound to look at such evidence, and, having looked at it, if we consider it renders the case inappropriate to the granting of this relief, to act accordingly. For those reasons I think that both these applications fail.

SOMERVELL, L.J. : I agree.

EVERSHED, L.J. : I agree.

Motions dismissed.

Solicitors: *Edward Moeran* (for the wife); *Westbrook & Co.* (for the husband).

[*Reported by R. L. ZIAR, ESQ., Barrister-at-Law.*]

PRESTON AND ANOTHER v. NORFOLK COUNTY COUNCIL.

[COURT OF APPEAL (Lord Greene, M.R., Wrottesley, L.J., and Lynskey, J.),
May 1, 2, 23, June 16, 1947.]

Agriculture—Agricultural holding—Compensation for disturbance—Tenant quitting holding “in consequence of” notice to quit—Notice to quit—Tenant refusing to leave—Judgment for possession—Jurisdiction of High Court to hear Special Case—Agricultural Holdings Act, 1923 (c. 9), s. 12 (1), sched. II, r. 10.

By s. 12 (1) of the Agricultural Holdings Act, 1923: “Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then . . . compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section . . .”

The landlords served on the tenants a notice to quit their holding which expired on Oct. 11, 1942. The tenants disputed the validity of the notice and failed to give up possession. On Oct. 13, 1942, the landlords issued a writ in the High Court, and, by a judgment of OLIVER, J., dated June 7, 1943, the tenants were ordered to give up possession. The judgment

directed that, in default of settlement by valuers, the tenants' claim for compensation for disturbance under s. 12 of the Act of 1923 should be submitted to arbitration. The matter went to arbitration, and, by what purported to be an award in the form of a Special Case, there was submitted for the opinion of the High Court the question whether the tenants were entitled to compensation for disturbance. If they were, the arbitrator awarded them an agreed sum :—

A. HELD : (i) the arbitrator had jurisdiction to act and the court had jurisdiction to deal with the Special Case.

Lowther v. Clifford ([1927] 1 K.B. 130) followed.

(ii) the question whether or not a tenant, who held over for any period after the expiration of a notice to quit and subsequently quitted the holding, could be said to have quitted the holding "in consequence of" the notice within the meaning of s. 12 (1) of the Act, was a question of fact on which the finding of an arbitrator under the Act was conclusive, provided there was evidence to support it; where, as in the present case, the tenant disputed the validity of the notice and the court decided against him and he thereupon quitted the holding, the inevitable inference would be that he had done so in consequence of the notice, and a tenant who quitted in consequence of the notice, even though he did so after an interval of time, must be regarded as a "tenant" within s. 12 (1) of a "holding" within the sub-section; and, therefore, the tenants were entitled to compensation.

Cave v. Page ([1923] W.N. 178) distinguished. *Mills v. Rose* ([1923] W.N. 330) followed. *Hendry v. Walker* (1927) S.L.T. 333 disagreed with.

Decision of LORD GODDARD, C.J. ([1946] 2 All E.R. 461), affirmed.

D [AS TO COMPENSATION FOR DISTURBANCE, see HALSBURY, Hailsham Edn., Vol. 1, p. 361, para. 594; and FOR CASES, see DIGEST, Vol. 2, p. 48, Nos. 265, 266.]

Cases referred to :

- (1) *Cave v. Page*, [1923] W.N. 178; 67 Sol. Jo. 659; Digest Supp.
- (2) *Mills v. Rose*, [1923] W.N. 330; 68 Sol. Jo. 420; Digest Supp.
- (3) *Dale v. Hatfield Chase Corpn.*, [1922] 2 K.B. 282; 92 L.J.K.B. 237; 128 L.T. 194; 87 J.P. 11; Digest Supp.
- (4) *Hendry v. Walker*, (1927), S.L.T. 333; Digest Supp.
- E (5) *Lowther v. Clifford*, [1927] 1 K.B. 130; 95 L.J.K.B. 576; 135 L.T. 200; Digest Supp.
- (6) *Olive v. Paynter*, [1932] 2 K.B. 666; 101 L.J.K.B. 786; 148 L.T. 65; 90 J.P. 113; Digest Supp.
- (7) *Donaldson's Hospital (Edinburgh) Trustees v. Esslemont*, 1926 S.C. (H.L.) 68; Digest Supp.

F APPEAL from a decision of LORD GODDARD, C.J., dated July 12, 1946, and reported [1946] 2 All E.R. 461, on a Special Case stated by an arbitrator.

LORD GODDARD, C.J., first considered the question whether he had jurisdiction to deal with the matter, and decided that he had, and he then held that the tenants of an agricultural holding who, after failure to give up possession under a notice to quit, were ordered to give up possession by the court, quitted the premises "in consequence of" the notice to quit within the meaning of s. 12 (1) of the Agricultural Holdings Act, 1923, and were, therefore, entitled to compensation for disturbance. The landlords appealed.

G *Havers, K.C.*, and *Diplock* for the landlords.

Percy Lamb for the tenants.

Cur. adv. vult.

H June 16. LORD GREENE, M.R., read the following judgment of the court. The question of substance raised by this appeal is one of some general importance under the Agricultural Holdings Act, 1923. There are two decisions of this court under earlier Acts which, on one view, are said to be inconsistent with one another and, on any view, call for careful examination. We shall postpone consideration of them until we have stated the conclusions to which, apart from authority, we should ourselves have come on the true interpretation of the relevant provisions of the Act. We shall then consider whether those conclusions are open to us having regard to the authorities.

The appellants, the landlords, served on the respondents, the tenants, a notice to quit their holding which expired on Oct. 11, 1942. The tenants

failed to give up possession. On Oct. 13, 1942, the landlords issued a writ, and by a judgment of OLIVER, J., dated June 7, 1943, the tenants were ordered to give up possession. The judgment contained a number of provisions relating to incidental matters which, although purely consensual, were not expressed, as they ought to have been, to be such in the order. One of these provisions directed that, in default of settlement by valuers, two matters should be submitted to arbitration of which one is the question relevant to this appeal, *viz.*, the tenants' claim for compensation for disturbance under s. 12 of the Agricultural Holdings Act, 1923. This matter went to arbitration, and, by what purports to be an award in the form of a Special Case, there was submitted for the opinion of the court the question whether, having regard to the facts in the Case, the terms of the submission, and the documents referred to in the schedule to the Case the tenants were entitled to any compensation for disturbance. If they were so entitled, the arbitrator awarded them the agreed sum of £212 10s. 0d. A

At this point we must interpose a reference to a preliminary point of considerable difficulty, *viz.*, whether, having regard to the special provisions of the Act of 1923, the arbitrator had jurisdiction to act, and, consequently, whether LORD GODDARD, C.J., and on appeal from him, this court, had jurisdiction to deal with the Special Case. Logically we should deal with this question first, but, as we have come to the conclusion that we are bound by authority to say that the jurisdiction exists and as the nature of the question as to jurisdiction will, we think, be more readily intelligible after we have examined the provisions of the Act which bear on the point of substance, we will defer our examination of the question of jurisdiction until we have dealt with the point of substance. B

Section 12 (1) of the Act of 1923 so far as material, provides as follows :—

Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then . . . compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section . . . C

The right to claim compensation is excluded in certain events specified in the sub-section, none of which occurred in the present case. Sub-section (6) of s. 12 provides as follows :— D

The compensation payable under this section shall be a sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connection with the holding, and shall include any expenses reasonably incurred by him in the preparation of his claim for compensation (not being costs of an arbitration to determine the amount of the compensation), but for the avoidance of disputes, such sum shall, for the purposes of this Act, be computed at an amount equal to one year's rent of the holding, unless it is proved that the loss and expenses so incurred exceed an amount equal to one year's rent of the holding, in which case the sum recoverable shall be such as represents the whole loss and expenses so incurred up to a maximum amount equal to two years' rent of the holding. E

It is argued on behalf of the landlords that, as the tenants failed to give up possession on the expiration of the notice to quit, they were not entitled to any compensation for disturbance. Two reasons were given for this. The first was that the tenants cannot be said to have quitted the holding "in consequence of" the notice to quit since they had refused to do what the notice required them to do and only gave up possession under the compulsion of the judgment of OLIVER, J. They quitted the holding, it was said, not in consequence of the notice, but in consequence of the judgment. The other reason was that, on the expiration of the notice to quit, the tenants became trespassers and each ceased to be a "tenant," while the "holding" which they had occupied was no longer a "holding." In other words, for both reasons, it was said, compensation for disturbance under the sub-section can only be claimed where the tenant quits voluntarily on the expiration of the notice. This result, it was said, would be in accordance with the apparent purpose of the Act which cannot be to assist tenants who wrongfully refuse to comply with a notice to quit. For the tenants, it was argued that, as the notice to quit is the essential step which gives rise to the claim to recover possession and F

is thus the real foundation of the judgment, a tenant who quits under the judgment is truly said to quit "in consequence of" the notice. As to the second of the two reasons put forward on behalf of the landlords, the tenants replied that, on the true construction of the Act, the words "tenant" and "holding" in this particular context and elsewhere in the Act must be interpreted as including a person who was, but has ceased to be, a tenant, and land which was, but has ceased to be, a holding, and they rely particularly on sub-s. (2) of the interpretation section (s. 57), which we will set out when we come to deal with this second reason.

We will now return to the first of the two reasons advanced on behalf of the landlords, and we will deal with it on the assumption that the second reason is a bad one, *i.e.*, that for the purposes of s. 12 (1), a tenant who has held over may still be a "tenant" and his holding may still be a "holding." On this basis, as it seems to us, the question whether or not a tenant who holds over for any period, be it short or be it long, after the expiration of a notice to quit and subsequently quits the holding can be said to have quit the holding "in consequence of" the notice, is really a question of fact on which the finding of an arbitrator under the Act is conclusive, provided that there is evidence to support it. In spite of the fact that a tenant holds over, it may well be that the notice is what causes him to quit the holding. To explain our meaning, we will give two examples. At the expiration of the notice, the tenant may be in bed seriously ill, and incapable of moving. In the absence of permission to remain, he becomes in law a trespasser. Nevertheless, if when he recovers sufficiently to enable him to be moved, he at once quits the holding, the inevitable conclusion would be that he did so "in consequence of" the notice. His temporary failure to comply with the notice could not break the causal link between the notice and his departure which is all that is postulated by the words "in consequence of." The other example is the case of a tenant who disputes the validity of the notice and requires a decision of the court upon it. Either he or the landlord may (subject to the arbitration provisions if they apply) obtain that decision by an originating summons or by an action for a declaration. If in such a case the court decided against the tenant, and the tenant thereupon quitted the holding, the inevitable inference would, we think, be that he had done so "in consequence of" the notice, since the notice, and nothing but the notice, would have been the effective cause of his departure. On the other hand, there may well be cases in which the arbitrator would be at liberty to find on the facts that the necessary causal link between the notice and the quitting of the holding did not exist.

If this view be right, it gives rise in the present case to an apparent difficulty, since there is no finding of the arbitrator on the question whether the tenants quitted the holding "in consequence of" the notice. That question is really involved in the question submitted to the court, that is, whether the tenants on the facts are entitled to compensation for disturbance. The difficulty is, we think, apparent rather than real, since, on the facts stated, we do not think that it would have been open to the arbitrator to find that the tenants quitted the holding otherwise than "in consequence of" the notice. The case, we think, falls within the principle of our second example. It is true that the validity of the notice was tested and established by means of an action to recover possession. We do not think, however, that the answer to the question can depend on whether an ejectment order is or is not, in fact, asked for or made. In order to ascertain whether what we have called the "causal link" exists or not, it is, we think, necessary to look beyond the mere form of the action and the mere form of the order. In the present case a reference to the defence put in by the tenants in the action before OLIVER, J., shows that under a certain amount of pleader's verbiage, the real point which fell to be determined was the validity of the notice which was attacked on a number of grounds, one at least of which, *viz.*, that the notice was not given *bona fide* (whatever that may mean), was quite irrelevant, but it was a ground put forward for saying that the notice was invalid. In these circumstances we do not think that it would have been open to the arbitrator to find that when after the judgment the tenants quitted the holding, they did so otherwise than "in consequence of" the notice the validity of which had been established by the judgment.

We now come to the second of the two reasons for rejecting the tenants' claim which are put forward on behalf of the landlords. In considering the first reason we assumed that the second reason was a bad one. It depends on the true meaning to be attributed to the words "tenant" and "holding" in the context. The relevant provisions of the interpretation section (s. 57) are as follows:

(1) . . . unless the context otherwise requires—"Tenant" means the holder of land under a contract of tenancy, and includes the executors, administrators, assigns, guardian, committee of the estate, or trustee in bankruptcy, of a tenant, or other person deriving title from a tenant: "Holding" . . . means [with certain exceptions] any parcel of land held by a tenant . . . (2) The designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of compensation.

We should ourselves have thought that to interpret the words "tenant" and "holding" as necessarily excluding a person who had been, but had ceased to be, a tenant, and land which had been, but had ceased to be, a holding, would have been to place an unwarrantably narrow construction on those words, particularly in view of the language of sub-s. (2) of s. 57, but we are relieved of the necessity of considering this question by itself—a course which would have placed us in some difficulty in view of *Cave v. Page* (1), hereinafter referred to—since any such construction is, in our opinion, excluded by the language of s. 12 (1) itself. We have already discussed the meaning of the phrase "in consequence of." The special significance of that phrase for this branch of the argument lies in the fact that, as we have pointed out, it postulates as a necessary condition of a claim for compensation the existence of nothing more than a causal link between the notice and the quitting. This appears to us to lead inevitably to the conclusion that the existence of a gap in time between the determination of the notice and the quitting by the tenant cannot possibly defeat a claim to compensation once the causal link is established. In other words, a tenant who quits in consequence of the notice, even if he does so after some interval of time, must be regarded as a tenant for the purposes of s. 12 (1), and similarly with the word "holding."

Counsel for the landlords relied on certain other passages in the Act in order to show the inconveniences which might result if the tenants were right. The most important of these points are as follows. Under s. 12 (6) compensation for disturbance is to be a sum representing "such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal of" his household goods, implements, stock, etc. Under s. 12 (7) compensation is not to be payable (a) in respect of a sale unless the tenant has before the sale given the landlord a reasonable opportunity of making a valuation; (b) unless the tenant has, not less than one month "before the termination of the tenancy," given written notice of his intention to claim. Under s. 16 (2) a claim for (among other things) compensation for disturbance ceases to be enforceable "after the expiration of two months from the expiration of the tenancy" unless particulars of the claim have been given to the landlord. These references to "the expiration of the tenancy" are relied on as showing that the legislature cannot have contemplated the existence of an interval of time between the expiration of a notice to quit (which terminates the tenancy) and the quitting of the holding by the tenant. In particular, it is asked, how can the necessary information be given under s. 16 (2) if the quitting of the holding which puts the tenant to the expense upon which his claim to compensation is based, does not take place, as it well may not, for months after the termination of the tenancy? The answer to these objections is, we think, a short one. It may very well be that the legislature did not direct its mind to any case other than the normal one in which the tenant quits on the expiration of the notice, but we are concerned with the language which the legislature has used, and if, as we think, that language is clear, the possibility that unforeseen inconveniences may arise in practice must be ignored. It may be that by reason of s. 16 (2) the time within which a tenant can hold over without losing his claim to compensation is curtailed, but we express no opinion on this point which admittedly does not arise on the special facts of the present case.

At this point we may conveniently refer to the authorities in this court, of which mention has already been made. They are both reported in the 1923 volume of the WEEKLY NOTES and no fuller report appears to exist in either case. The first, *Cave v. Page* (1), was decided on Apr. 20, 1923, by a court consisting of SIR HENRY DUKE, P., BANKES and SCRUTTON, L.JJ. The statute which was applicable was the Agricultural Holdings Act, 1908. That Act provided, by s. 11, for compensation for disturbance, but only where the

A landlord had acted unreasonably as mentioned in the section. The words of the section were that in the cases mentioned "the tenant, upon quitting the holding, shall . . . be entitled to compensation for the loss or expense directly attributable to his quitting the holding which the tenant may unavoidably incur upon or in connection with the sale or removal" of his household goods, implements, stock, etc. The relevant provisions of the interpretation section (s. 48), were in substance the same as those already quoted from the Act of

B 1923. Notice to quit was served expiring on Mar. 25, 1920, but the tenant held over and was finally removed from the holding on Jan. 1, 1921, pursuant to an ejectment order made on Nov. 5, 1920, in proceedings instituted by the landlord. He had furnished details of his claim for compensation on Dec. 29, 1920, nine months after the notice to quit expired, but three days before he was actually ejected. Paragraph (d) of the proviso to s. 11 of the Act provided that no compensation under the section should be payable if the claim was not made

C within three months after "the time at which the tenant quits the holding." The tenant claimed that his claim was made within three months of his quitting the holding and that he was entitled to compensation. The question submitted by the arbitrator was whether he was so entitled notwithstanding that nine months had elapsed between the termination of the tenancy and the furnishing of the claim, and in view of the fact that the claim was made

D within three months of his quitting the holding. The county court judge decided that the tenant was not so entitled and this court affirmed his decision. SIR HENRY DUKE, P., at p. 179, said that the case depended on the words "the time at which the tenant quits the holding." He referred to the meanings of the words "tenant" and "holding" as given in the interpretation section, but neither he nor either of the Lords Justices referred to sub-s. (2) of that section, which is similar to sub-s. (2) of s. 57 of the Act of 1923

E (already quoted) providing for the continuation of the designation of landlord and tenant until the conclusion of any proceedings. The learned President then proceeded to say that, having regard to the interpretation section, from Mar. 25, 1920, the tenant was not holding under a contract of tenancy and the land which he persisted in occupying was not a holding within the meaning of s. 11. BANKES, L.J. (*ibid*), agreed, and said by way of *dictum* that the

F question in the case was not likely to arise again because it was set at rest by s. 10 of the Agriculture Act, 1920, which had then recently been passed, but did not apply to the case. This Act of 1920 had extended the right to compensation for disturbance to cases other than cases of unreasonable conduct by the landlord, and the language of s. 10 was, for all relevant purposes, the same as that of s. 12 of the Act of 1923. In particular, it for the first time used,

G in consequence of such notice the tenant quits the holding," in place of the words "upon quitting the holding" in s. 11 of the Act of 1908. BANKES, L.J., appears to have thought that these new words would have excluded the right to compensation in such a case as that before him. This, of course, was *dictum* only, and, with deference, we cannot agree with it, save on the assumption that on the facts it could properly have been found that the tenant, who appears

H to have been physically removed from the holding, had not quitted in consequence of the notice, but on the actual Case BANKES, L.J., refused to accept the meaning of the words "quits the holding" as being "takes his final departure from the holding," an interpretation which would have benefited those who broke their contracts. He also agreed with the President's view that the interpretation section excluded such a meaning. SCRUTTON, L.J. agreed. We are not, of course, entitled to say that this decision was wrong, but it was a decision on a different statute, and it in no way binds us in the present case. Indeed, assuming, as we must, that the interpretation put by the court on the Act of 1908 was right, it was based on the view that there

must be a coincidence in time between the expiration of the notice and the quitting of the holding. The Acts of 1920 and 1923, on the other hand, as we have already said, appear to us to have envisaged, by the use of the phrase "in consequence of," not a coincidence in time, but what we have described as a causal link between the notice and the quitting.

This brings us to the second of the two cases, *Mills v. Rose* (2), reported at p. 330, which was heard on the following Nov. 23, by a court consisting of BANKES, SCRUTTON and ATKIN, L.JJ. It was a case under the Act of 1920, and the court had to construe the words "in consequence of" in relation to the facts found by the arbitrator. Notice to quit was given expiring on Mar. 25, 1922. On Feb. 18, the tenant gave notice of intention to claim compensation for disturbance. The tenant gave possession of the land immediately after Mar. 25, 1922, but did not quit the farmhouse owing to the serious illness of his wife. On May 29, 1922, the landlord obtained judgment for possession in default of appearance and a writ of possession was executed on June 28. This court reversed the decision of the county court judge on the Special Case, and held that the tenant was entitled to compensation. *Cave v. Page* (1), does not appear to have been quoted, nor is it referred to in any of the judgments. The arbitrator, in announcing his decision by letter, had found that the tenant quitted his holding in consequence of the notice to quit. BANKES, L.J., said (at p. 331) that, on this finding, no question of law arose, and that it was impossible to say that there was no evidence to support it. He thus treats the question as one of fact as we ourselves regard it. The Special Case had, however, been demanded and BANKES, L.J. said of it that it did not enable the court to decide whether the tenant did or did not, in fact, leave in consequence of the notice. He went on to say, however, that the obtaining and execution of the writ of ejectment were "in consequence of the notice to quit"—in other words, that it was not open to the arbitrator on the facts to hold otherwise. With this, if we may say so, we respectfully agree, since the only reason which appears why the tenant did not give possession of the farmhouse was the serious illness of his wife. SCRUTTON, L.J. (at p. 332), agreed that the proceedings were in consequence of the notice to quit and saw nothing that would entitle the landlord to any finding other than that the tenant did quit the holding in consequence of the notice to quit. ATKIN, L.J. (*ibid*), thought that there was no question of law and said that "although the tenant was put out by a writ of execution he none the less quitted the holding in consequence of a notice to quit inasmuch as the landlord's right to a judgment in ejectment depended upon the notice to quit." Save insofar as the opinions expressed appear to lay it down that in every case where there is a notice to quit followed by ejectment proceedings it must necessarily be said that the tenant quitted the holding in consequence of the notice, this decision appears to us to be in complete accord with the conclusions to which we have come independently of it. It treats the question as one of fact, it affirms our view as to the causal link implied by the words "in consequence of," and it disaffirms the view that coincidence in time between the expiration of the notice and the quitting of the holding is necessary before a claim to compensation can be made. On the matter above referred to in which the opinions expressed appear to go beyond what we ourselves think is the correct view, those opinions were, in our judgment, unnecessary to the decision, and we venture respectfully to disagree with them. In any case, if they be right and our view is wrong, the reasons for deciding the present case as we do decide it are, of course, strengthened. There appears to us to be no real conflict between this decision and the decision in *Cave v. Page* (1), because the latter was a decision on quite different language.

Two other cases were relied on by counsel for the landlords. With one of them—*Dale v. Hatfield Chase Corpn.* (3), we need not deal. The point in it which is relied on is that, under the Act of 1908, the person liable to pay the compensation is the person who was the landlord at the expiration of the notice to quit. This does not appear to us to have any bearing on the present question. The other case was that of *Hendry v. Walker* (4), decided by the Lord Ordinary (LORD CONSTABLE) in the Outer House of the Court of Session on Dec. 1, 1926. The Act there in question was the Agricultural Holdings (Scotland) Act, 1923, which for the relevant purposes contains similar pro-

visions to those contained in the English Act of 1923. The tenant had refused to quit on the expiration of a notice to quit, his ground being that the notice was invalid. Ultimately the landlords obtained a decree of removal. The Lord Ordinary, after holding that he had jurisdiction to consider the questions (i) whether the tenant was a "tenant quitting the holding" and (ii) whether he quitted the holding "in consequence of the notice to quit," proceeded to examine *Cave v. Page* (1) and *Mills v. Rose* (2). *Cave v. Page* (1), in his opinion, supported the view that question (i) should be answered in the negative, and the judgment of BANKES, L.J. in that case appeared to him to suggest that a negative answer should be given to question (ii) also. He felt, however, some difficulty in reconciling the decision in *Cave v. Page* (1), with that in *Mills v. Rose* (2). On the whole, he preferred the reasoning in the latter case, but he preferred to base his judgment on the answer which he thought should be given to question (i) on the authority of the reasoning in *Cave v. Page* (1), i.e., that for more than a year prior to his removal there had neither been a holding within the meaning of the Act nor a tenant thereof. He thought that "the language and the provisions of the Act plainly imply that the quitting of possession upon which the statutory claim emerges shall take place at or immediately after the termination of the tenancy." With respect, we cannot agree with this broad proposition, and we have already given our grounds for thinking that the reasoning on which the decision in *Cave v. Page* (1), was based is not applicable to cases under the later Acts. LORD GODDARD, C.J., decided the point of substance in favour of the tenants. He found difficulty in reconciling the decisions in *Cave v. Page* (1) and *Mills v. Rose* (2), but he preferred the reasoning in the latter case. We do not share his difficulty in the matter of reconciliation for reasons already explained, but, with the modification which we have explained earlier in this judgment, we respectfully agree with him in his preference for the reasoning in *Mills v. Rose* (2).

We will now deal shortly with the question of jurisdiction. This question was raised by the Lord Chief Justice himself, who, without expressing any opinion of his own, thought it right to follow two decisions in the Court of Session in order that there might be uniformity of practice. The question arises in this way. Under s. 16 (1) of the Act of 1923 :

Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act . . . or otherwise in respect of the holding . . . and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding . . . and any other question which under this Act is referred to arbitration shall be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in sched. II to this Act.

Schedule II contains a set of rules as to arbitration the object of which appears to be to provide a cheap and simple method of dealing with disputes. Under r. 10 the arbitrator is empowered and may be directed by the judge of the county court to state in the form of a Special Case "for the opinion of that court" any question of law arising in the course of the arbitration. Both parties before us very naturally supported the view that the Lord Chief Justice had, and that, on appeal from him, this court had jurisdiction to deal with the matter in controversy, and we did not have the advantage of hearing any argument to the contrary. On considering our judgments, we found it desirable to restore the case to the list for further hearing on the question of jurisdiction, and we had the advantage of hearing a very helpful argument from junior counsel for the landlords. We are bound to confess that, apart from authority, we should have thought that the present question was covered by s. 16 (1), and that the statutory arbitrator and the county court judge had exclusive jurisdiction, and that, in consequence, (i) the order of OLIVER, J. as to arbitration, (ii) the consequential submission by the parties, (iii) the Special Case, and (iv) the hearing before the Lord Chief Justice, were contrary to the provisions of the statute, and that this court could have no jurisdiction save on an appeal from a decision of a county court judge. It is noticeable that both in *Cave v. Page* (1) and in *Mills v. Rose* (2), no doubt appears to have suggested itself to the mind of this court as to the jurisdiction of the county court judges from whom the appeals in those cases were brought, but the

subject of the scope of s. 16 (1) was much debated in later cases—in which neither *Cave v. Page* (1) nor *Mills v. Rose* (2), appear to have been cited. We do not propose to burden this judgment by a detailed examination of the authorities, since we feel bound by what appears to us to be the *ratio decidendi* of the decision of this court in *Lowther v. Clifford* (5). The point which, it was argued in that case, must go to arbitration under the statute, was different from the point which we have had to consider, but the court placed a limited construction on s. 16 (1). The substance of the decision was, as it appears to us, that s. 16 (1) must be construed as a procedure section dealing only with those matters which in other parts of the Act are referred to arbitration. It is not for us to criticise the reasoning on which this construction was based, nor to discuss the rather strange consequences to which, in *Olive v. Paynter* (6), the decision in *Lowther v. Clifford* (5), was held by this court to lead. In the present case, the question of substance is whether or not the necessary condition for the making of a claim to compensation for disturbance was satisfied, *viz.*, the quitting of the holding in consequence of the notice. Nowhere in the Act is this question referred to arbitration, and the result, in our opinion, necessarily follows from *Lowther v. Clifford* (5), that it does not fall within s. 16 (1) as construed by this court. The Lord Ordinary, in *Hendry v. Walker* (4), decided that a question which was on all fours with the present question, fell outside the corresponding provisions as to arbitration in the Scottish Act, and he found support for this view in an earlier decision of the Court of Session in *Donaldson's Hospital v. Esslemont* (7). In feeling ourselves bound to decide as we do, we do not ignore the decisions in *Cave v. Page* (1) and *Mills v. Rose* (2), but, as the point was not considered by the court in either of those two cases, we cannot regard them as prevailing against the decision in *Lowther v. Clifford* (5). We need say no more on the question of jurisdiction save that, in our opinion, the state of the authorities, in the absence of an authoritative decision by the House of Lords, calls for the attention of the legislature, whose apparent object to secure a cheap and simple procedure seems, through the inadequacy of the language used, to have been singularly frustrated. In the result, the appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. Oswald Brown*, clerk to the Norfolk County Council (for the landlords); *Tarry, Sherlock & King*, agents for *Blyth & Hornor*, Norwich (for the tenant).

[Reported by J. CROCKETT, Esq., Barrister-at-Law.]

EVERETT v. ASSOCIATED EQUIPMENT CO., LTD.

[COURT OF APPEAL (Scott, Bucknill and Wrottesley, LJJ.), June 5, 6, 16, 1947.]

Workmen's Compensation—Partial incapacity—Declaration of liability—Earnings not diminished by injury—Illness causing workman's return to employment in which earnings diminished by injury—Workmen's Compensation Act, 1925 (c. 84), ss. 1, 9 (3) (i).

The workman, whose previous occupation had been that of a tailor, worked as a turner during the war, and on Nov. 1, 1941, in the course of that employment, he suffered an accident which caused the loss of the top joint of the index finger of his right hand. After a short period of total incapacity during which he was paid compensation, he resumed work as a turner at his old wages, a declaration of the liability of the employers being recorded. In 1945, an affliction of the legs, from which he had suffered as a child, recurred, so that he could not continue working as a turner and he returned to tailoring, but, owing to the injury to his finger, he was unable to earn as a tailor as much as he had been earning as a turner at the time of the accident, and he claimed compensation.

Held: (i) the workman's right to compensation under s. 1 (1) of the Act of 1925 was established by the declaration of liability, and the quantum and conditions of compensation, which were the only questions before the county court judge, did not touch that right, which remained dormant until the partial incapacity of the workman to do the work of a

tailor came into existence; the concomitance of a second cause of incapacity did not prevent the continuing operation of the cause within s. 1; and, therefore, the workman was entitled to compensation.

[AS TO COMPENSATION FOR PARTIAL INCAPACITY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 914-917, paras. 1258-1260; and FOR CASES, see DIGEST, Vol. 34, pp. 414-416, Nos. 3364-3383.]

Cases referred to:

- A (1) *Lysons v. Knowles (Andrew) & Sons, Ltd., Stuart v. Nixon & Bruce*, [1901] A.C. 79; 70 L.J.K.B. 170; 84 L.T. 65; 65 J.P. 388; 34 Digest 423, 3433.
 (2) *Ball v. Hunt (William) & Sons, Ltd.*, [1912] A.C. 496; 81 L.J.K.B. 782; 106 L.T. 911; 34 Digest 395, 3228.

APPEAL by a workman from an award of His Honour JUDGE REES, at Uxbridge County Court, dated Oct. 4, 1946.

- B The county court judge held that the workman abandoned his former trade as a tailor when he became employed as a turner, and that the aggravation of an infirmity, unconnected with the accident, which made it impossible for him to continue work as a turner deprived him of his accrued right under the Workmen's Compensation Act, 1925.

Edgedale, K.C., and *H. Lester* for the workman.

John Russell for the employers.

- C *Cur. adv. vult.*

- June 16. SCOTT, L.J., read the following judgment of the court. This appeal by the workman must be allowed. The facts are not really in dispute, although we think the judge misapprehended one aspect of them. The workman, who was 41 years old at the time of the arbitration, as a child had suffered from infantile paralysis, which affected his legs permanently and made it necessary for him to be put into a trade where little standing would be involved. Tailoring was chosen, and in that trade he became proficient. His leg weakness became less and in May, 1941, he felt it his duty to take up some war work. He, accordingly, became a turner employed by the present respondents. On Nov. 1, 1941, however, he met with an accident within the Workmen's Compensation Acts which caused the loss of the top joint of the index finger of his right hand. He was paid compensation for total incapacity for a short time and then he resumed work at his old wages as the injury did not interfere with his work as a turner. The partial disablement, of course, was still there, but, as he was earning no less than at the time of the accident, it caused no present "incapacity for work," either total or partial, within the Workmen's Compensation Act, 1925, s. 9. By consent, on Jan. 23, 1942, the time of his return to work at his old wages, a declaration of liability was duly recorded in the county court. Thereafter the workman continued to work for the employers as a turner at not less than his previous wages, but on Sept. 27, 1945, the paralysis of the legs became worse, and he could no longer stand to do the work of a turner. Accordingly, he gave up that work and resumed the trade of tailoring in which he had been brought up and which may properly be regarded as his own trade. The master tailor who had employed him previously employed him again, but his finger disability prevented him earning as much money as he had been earning from the respondent employers at the time of the accident or thereabouts. His claim, therefore, under the Workmen's Compensation Act, 1925, s. 9 (3) (i) for half the difference, took the form of a claim for review under s. 11, based on the declaration of liability.

- What, then, was the legal position? In our opinion, it was plain. The workman's right under s. 1 of the Act was established by the declaration of liability, and the only question before the judge was as to the amount and conditions of compensation under s. 9. As was pointed out by the House of Lords in *Lysons v. Andrew Knowles & Sons, Ltd.* (1), and again in *Ball v. William Hunt & Sons, Ltd.* (2), the workman's statutory right is vested in him by s. 1 of the Act and the *quantum* and conditions of compensation do not touch the right. For that reason the Acts of 1897 and 1906 relegated them to the schedule, and the basic distinction between the vested right and the *quantum* of compensation has not been altered by the subsequent Parliamentary transfer of the provisions about compensation from the schedule to the body of the Act, now to be found in s. 9.

What then was the workman's position when working for the respondent employers on his return to them after his finger amputation had healed up? Obviously, he still owned his latent right to receive compensation as and when his actual earnings—or, if he was not, in fact, earning, his ability to earn—might fall below his pre-accident earnings, in which event he automatically became *pro tanto* incapacitated for work and so entitled to receive half that difference. Until he left his employment as a turner his right was, as it were, dormant, but the moment the facts contemplated by s. 9 (3) (i) came into existence it became active again. The judge made the mistake of assuming that the aggravation of the workman's old trouble, which made it impossible for him to continue work as a turner, deprived him of his accrued right under the Workmen's Compensation Act. He forgot that the concomitance of a second cause does not prevent the continuing operation of the cause within s. 1 of the Act. There is one sentence in the judgment which we think indicates where the judge went wrong. He says:

It is true that, as a tailor, he is now unable to earn the wages that he could earn if he had not lost the tip of his finger. That loss is, without a doubt, a serious and disabling handicap in the tailoring trade. But he had abandoned that trade when he entered the service of the respondent employers [as a turner].

We can see no evidence to justify the statement that the workman had abandoned his trade of tailoring. On the contrary, his uncontradicted evidence was:

I gave up tailoring because I thought I ought to do some war work. I have been re-training my hand for tailoring . . . I wanted to do war work during the war and if the A.E.C. [i.e., the employers] did not retain me I intended to go back to tailoring.

The workman is partially incapacitated from doing the work of a tailor, and the law is clear that where a man is partially incapacitated for his proper work by an accident within the Act, the test of his actual earnings at that moment remains applicable to the ascertainment of the amount of his compensation, even though some other cause of incapacity be concurrent. When this workman met with his accident, he was of full capacity for tailoring work. As his present employer said: "but for the accident he would be earning £20 a week." The appeal must be allowed, the award below set aside, and the case remitted for the exact amount to be agreed, or settled by the judge.

Appeal allowed with costs.

Solicitors: W. H. Thompson (for the workman); Carpenters (for the employers).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Affirmed. H.L. [1949] 1 All E.R. 841.

Re MIDLETON'S SETTLEMENT, COTTESLOE v. H.M. ATTORNEY-GENERAL.

[COURT OF APPEAL (Lord Greene, M.R., Cohen, L.J., and Vaisey, J.), June 6, 9, 10, 1947.]

Estate Duty—Settlement—Investments in England representing proceeds of sale of land in Eire—"Purpose of devolution"—Settled Land Act, 1882 (c. 38), s. 22 (5)—Irish Free State Constitution Act, 1922 (Session 2) (c. 1), sched. I, art. 73.

Certain securities, transferable on registers in England, represented the proceeds of sale of land situate in Ireland, arising under a strict settlement. The trustees were resident in England, and both the former and the present life tenants were domiciled in England. On the death of the first life tenant, estate duty was claimed in respect of the securities.

HELD: (i) art. 73 of the Irish Free State Constitution as set out in the Irish Free State Constitution Act, 1922, (Session 2), sched. I, by which all laws then in force in the Irish Free State were to continue to operate, had not the effect of continuing their operation outside the Irish Free State, and, therefore, the Settled Land Act, 1882, s. 22 (5), by which capital money was for certain purposes to be considered as land, and which had been superseded in England by the Settled Land Act, 1925, could not be regarded for the present purpose as an enactment of the Parliament of the United Kingdom.

(ii) the incidence of estate duty was not a "purpose of devolution" within s. 22 (5), which dealt solely with the preservation of beneficial interests.

Re Stoughton ([1941] I.R. 166) not followed.

Marlborough (Duke) v. Attorney-General ([1945] Ch. 145) discussed.

Decision of ROXBURGH, J. ([1947] 1 All E.R. 345), affirmed.

[AS TO DUTIES ON FOREIGN PROPERTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 246-248; and FOR CASES, see DIGEST, Vol. 21, p. 17, Nos. 89-96.]

Cases referred to :

(1) *Re Stoughton*, [1941] I.R. 166.

(2) *Marlborough (Duke) v. Attorney-General* (No. 2), [1945] Ch. 145; Digest Supp.

(3) *Re Cartwright, Cartwright v. Smith*, [1938] 4 All E.R. 209; [1939] Ch. 90; Digest Supp.

B APPEAL from a decision of ROXBURGH, J., dated Jan. 28, 1947, and reported [1947] 1 All E.R. 345.

ROXBURGH, J., held that investments in the United Kingdom representing the proceeds of sale of land situated in Eire were not property situate out of the United Kingdom and were liable to estate duty. The facts appear in the judgment of LORD GREENE, M.R.

G. R. Upjohn, K.C., and *D. Buckley* for the appellant (the life tenant).

C *N. C. Armitage* for the trustees.

J. H. Stamp for the Attorney-General.

D **LORD GREENE, M.R.:** This is an appeal by the second defendant, the second Earl of Middleton, who is tenant for life in possession under a settlement of May 15, 1909. The question raised by the appeal is as to the position with regard to estate duty on certain investments held by the trustees of the settlement for the purposes of the Settled Land Act, 1882. The investments with which we are concerned are what are described in the affidavit as the English investments, being "inscribed or registered stock or shares transferable in the books of the Bank of England or on registers kept in England." They are, therefore, *prima facie*, located in England. Under one of the well-known rules which attribute location to property, the location of shares in an English company, transferable on an English register, is to be treated as in this country.

E The settlement was originally a settlement of Irish land. The present tenant for life and his father, the first tenant for life and the first earl, were both domiciled in England, the father being domiciled there at the date of his death, and the son being domiciled there now. The trustees are in England and the investments are in England. Therefore, *prima facie*, I should have thought that there could be no possible question that, on the death of the first earl, the property passed within the meaning of the Finance Act, 1894, and on that passing estate duty was attracted.

F Had the matter stood there, I do not think that this would be contested, but it is said that, for the purposes of estate duty, these investments must be regarded as located in the Irish Free State. The argument in support of that proposition is a complicated one, but it seems to me that there are several grounds for holding that it cannot succeed. It is said that the investments, **G** for the purposes of English estate duty, must be regarded as land situate in Ireland, and reference is made to the Settled Land Act, 1882, s. 22 (5), which is the relevant Act for present purposes. By that sub-section it is provided :

H Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

First, it is said that that sub-section applies to the present case and its effect is that these investments must be treated not merely as land, but as land locally situated in Ireland, the investments having been derived ultimately from the proceeds of the sale of the Irish settled land. It is argued that the phrase "for all purposes of disposition, transmission, and devolution" includes estate duty as being an incident of devolution. Next, the Crown says: How can

the Settled Land Act, 1882, which, in effect, is now to be treated as an Irish Act, operate to defeat the claim to estate duty of the United Kingdom revenue by making alterations in what is, *prima facie*, the location of property? Counsel for the life tenant concedes that if, just before the death of the first earl, the Irish Free State Parliament had chosen to pass an Act purporting to declare the locality of property physically situated in England as Irish, that could not possibly have had an extra-territorial effect in this country so as to defeat the operation of the Finance Act as applied to property situated here, but he says that this is not the position, because the Settled Land Act, 1882, for all relevant purposes must be regarded, not as an Irish Act having a purely Irish territorial effect within the Free State, but as an Imperial Act which is competent to declare or to regulate questions of the locality of property situated within the jurisdiction of the Imperial Parliament. It is argued that the Settled Land Act, 1882, was an Act of the United Kingdom Parliament, and that it applied, with certain modifications to Ireland, and that the provisions of s. 22 (5) applied to England as much as they applied to Ireland.

I might interpose that, for the purposes of estate duty, it made not the slightest difference, before the creation of the Irish Free State, whether property was located in England or Ireland, because it attracted British estate duty in any event, but the Crown rely on the Irish Free State Constitution Act, 1922, (Session 2), which was passed on Dec. 5, 1922, and was brought into operation by proclamation on Dec. 6, 1922. That Act provided that the constitution set out in the first schedule to a document referred to as "the Constituent Act" was, subject as mentioned, to be the constitution of the Irish Free State. Article 1 of the constitution provided that the Irish Free State :

... is a co-equal member of the community of nations forming the British Commonwealth of Nations.

Article 2 provided :

All powers of government and all authority legislative, executive, and judicial in Ireland, are derived from the people of Ireland and the same shall be exercised in the Irish Free State . . . through the organisations established by or under, and in accord with, this constitution.

Speaking generally, the effect was to constitute the Irish Free State as a co-equal member of the community of nations forming the British Commonwealth of Nations, raising it to the same status as the other self-governing parts of His Majesty's Dominions. At that time the Statute of Westminster, 1931, had not been passed, but under the recognised convention which governed the relations of the Commonwealth, the British legislature would not legislate for such a dominion as the Irish Free State without the consent of that country. That convention was given the force of law by the Statute of Westminster. Article 73 of the Free State constitution provides :

Subject to this constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State . . . at the date of the coming into operation of this constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the *Oireachtas* [i.e., the parliament of the Irish Free State.]

Counsel for the life tenant contends that the Settled Land Act, 1882, was an Act of Parliament of the United Kingdom operating at its date both in Ireland and in England, that it remains as an Act of the United Kingdom Parliament, and, therefore, that it is not true to say that he is claiming by virtue of an Irish Act to alter the notional location of property situated in England. He maintains that he is relying on an Act of Parliament of the United Kingdom which has force locally in this country and is not confined in its operation to the Irish Free State. The Act of 1882 has been superseded in England by the Settled Land Act, 1925. The Act of 1882, we are told, has never been repealed or modified by the Irish legislature. Therefore, at the date of the death of the first earl, which was the date of the passing of the property, the Settled Land Act in force in this country was the Act of 1925 and the Settled Land Act in force in the Free State was the Act of 1882. It was said that the Act of 1882 still has the effect of altering in England the locality of property situated in England.

In my opinion, that argument completely breaks down. Article 73 had its force and effect by virtue of the Imperial Act which set up the Irish Free State. Constitutionally, it is imperial legislation. Although it originated in a document drawn up by persons responsible for organising the Irish Free State, it had not thereby any force in law. It could only have the force of law if it were given that force by United Kingdom legislation, but, in my opinion, the effect of art. 73, as construed in its context as part of the new constitution, is not to give to laws which are thereby said to remain in force in the Free State any extra-territorial effect so as to affect property outside the Free State. In my view, it can only mean that those laws shall continue to operate within the jurisdiction of the Irish Free State. To say that they will continue to operate, not merely within the jurisdiction of the Irish Free State, but extra-territorially, so that they would continue to operate in this country, appears to me to be a mistaken construction and not one which can be accepted in the case of a document which was setting up a new and independent co-equal member of the British Commonwealth. The result, in my opinion, is that the Settled Land Act, 1882, s. 22 (5), cannot be regarded for the present purpose as an Act of the United Kingdom Parliament, but must be regarded in the same way as an Act of the Irish Parliament which, as I have said, could have no jurisdiction to affect the law relating to the locality of property in the United Kingdom or to regulate that locality.

Counsel for the life tenant agrees that, unless he can succeed on that argument, he must fail in this appeal, and, in my opinion, he does fail on it.

He also fails, in my view, on his first argument on the construction of s. 22 (5). This is not a case of equitable conversion. Equitable conversion, based on the doctrine that equity regards as done that which ought to be done, requires a direction for sale to effect a change in the character of the property. There is no direction for sale here either in the Act or in the settlement. All that the Settled Land Act does is to give a power of sale. Obviously, it was necessary for the legislature to insert in the Act giving that power some provision which would ensure that its exercise should not prejudice the beneficial interests in land sold under the power. That was done by sub-s. (5). In my view, it is a mistake to regard sub-s. (5) as equivalent to or as expressing the same results as would arise on a conversion under the ordinary equitable doctrine of conversion. It does not say that the capital money and the investment of the capital money are to be considered for all purposes as though they were the proceeds of a direction to sell the land under the doctrine of equitable conversion. For certain limited and stated purposes, it enacts that the proceeds are to "be considered as land," and they are to be :

... held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

The object is, clearly, to preserve the beneficial interests and cause those beneficial interests to attach to the capital money in the same way as they attached to the land from which it was derived.

Counsel's argument involves two propositions. First, he has to say that the phrase "for all purposes of disposition, transmission, and devolution" includes the purposes of estate duty. He also has to say that the effect of sub-s. (5) is to treat capital money as located for those purposes in the same place as the land from which it was derived was located. Sub-section (5) appears to me to have nothing to do with location. Location was not a matter which was relevant for the purposes of the sub-section. All that the sub-section required to do was to ensure that the beneficial interests should be the same as regards the capital moneys as they had been regarding the land. To effect that result it was not necessary to bring in any reference to location at all. Wherever the land was located the same result would follow—that the beneficial interest would be preserved by virtue of those words. Apart from that, the words "for all purposes of disposition, transmission, and devolution" show that it is only for those selected purposes that capital money is to be considered as land. The sub-section clearly recognises that for other purposes, any purposes not falling under those three heads, capital money will not be considered as land because there is nothing to make it land. Therefore, it would remain personal property.

Counsel for the life tenant says estate duty is only exigible on a devolution described as a "passing" under the Finance Act, I am not going to stop to consider whether the word "passing" and the word "devolution" mean the same thing, but I venture to doubt it. What I do think is that estate duty is not a purpose of devolution. The devolution of property, if it be treated as the equivalent of passing, is merely the occasion on which the Crown steps in and levies duty. It is an incident, not a purpose, of devolution. It is something entirely outside the beneficial interests, *inter se*, which are preserved by the sub-section. It is a third party intervening on the occasion of the devolution and taking a toll. It seems to me impossible to say that that is covered by the sub-section. In my opinion, that argument also fails.

Counsel relied on certain authorities, and his principal authority was the Irish case of *Re Stoughton* (1), which raised a question under the Finance Act, 1894, s. 2 (2), a sub-section which is still in operation in Eire. The sub-section provides :

Property passing on the death of the deceased, when situate out of the United Kingdom, shall be included only if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof or would be so payable but for the relationship of the person to whom it passes.

In the application of that sub-section, for "the United Kingdom" would have to be read "Eire." The case turned on the question whether succession duty would have been payable. The question of the notional location of the English investments there in issue, which were derived from sales of Irish land, was not discussed by counsel, so far as appears from the report which contains a very full statement of the argument on both sides. HANNA, J., came to the conclusion that Irish succession duty would have been payable, and, therefore, that estate duty was also payable. I might mention that there is no question about s. 2 (2) in the present case, but, at the conclusion of his judgment, HANNA, J., refers to the Settled Land Act, which he said for the purposes of that case was an Irish Act. He said ([1941] I.R. 181) that the change was made :

... in pursuance of certain statutory rights and privileges given by the Irish law in relation to land. The sale of the lands was a joint operation under the powers of the Settled Land Act, 1882, and the Irish Land Act of 1903, the provisions of which Acts enable the proceeds of the sale to be followed wherever they may be and in whatever form, so that there is impressed upon such proceeds the notional character of Irish land . . . I am of opinion that the effect of these sections is to give a complete answer to the argument of the petitioners and to establish not only that the English securities are notional Irish land but that the claim of the Revenue Commissioners [i.e., the Southern Ireland Revenue Commissioners] to have the estate duty charged upon the proceeds falls upon them. The succession of William Anthony Stoughton was, in my opinion, a "devolution" within the meaning of the words in s. 22 (5) of the Settled Land Act, 1882, under the will, and also one of a series of successions made by "the disposition" thereunder. This brings the securities within one or other, or both, of the words in s. 22 (5), of the Settled Land Act. These words cannot refer to the barest legal meaning to be applied to the terms and would, in my opinion, carry with them the legal incidents or obligations such as estate duty attached thereto by statute or otherwise.

Counsel relies on that, and I should, of course, pay great respect to a decision of HANNA, J., but I must point out that it was a decision on a point which, apparently, was not argued before him so that he did not have the advantage of having the various difficulties pointed out. That being so, I cannot attach to his observations the weight I otherwise should. I hope in saying that I shall not be thought disrespectful, but for the reasons I have given, in so far as he held that s. 22 (5) could alter the *prima facie* location of investments representing capital moneys in England, I must disagree with him.

That is the only case in which the point was discussed or referred to in a judgment except for one casual reference to it in *Duke of Marlborough v. Attorney-General* (No. 2) (2), a case dealing with an entirely different question which arose under the Finance Act, 1894, s. 5 (5), which concerns, among other things, land settled by Act of Parliament. There was an annuity settled on the first duke and his heirs and successors by an Act of Parliament. It was, therefore, personalty in its origin. That was commuted for a capital sum which was invested, by an order of court, in land in London. CHITTY, J., made an order under which the London freeholds so purchased were to be deemed as

temporary investments only, and they were, accordingly, conveyed to trustees on trust for sale with power to retain. The question there was whether the London freeholds were land within s. 5 (5) of the Act of 1894. The Crown argued that what had to be looked at to ascertain whether the property was land was the original settled property. There was also a statutory settlement of land and it was necessary for the Crown, to be logical, to maintain precisely the same principle in its argument in connection with both settlements. MORTON, L.J., in delivering the judgment of the court, said ([1945] Ch. 153) that at the date of the death of the ninth duke, the occasion which was relevant to the claim :

... the London freeholds were undoubtedly lands in fact, and it is contended by counsel for the duke that the trusts of the deed of Apr. 11, 1905, were not such as to convert them into personalty. Counsel conceded, however, that if the deed did operate to convert the London freeholds into personalty for the purposes of transmission and devolution, they must also be regarded as converted into personalty for fiscal purposes.

It is to be observed that that was the basis on which the court was approaching the matter. The court had no need to consider the question we are considering here, and, in particular, the question there had nothing whatever to do with the Settled Land Act, 1882, s. 22 (5). It was a question only, so far as the results of the conversion were concerned, of the effect of a deed of conveyance which, in accordance with the order of CHITTY, J., contained a trust for sale.

Therefore, it was not concerned with the special statutory provisions under which the proceeds of land sold under the powers of the Settled Land Act are, for the limited purposes mentioned in s. 22 (5), to be considered as land.

Counsel endeavoured to extract from some words of my own in *Re Cartwright* (3), a general proposition which assisted him. I only refer to the case to point out that, when it is read and the facts are appreciated, it is obvious that the language I used was in reference to the circumstances of that case and had nothing to do with any question of duty. Those words cannot be used to support counsel's argument in this case. In my opinion, the life tenant fails, and the appeal must be dismissed. Although the reasons that he gave are, perhaps, not quite the same in some respects as those which I have expressed, I agree that the conclusion to which ROXBURGH, J. came was the correct one.

COHEN, L.J. : I agree. Counsel for the Crown argued that, according to ordinary principles, the investments in question in this case would inevitably be regarded as locally situated in England, and, therefore, subject to estate duty in England. He also pointed out that, to escape this liability, the life tenant must establish, first, that the Settled Land Act, 1882, as it affects Irish land and the proceeds of sale of Irish land, has the force of a statute in this country, and, secondly, that the assessment of liability to estate duty is a purpose of disposition, transmission, and devolution within the Settled Land Act, 1882, s. 22 (5). ROXBURGH, J., decided the case on the ground that the life tenant had not negotiated the first hurdle. He was inclined to think that, if he had overcome that obstacle, he would still have failed at the second one. I agree with my Lord, the MASTER OF THE ROLLS, that he falls at both fences.

I do not desire to add anything to what my Lord has said so far as the first obstacle is concerned, but I will add a few words on the question whether the ascertainment of liability to estate duty can be said to be a purpose of disposition, transmission, and devolution. Counsel for the life tenant pointed out that, in cases where the equitable doctrine of conversion applies, the court has given full effect to that doctrine when considering whether the Crown has the right to demand payment of some particular duty, but that is because of the principle that equity regards as done that which ought to be done. That principle can have no effect here, because there is no obligation under the Settled Land Act, 1882, to invest the proceeds of sale of settled land in land. Land is only one of the investments which are the authorised investments of capital moneys. Counsel conceded that he must bring the case within the limited purposes defined by s. 22 (5), namely, "the purposes of disposition, transmission, and devolution," but he argued that the question of estate duty, being an incident inevitably arising on the passing of property, that is to say, on the devolution of property, the assessment of duty must be regarded as part of "the purposes of devolution." I entirely agree with the

observations made by my Lord in rejecting that argument. It seems to me that what the sub-section is dealing with is the disposition, transmission and devolution of the beneficial interests in the property. It is not directed at, nor is it framed very aptly to affect, the rights of creditors. The Crown is really in the position of a creditor. It has, it is true, a statutory charge on the assets—including the investments now in question—but its rights none the less are those of a creditor.

For these reasons, in addition to those which were given by my Lord, I agree that this appeal fails. A

VAISEY, J.: I agree with the judgments delivered by my Lords.

Appeal dismissed with costs.

Solicitors: *Warrens* (for the trustees and for the tenant for life); *Solicitor of Inland Revenue* (for the Attorney-General).

[Reported by J. A. CROCKETT, Esq., Barrister-at-Law.] B

COVERED MARKETS, LTD. v. (

Not followed. ADLER v. BLACKMAN, [1952] 2 All E.R. 41.

[KING'S BENCH DIVISION (Macnaghten, J.), June 11.]

Disapproved. ADLER v. BLACKMAN, [1952] 2 All E.R. 945.

Landlord and Tenant—Duration of tenancy—Yearly tenancy remaining in possession—Rent payable weekly. C

In 1934 or 1935 the landlord granted to the tenant a lease of a lock-up fish shop for a period of 7 years at a rent of £3 payable weekly in advance. The tenant paid that amount every Monday throughout the term of the lease and thereafter until June 13, 1946 when he was served with a notice to quit expiring on June 24, 1946. The lease and counterpart were lost or destroyed and the exact contents thereof were unknown. In a claim for possession:—

HELD: the proper inference to be drawn from the circumstances was that there was a yearly tenancy on the termination of 7 years, and the action, therefore, failed. D

Observations of MAUGHAM, J., in *Ladies' Hosiery & Underwear, Ltd. v. Parker* ([1930] 1 Ch. 304) distinguished.

[AS TO TENANCY FROM YEAR TO YEAR BY PRESUMPTION OF LAW, see HALSBURY, *Hailsham Edn.*, Vol. 20, p. 124, para. 137; and FOR CASES, see DIGEST, Vol. 31, pp. 52-58, Nos. 2003-2044.] E

Case referred to:

(1) *Ladies' Hosiery & Underwear, Ltd. v. Parker*, [1930] 1 Ch. 304; 99 L.J.Ch. 201; 142 L.T. 299; Digest Supp.

ACTION by the landlord for recovery of possession. The facts appear in the headnote. F

B. B. Stenham for the landlord.

C. Lewis Hawser for the tenant.

MACNAGHTEN, J., recited the facts and continued: The action is brought on the footing that when the term of 7 years expired, as it must have expired before June 28, 1946, when the writ was issued, the tenant, who had been lessee for 7 years and has remained in possession ever since, then became a weekly tenant who could be ejected from the shop at a week's notice. Counsel for the landlord relies on a passage in the judgment of MAUGHAM, J., in *Ladies' Hosiery & Underwear, Ltd. v. Parker* (1) [1930] 1 Ch. 327, where the learned judge, having decided the case, added some observations with regard to the matter which were *obiter dicta*. He held that in the circumstances of that case there was no ground to enable the court to draw the inference that on the termination of a lease for 3 years at a rent of £2 a week, payable weekly, the tenant became a tenant from year to year. The Court of Appeal held that the circumstances were such that no consensus between the lessor and the lessee could be inferred and they disposed of the case shortly on that ground. I do not understand MAUGHAM, J., as saying that where rent is payable weekly the proper inference may not be that the tenant who held over is a tenant from year to year. In the present case the circumstances were very different from those in the case dealt with by MAUGHAM, J., where the subject-matter was G
H

a piece of vacant ground. In this case it is a fishmonger's shop, and the tenant for 7 years carried on his business under his lease and has been allowed to stay on for several years after the termination of that period. In my opinion, the proper inference from the circumstances is that there was a yearly tenancy on the termination of the 7 years, whenever that took place, and the result is the action fails and there will be judgment for the tenant with costs.

Judgment for tenant with costs.

A Solicitors: *Elwell & Binford Hole* (for the landlord); *Manches & Co.* (for the tenant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

B J. L. FAIRRIE v. J. M. HALL (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Macnaghten, J.), June 9, 10, 1947.]

Income Tax—Assessment—Deductions against profits—“Loss . . . connected with or arising out of trade”—“Disbursement wholly and exclusively laid for purposes of trade”—Damages and costs in libel action—Libel by sugar broker against chairman of rival company—Income Tax Act, 1918 (c. 40). sched. D, cases I and II, r. 3 (a) (e).

C The taxpayer, a sugar broker, had published a malicious libel against the chairman of a rival company, accusing him of using an official position for advancing the interests of his own company, and, in a libel action brought by the chairman, the taxpayer had to pay £550 damages and the costs of the action which amounted to £3,025. He claimed that these sums should be deducted from the assessment made on him under the Income Tax Act, 1918, sched. D, in respect of his profits as a sugar broker:—

D HELD: the damages and costs (although in one sense connected with the taxpayer's trade in that his object in publishing the libel was to increase his own profits) were not a loss “connected with or arising out of” his trade within the meaning of the Income Tax Act, 1918, sched. D, cases I and II, r. (3) (e) (and *semble* they were not a disbursement or expense “wholly and exclusively laid out or expended for the purposes of the trade” within r. 3 (a)), and they could not, therefore, be deducted from the assessment made on the taxpayer under sched. D.

E *Strong & Co., Ltd. v. Woodfield* ([1906] A.C. 448) and *Inland Revenue Comrs. v. Warnes & Co.* ([1919] 2 K.B. 444) applied.

[AS TO TRADE EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-156, paras. 309-320; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, Nos. 215-226, and p. 46, Nos. 233-236.]

F Cases referred to:

(1) *Strong & Co., Ltd. v. Woodfield*, [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax. Cas. 215; 28 Digest 57, 290.

(2) *Inland Revenue Comrs. v. Warnes & Co.*, [1919] 2 K.B. 444; 89 L.J.K.B. 6; 121 L.T. 125; 12 Tax Cas. 227; 28 Digest 46, 235.

CASE STATED by Special Commissioners of Income Tax.

G The commissioners confirmed an assessment made on the taxpayer under the Income Tax Act, 1918, sched. D, rejecting a claim by the taxpayer that sums paid by him as damages and costs in a libel action should be deducted, in making the assessment, from his profits as a sugar broker. The facts appear in the judgment.

Borneman for the taxpayer.

H *Sir Patrick Hastings, K.C.*, and *Reginald P. Hills* for the Crown.

MACNAGHTEN, J.: This is an appeal by Mr. J. L. Fairrie, a sugar broker in the city of London, against a decision of the Special Commissioners of Income Tax confirming an assessment to income tax under sched. D to the Income Tax Act, 1918, for the year ending Apr. 5, 1943.

The taxpayer, who acted as selling agent in London for a company called Calban Lobo which produced sugar in Cuba, was sued for libel by a Mr. William James Rook. Mr. Rook was chairman of Czarnikow, Ltd., a company of very high standing in the city of London, who acted as selling agents for various

sugar producers throughout the world, and, among others, for a firm interested in sugar produced in Cuba. Shortly after the war broke out, Mr. Rook, by reason of his high standing in the city of London, was appointed Deputy Director of Sugar Supplies at the Ministry of Food. The alleged libel imputed against Mr. Rook that he had disgracefully abused his position as Deputy Director of Sugar Supplies in that he had used that position to advance the interests of the company of which he was chairman and of their clients in Cuba. The action came on for trial without a jury before ATKINSON, J. The defence raised was that the occasion of the communication of the libel was privileged because it was made in defence of the interests of the Calban Lobo company. That defence failed. ATKINSON, J., awarded Mr. Rook £550 damages and directed that the taxpayer should pay the costs of the action. The taxed costs of the plaintiff amounted to £3,025. In this appeal the taxpayer contends that these sums ought to be deducted from the assessment made on him under sched. D. in respect of his profits as a sugar broker.

The material provisions of the Income Tax Act, 1918, are contained in sched. D. Rules Applicable to Cases I and II, r. 3, which provides as follows :

In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation . . . (e) any loss not connected with or arising out of the trade, profession, employment or vocation.

These provisions are re-enactments of similar provisions in the Income Tax Act, 1842.

In my opinion, this case is concluded by the decision of the House of Lords more than forty years ago in *Strong & Co., Ltd. v. Woodifield* (1). In that case the appellants, Strong & Co., a brewery company, owned an inn and conducted it through a manager. A customer sleeping in the inn was injured by a chimney falling on him and the appellants had to pay £1,490 in costs and damages, because the fall of the chimney was due to the negligence of the appellants' servants whose duty it was to see that the premises were in a proper condition. The House of Lords, confirming the order of the Court of Appeal, held that no part of that sum of £1,490 could be deducted for the purposes of income tax from the profits made by the brewery company in the way of their trade. The case was decided in 1906 and, therefore, it was decided under provisions similar to those in the Income Tax Act, 1918, which were at that date contained in the Income Tax Act, 1842. Dealing with the provisions of s. 100 of the Act of 1842 (sched. D, cases I and II, r. 1, now r. 3 (a) *supra*), which provided that no sum should be deducted in respect of any disbursements or expenses, "not being money wholly and exclusively laid out or expended for the purposes of the trade," LORD DAVEY said ([1906] A.C. 453) :

I think that the payment of these damages was not money expended "for the purpose of the trade." These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

I do not think that that pronouncement by LORD DAVEY has ever been questioned. LORD LOREBURN, L.C., dealt with s. 100 of the Income Tax Act, 1842, (sched. D, case I, r. 3) which is now contained in r. 3 (e), *viz.*, that no sum shall be deducted in respect of "any loss not connected with or arising out of the trade." LORD LOREBURN, L.C., in the course of his judgment, said (*ibid.*, 452) :

A deduction may be allowed on account of loss, and this [*i.e.*, the £1,490 which was claimed to be deducted] is a loss. The Act does not affirmatively state what losses may be deducted. It furnishes merely negative information. A deduction cannot be allowed on account of loss not connected with or arising out of such trade. That is one indication. And no sum can be deducted unless it be money wholly and exclusively laid out or expended for the purposes of such trade. That is another indication. Beyond that the Act is silent. In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction ; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can

be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration, losses sustained by a railway company in compensating passengers for accidents in travelling might be deducted. On the other hand, if a man kept a grocer's shop for keeping which a house is necessary, and one of the window shutters fell upon and injured a man walking in the street, the loss arising thereby to the grocer ought not to be deducted. Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to solve at sight all the cases that may arise. In the present case I think that the loss sustained by the appellants was not really incidental to their trade as inn-keepers, and fell upon them in their character not of traders, but of householders. Accordingly I think that this appeal must be dismissed.

In the present case the loss which the taxpayer has sustained—£550 damages and £3,025 costs—is in one sense a loss connected with his trade, but the case falls, it seems to me, exactly within the words of LORD LOREBURN, L.C., when he said that the losses :

... cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader.

The loss fell on the taxpayer in the character of a calumniator of a rival sugar broker. It was only remotely connected with his trade as a sugar broker.

The case seems to me to be plain beyond all possible doubt, and, bearing in mind that at that date the standard rate of income tax was 10s. in the £, it would, indeed, be preposterous if the taxpayer were allowed to deduct these sums from his assessment and were thus enabled to share equally with the public revenue the loss to which he was condemned by the judgment of ATKINSON, J.

In *Inland Revenue Comrs. v. Warnes & Co.* (2), decided by ROWLATT, J., the Commissioners of Inland Revenue appealed from a decision allowing a deduction of a penalty of £2,000 and costs which had been incurred and paid by the taxpayers in proceedings instituted against them by the Attorney-General. The taxpayers carried on the business of exporting oil to Norway, and in connection with the export of certain cargo it was alleged that they incurred penalties under the Customs (War Powers) Act, 1915, s. 5 (1). They were sued for a very large sum, but, by consent, judgment was taken for a mitigated penalty of £2,000, and they had to pay their own costs. ROWLATT, J., said ([1919] 2 K.B. 452) :

Now, undoubtedly this detriment, if I may use the vaguest word, is a "loss" in the sense that the respondents have had to pay £2,000, and, therefore do not possess the £2,000 which they otherwise would have had. It is also "connected with or arising out of such trade," because they committed the offence—or what must be regarded as the offence—in carrying out their trade. But the question is whether, within the meaning of the rule, it is a loss connected with or arising out of their trade. I may shelter myself behind the authority of LORD LOREBURN, L.C., who, in his judgment in the House of Lords, in *Strong & Co. v. Woodfield* (1), said that it is impossible to frame any formula which shall describe what is a loss connected with or arising out of a trade. That statement I adopt, and I am not sure that I gain very much by examining a number of analogies; but it seems to me that a penal liability of this kind cannot be regarded as a loss connected with or arising out of a trade. I think that a loss connected with or arising out of a trade must, at any rate, amount to something in the nature of a loss, which is contemplable [*sic*] and in the nature of a commercial loss. I do not intend that to be an exhaustive definition, but I do not think it is possible to say that when a fine—which is what the penalty in the present case amounted to—has been inflicted upon a trading body, it can be said that that is a "loss connected with or arising out of" the trade within the meaning of this rule.

I entirely agree with what ROWLATT, J., said. I, too, shelter myself behind the authority of LORD LOREBURN, and I think that it is not possible to say that damages for a malicious libel published by a sugar broker can be said to be a loss connected with or arising out of his trade within the meaning of r. 3 (e). Therefore, the appeal must stand dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Ernest Bevir & Son* (for the taxpayer) ; *Solicitor of Inland Revenue* (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. LAURENCE PHILIPPS & CO. (INSURANCE), LTD.

[KING'S BENCH DIVISION (Atkinson, J.), May 15, 16, 19, June 6, 1947.]

Revenue—Excess profits tax—“Capital employed in trade or business”—Insurance company promoting underwriting syndicates—Loans to persons added as “names”—Finance (No. 2) Act, 1939 (c. 109), s. 13 (3), sched. VII, pt. II, para. 1 (1) (b).

The objects of a company were, *inter alia* : “(1) To carry on the business of insurance brokers and insurance agents in all its branches. (2) To act as agents or managers for any insurance company, club, or association, or for any individual underwriter in connection with its or his insurance or underwriting business. . . (37) To lend money to any person or company . . .” In 1934 the company promoted at Lloyds the formation of a marine syndicate for which the company acted as underwriting agent, receiving a salary and commission from each member of the syndicate. In 1935, the company promoted a non-marine syndicate. It was not an economic proposition for a syndicate to be small, and, therefore, certain persons, three of whom were directors and one an employee of the company, were added as “names” in the syndicates. The company lent money to two of these persons that they might deposit the necessary sums to become underwriting members of Lloyds.

HELD : the loans were temporary deposits made by the company with the object of securing business, and constituted “capital employed in the trade or business” within the Finance (No. 2) Act, 1939, sched. VII, pt. II, para. 1 (1) (b), and, therefore, they should be included in the computation of the “average amount of the capital” for the purposes of s. 13 (3) of the Act and the assessment of excess profits tax.

[FOR THE FINANCE (No. 2) ACT, 1939, s. 13 (3) AND SCHED. VII, PT. II, PARA. 1 (1), see HALSBURY'S STATUTES, Vol. 32, pp. 1195, 1221.]

Cases referred to :

- (1) *English Crown Spelter Co., Ltd. v. Baker*, (1908), 99 L.T. 353 ; 5 Tax. Cas. 327 ; 28 Digest 48, 250.
- (2) *Waldie (James) & Sons, Ltd. v. Inland Revenue Commissioners*, (1919), 12 Tax Cas. 113 ; Digest Supp.
- (3) *Reid's Brewery Co., Ltd. v. Male*, [1891] 2 Q.B. 1 ; 60 L.J.Q.B. 340 ; 64 L.T. 294 ; 55 J.P. 216 ; 28 Digest 56, 285.
- (4) *Inland Revenue Commissioners v. Gas Lighting Improvement Co., Ltd.*, (1923), 129 L.T. 481 ; 12 Tax Cas. 503, H.L. ; Digest Supp.
- (5) *Inland Revenue Commissioners v. Imperial Tobacco Co. (of Great Britain & Ireland), Ltd.*, [1940] 3 All E.R. 248 ; [1940] 2 K.B. 287 ; 109 L.J.K.B. 737 ; 163 L.T. 310 ; Digest Supp.
- (6) *Thomas Roberts v. Inland Revenue Commissioners*, (1946) Excess Profits Tax Leaflet, No. 42.
- (7) *Acme Flooring and Paving Co. (1904), Ltd. v. Inland Revenue Commissioners*, May 14, 1947, unrep.

CASE STATED by the Special Commissioners of Income Tax, who had held, in favour of a company, that sums lent by the company to a director and an employee of the company to enable them to be added as “names” in a syndicate promoted by the company at Lloyds were capital moneys employed in the company's business and were not investments. The facts appear in the judgment.

The Solicitor-General (Sir Frank Soskice, K.C.) and R. P. Hills for the Crown. Mustoe for the company.

Cur adv. vult.

June 6. ATKINSON, J., read the following judgment. Laurence Philipps & Co., Ltd., carry on business as insurance brokers and insurance agents in all its branches. They are, therefore, assessable to excess profits tax. Certain assessments were made on them for the years ending Dec. 31, 1939, and Dec. 31, 1940, against which they appealed. They claimed to be entitled to an increase in their standard profits for the purpose of ascertaining the excess profit in those two years because of an increase of capital employed in the business. The Special Commissioners decided in their favour, and the Commissioners of Inland Revenue appeal by way of Stated Case.

The Case states in para. 3 :

The objects for which the respondent company was incorporated include the following :

- (1) To carry on the business of insurance brokers and insurance agents in all its branches.
- (2) To act as agents or managers for any insurance company, club, or association, or for any individual underwriter in connection with its or his insurance or underwriting business . . . (37) To lend money to any person or company, and on such terms, as may seem expedient, and in particular to customers and others having or contemplating dealings with the company.

A To understand this case, one must appreciate how business is carried on at Lloyds. Risks are undertaken by groups of underwriting members known as "syndicates," the members of which are described as "names." That is a very apt description, for it is all they are. The entire business is conducted for the syndicate by an agent called the "underwriting agent." The underwriting agent controls the syndicate. It can wind up the syndicate. It can decide what share any member of the syndicate may have. [His Lordship quoted a typical agreement between a syndicate and an underwriting agent, and continued :—] The actual technical accepting of the risk, *i.e.*, the signing of the slip, is done on behalf of the syndicate by a person known as the underwriter, but he is appointed by the underwriting agent. He may or may not be a member of Lloyds, and, if a member of Lloyds, he may or may not be a member of the syndicate on whose behalf he initials the slips. Each member of the syndicate authorises the underwriting agent to conduct the business on his behalf.

B In 1934, the respondent company, with the object of increasing its business, promoted the formation of a marine syndicate at Lloyds for which they would act as underwriting agents. This is a usual undertaking in the business of brokers and insurance agents. It was to consist of at least six names, but the ultimate aim was to have ten, or even more. Every member of the syndicate would have to be an underwriting member of Lloyds. To be an underwriting member of Lloyds a man has to deposit with Lloyds securities of a value fixed by the committee. In this case the values were fixed at £5,000 in respect of the marine syndicate. The more names there are in a syndicate the better. More substantial risks can be accepted, the overhead expenses are reduced, and the underwriting agent gets more salaries and more commission. Only four names could be collected at the beginning, and it was decided that Mr. J. P. Philipps and Mr. W. G. Henderson, two of the company's directors, should be added as names. The company appointed Mr. O'Bryen Broadbridge, who was a salaried servant of the company, to be underwriter of the syndicate, and in 1936 he was added as a name. In 1935 the company formed another syndicate, a non-marine syndicate. Again, at the outset only four names were obtained. Mr. Philipps and Mr. Henderson were made names in that syndicate, and in 1938 Mr. Broadbridge was added as a name. The value of the security to be deposited was fixed by the committee at £1,500 per member, later increased to £2,500. Today the marine syndicate consists of 14 members, and the non-marine of 13. There are material advantages in having in a syndicate persons closely associated with the underwriting agent, whether as directors or employees. Besides the fact that the agent gets more salary and commission, others are encouraged to join, and it creates confidence in the syndicate because members who are connected with the company are less likely to leave the syndicate, and the syndicate is less likely to transfer the underwriting agency to other insurance broking businesses.

C Neither Mr. Henderson nor Mr. Broadbridge could supply the deposit of £5,000 for the marine syndicate, nor the £1,500 for the non-marine syndicate, nor the further £1,000 when the £1,500 was increased to £2,500. The company, therefore, agreed to lend them these sums for the express purpose, the only purpose, of providing the necessary deposits. There was also other money to be found, the amount, fixed by the committee, to be deposited by the names with the underwriting agent to form the nucleus of the premium trust fund, a fund into which premiums are paid and out of which claims are paid. The necessary loans were made to comply with those requirements. Further, £300 was required by each of them for the first annual subscription, and one or two other small sums were also required. These amounts were also lent at 3 per cent. interest.

The question for the commissioners was whether, for the purposes of the excess profits tax, these loans were capital employed in the business of the company, or whether they were investments and, therefore, to be excluded from the computation of the capital for the purpose of the tax.

One deposit deed, that for the marine syndicate, is made between Broadbridge and the respondent company and the Society of Lloyds, and it recites that:

The candidate is desirous of being admitted to the privileges of an underwriting member of Lloyd's [and he has] caused or procured to be transferred to or into the name of the society the stocks funds shares or securities mentioned in the schedule hereunder written [which in this case consisted of 5,180 2½ per cent Funding Loan, 1956-61] (hereinafter called the "trust fund") to be held by the society upon the trusts and for the purposes hereinafter mentioned. [Then the deed witnessed and declared] that the society shall stand possessed of the trust fund upon trust for the company until the candidate shall be admitted a member of Lloyd's as aforesaid and from and after his admission upon trust to allow the trust fund or any part thereof to remain in its present state of investment [for so long as the society shall think fit]. . . . Upon trust until the committee shall receive notice in writing that the candidate has made default in paying the just claims upon any policy or policies . . . to pay the annual income of the trust fund to the company or its assigns or as it or they shall direct. . . . And subject to the trusts aforesaid the society shall hold the trust fund or so much thereof as shall not be applied for any of the purposes aforesaid in trust for the company or its assigns.

The non-marine agreement is to the same effect and relates to the £1,500.

The agreement made between the company and Broadbridge, which is similar to the agreement with Henderson, recites that:

Mr. Broadbridge has appointed the company to be the underwriting agents. . . . And . . . the company has made to Mr. Broadbridge the three following loans (hereinafter called the "marine loans") . . . (a) the sum of £5,000, and (b) the sum of £1,000, and (c) the sum of £300 7s. 2d. representing Mr. Broadbridge's first annual subscription, and entrance fee to Lloyd's. . .

There follows the list of loans for purposes connected with the non-marine underwriting representing £1,500 and £1,000—that £1,000 being held upon the trusts of the premium trust deed—and a further £10 for certain expenses. The deed witnesses that Broadbridge acknowledged that he was indebted to the company in the amounts of the marine loans and the non-marine loans therein before recited. The deed continues:

2 (a) The annual income of the first marine loan and the first non-marine loan or any part thereof from time to time outstanding or any investments representing the same shall be paid to the company in accordance with and subject to the provisions of the marine deposit deed and the non-marine deposit deed respectively. (b) The annual income of the second marine loan and the second non-marine loan or any part thereof from time to time outstanding or any investments representing the same shall be paid to the company. (c) Mr. Broadbridge shall pay to the company interest at the rate of 3 per centum *per annum* upon the third marine loan and the third non-marine loan. . .

3(a): The company hereby undertakes and agrees that no part of the said loans or any investments representing the same shall at any time be repayable to the company by Mr. Broadbridge, either directly or indirectly out of Mr. Broadbridge's premiums or other underwriting moneys, except out of ascertained net profits on closed underwriting accounts. (b): Mr. Broadbridge hereby undertakes and agrees that the net ascertained profits on closed underwriting accounts of his marine underwriting shall from time to time be paid to the company in repayment [of the loans in a certain order until they have been all paid.]

There is a similar provision as to the non-marine loans, and that he is entitled to repay them at any time. By cl. 5 it is provided that the marine loans outstanding shall become repayable to the company if Broadbridge ceases to be a member, or if the company ceases to be the underwriting agents, or if Broadbridge ceases to be the underwriter for the company's marine underwriting. There is a similar provision as to the non-marine loans. When the further £1,000 was required as extra security for the non-marine syndicate a memorandum was added that the company, having increased the amount of the first non-marine loan by the sum of £1,000, was to be in the same position as the original £1,500. So that there was no question that these advances did result in debts from Henderson and Broadbridge to the company.

This transaction was remunerative for the company. The account shows, for example, that in the year ending Dec., 1939, the company received by way of interest and dividend from Mr. Henderson £274, a salary of £200, and a commission of £230, and from Mr. Broadbridge £263 interest, £200 salary, and £230

commission. The following year, in the case of Mr. Henderson, the commission was increased to £249, and was a little less in Mr. Broadbridge's case, namely £216. In 1941 there was £420 commission in the case of Mr. Henderson, and £396 in the case of Mr. Broadbridge, and in 1942 £701 commission in the case of Mr. Henderson and £627 commission from Mr. Broadbridge. In other words, from the two of them, in 1942, the commission amounted to £1,300 in addition to salaries of £400.

A The Finance (No. 2) Act, 1939, s. 13 (3) provides :

... Provided that if the average amount of the capital employed in the trade or business in any chargeable accounting period is greater or less than the average amount of the capital employed therein in the standard period, the standard profits for a full year shall, in relation to that chargeable accounting period, be increased, or, as the case may be, decreased, by the statutory percentage of the increase or decrease in the average amount of the capital employed in the trade or business.

B That percentage is later fixed at 8 per cent. Section 14 provides :

(2) The average amount of the capital employed in a trade or business in the standard period or any chargeable accounting period shall be computed in accordance with pt. II of sched. VII to this Act.

Schedule VII, pt. II, para. 1 provides :

C (1) Subject to the provisions of this part of this schedule, the amount of the capital employed in a trade or business (so far as it does not consist of money) shall be taken to be ... (b) so far as it consists of assets being debts due to the person carrying on the trade or business, the nominal amount of those debts. . . .

Part II, para. 3, provides :

Any investments the income from which is by virtue of the provisions of part I of this schedule not to be taken into account in computing the profits of the trade or business, and any moneys not required for the purposes of the trade or business, shall be left out of account, . . .

D Part I, para. 6, provides :

(1) Income received from investments shall be included in the profits in the cases and to the extent provided in sub-para. (2) of this paragraph and not otherwise.

E Sub-paragraph (2) limits that to the business of a building society or a banking business, assurance business or business "consisting wholly or mainly in the dealing in or holding of investments." There is no doubt that this business was one in which the income received from investments was not to be included in the profits of the concern. If the income is not to be included, pt. II, para. 3, makes it clear that the investments themselves are not to be deemed part of the capital. It is to be noted here that all the profit resulting from the finding and use of this money was included in the assessed profits of the company. I do not know whether the interest was included, but it is sufficient to say that these large profits, which were received solely as the result of the financing of these two employees of the company, all form part of the profits in respect of which the assessment has been made.

F The Crown contends that these advances or debts to the firm were not capital employed in the business, or, if employed in the business, they were still only investments. On the other hand, the company says—and this is the view the commissioners have taken—that the money was used in its business in furtherance of an operation which was in the ordinary course of the business. It was used for business purposes to produce business revenue, and it resulted in debts which, according to the section I have read, form part of the capital of the concern. There is no doubt that the advances were loans and did result in debts owing to the company, but investments might do that as well, so that does not settle the question.

H In *English Crown Smelter Co., Ltd. v. Baker* (1) a company carried on the business of zinc smelting and they wanted to be certain of their supply of "blende." They bought two Welsh mines and they formed a new company to take them over and to work them. They lent money to this new company at various times. When they had advanced up to £40,000 they refused to advance any more, with the result that the company was wound-up and the £40,000 was a bad debt. The only question there was whether the bad debt could be brought into the profit and loss account as a trade loss reducing their profits. The commissioners took the view that it was not an ordinary business transaction.

They were of opinion that the amounts advanced to the Welsh company represented advances quite out of the usual course of trade, and, therefore, the debt was not an ordinary trade loss which would come into the profit and loss account. a view which was upheld by the court. That does not help much in the present case, because what was done here was something in the usual course of trade.

The next case referred to, *Waldie & Sons v. Inland Rev. Comrs.* (2), seems to me very much in point. There certain coal merchants, who had the exclusive disposal on commission of the output of a colliery in which they had a controlling interest, made advances to the colliery, and the question was whether those advances could be treated as capital for the purposes of excess profits duty assessments. It was held that they could. LORD SALVESEN said (12 Tax Cas. 117), and his remarks seem to me to be very applicable to the case with which I have to deal:

These being the facts and the respective arguments, I am of opinion that the appellants are right. I think in a commercial sense the sums in question were employed in the appellants' business. It was on purely business grounds that they made the advances and if they had no other business than that of agents for the First Coal Company there would have been no profits to assess. It is conceded that if they gave their customers long credits for payment of their accounts and so needed a much larger working capital than if they had been able to get cash on delivery of the coal which they sold, the additional capital so used would have been employed in their business. Equally I think they were entitled to use their capital in financing for business reasons the sellers from whom they derived the raw material in which they deal. *Ex hypothesi* they could not have withdrawn these sums from their business and put them on deposit receipt or invested them in war loan without materially affecting the profits of their own business. The sums advanced have none of the features that are associated with investments, *e.g.*, any fixed permanence or any expectation of profit whether in the shape of dividends or otherwise. I think they were merely temporary items (as they are described in the argument for the appellants) in the running agency account, very similar to advances which a law agent may make to a client in the course of a litigation and for the purpose of enabling the litigant to carry on his suit.

Later he quotes with approval a passage from the judgment of POLLOCK, B., in *Reid's Brewery Co., Ltd. v. Male* (3):

"It is found on the facts that in no case is any loan or advance made by way of permanent investment whether it be by way of deposit of deeds, mortgage, promissory note or otherwise. That might not be perhaps in itself sufficient, but the description of the course of business shows beyond doubt that this is not capital invested; it is capital used by the appellants, but used only in the sense that all money laid out by traders whether in the purchase of goods be they traders only, or raw materials be they manufacturers or on loans in the case of moneylenders or pawnbrokers is used. It is used and is out of capital but is not invested in the ordinary sense of the word."

In *Inland Rev. Comrs. v. Gas Lighting Improvement Co., Ltd.* (4), the company, which carried on the business of refining and distributing petroleum and petroleum products, held shares in a Belgian company formed to sell petrol, and shares and debentures in two Roumanian oil producing companies. The shares in the Belgian company were acquired as part of an arrangement under which the respondent company transferred its existing business in Belgium to the Asiatic Petroleum Co. for which the Belgian company was to act as distributor. The shares and debentures in the Roumanian companies were acquired to secure a supply of crude oil. There was no question, but that those were investment transactions. The only point which was decided was whether the exclusion of investments in the clause in the schedule which I read was limited to the exclusion of investments not connected with the trade or business. The decision, quoting from LORD CAVE'S opinion (12 Tax Cas. 535) was:

I find nothing in the Act which compels or admits of such a limitation of the meaning of the word "investments." The expression cannot be intended to apply to investments wholly unconnected with the business to be assessed; for investments of that character could in no case be regarded as capital of the business, and it would be quite unnecessary to direct their exclusion. It must therefore refer to investments connected with the business, and I see no reason why it should not include an investment of part of the business capital in an outside security, though made with the object of forwarding the trading operations for which the business was constituted.

LAWRENCE, J., made some useful observations on this matter in *Inland Rev. Comrs. v. Imperial Tobacco Co., Ltd.* (5). Having read that passage from LORD CAVE, which I have already read, he said ([1940] 3 All E.R. 250):

In my opinion, the crucial words for the present purpose there used by VISCOUNT CAVE, L.C., are "in an outside security." That is the limitation which, in my opinion, has to be imposed upon these words.

Dealing with the question whether it was income from other properties, he says (*ibid.*, 251) :

In my opinion, the rule contrasts investment income and trade profits. I think that the words mean, as VISCOUNT CAVE, L.C., seems to me to have suggested in his opinion in the *Gas Lighting Improvement Co., Ltd.* (4) case, income derived from sources outside the trade, and produced by money or money's worth not then used in the trade.

It seems to me it would be impossible to say that these profits were profits from an outside security or that they were investment income as opposed to trade profits. It is clear that the profits derived from this transaction were trade profits. In *Inland Rev. Comrs. v. Gas Lighting Improvement Co., Ltd.* (4) the House of Lords was dealing with something which was, beyond question, an investment. Here the question is whether or not these loans were investments. I think that this money was capital put into the business and expended in a business transaction. The income derived from the transaction was not from a source outside the trade, but was within it, it being a customary part of the company's trade to promote syndicates. If it was customary for the company to promote syndicates, it must be part of its ordinary business functions to advance money to the syndicates where required. The Case finds that it was not unusual for an insurance broking company to form and manage one or more underwriting syndicates. I think the payments were temporary deposits on loan made with the object of securing a business revenue, not some collateral kind of revenue, but ordinary business revenue. That business revenue is included in the assessed profits. It could not have been earned without these deposits being made to finance the two members. It was, therefore, capital employed in the business. All the time it was serving the essential purpose of maintaining Henderson and Broadbridge as underwriting members of Lloyd's.

There is never any difficulty about regarding money lying idle in the bank as money employed in the business providing there is a reasonable probability of it being wanted in the accounting year or in a short space of time thereafter : see *Thomas Roberts v. Inland Rev. Comrs.* (6) and *Acme Flooring and Paving Co. (1904) Ltd. v. Inland Rev. Comrs.* (7). These deposits on loan to Henderson and Broadbridge were performing an active operation as compared with the passive operation of such balances. I read the Finance (No. 2) Act, 1939, sched. VII, pt. II, para. 1 :

(1) Subject to the provisions of this part of this schedule, the amount of the capital employed in a trade or business. . . shall be taken to be . . . (b) so far as it consists of assets being debts due to the person carrying on the trade or business . . .

as meaning, or, at any rate, as including, debts arising from a business transaction or from the employment of money in the business. I agree with the Solicitor-General that the paragraph does not include any debt however it comes about, because an investment may lead to a debt—for instance, a mortgage is a debt, notwithstanding that it is an investment—but, if a debt arises from a business transaction or through the employment of money in the business, it seems to me that the debt is capital within para. 1 of pt. II of the schedule. I think these debts arose from the employment in its normal course of business of capital belonging to the company, and that it is impossible to regard the advances as an investment, if the word is used in its ordinary meaning or in any of the meanings suggested by LORD STERNDALE in *Inland Rev. Comrs. v. Gas Lighting Improvement Co., Ltd.* (4). It is an employment resulting in a considerable profit enuring to the company, not profit from an outside source, but profit enuring to the company in the conduct of its own ordinary business, a profit which would not have enured but for the use made of this money. In my view, there was ample evidence to support the finding of the Special Commissioners, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors : *Solicitor of Inland Revenue* (for the Crown) ; *Slaughter & May* (for the company).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

WOLFSON v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Atkinson, J.), May 19, 20, June 6, 1947.]

Income Tax—Sur-tax—Settlement—“Power to revoke or otherwise determine settlement”—Dividends from shares in investment company controlled by taxpayer—Whether power must be found in terms of settlement—Finance Act, 1938 (c. 46), s. 38 (1) (a).

The Finance Act, 1938, s. 38 (1) provides: “If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor . . . will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement . . .”

The capital of a private investment holding company consisted of 1,000 shares of £1 each of which the taxpayer held 700, his two brothers 100 each, and his father's trustees the remaining 100. Each share carried a vote. To make provision for their sisters, the taxpayer and his brothers entered into a deed of covenant, under which they each covenanted to pay to trustees for the benefit of the sisters such sum each year as, after the deduction of income tax, left a sum equal to the net amount of all dividends received by them during the previous 12 months on the ordinary shares of the company. The Special Commissioners held that the annual sum payable by the taxpayer must be treated as his income. On an appeal by the taxpayer the Crown contended that while, on the face of it, the settlement was innocuous, in fact, the taxpayer could stop the dividends or wind-up the company alone or with the consent of another person and that that was enough to bring the settlement within s. 38 (1) (a).

HELD: the power referred to in para. (a) must be found in the terms of the settlement and not *aliunde*, and, as no such power was to be found in this settlement, the gross equivalent of the net amount paid annually by the taxpayer under the deed was an admissible deduction in computing his total income for sur-tax purposes.

Inland Revenue Comrs. v. Payne (1941) (110 L.J.K.B. 323); *Chamberlain v. Inland Revenue Comrs.* ([1943] 2 All E.R. 200); and *Jenkins v. Inland Revenue Comrs.* ([1944] 2 All E.R. 491) considered.

MacAndrew v. Inland Revenue Comrs. (1943) (25 Tax Cas. 500) criticised.

[FOR THE FINANCE ACT, 1938, s. 38, see HALSBURY'S STATUTES, Vol. 31, p. 348].

Cases referred to:

- (1) *Inland Revenue Comrs. v. Payne* (1941), 110 L.J.K.B. 323; 23 Tax Cas. 610; Digest Supp.
- (2) *Chamberlain v. Inland Revenue Comrs.*, [1943] 2 All E.R. 200; 25 Tax Cas. 317; Digest Supp.
- (3) *MacAndrew v. Inland Revenue Comrs.* (1943), 25 Tax Cas. 500; Digest Supp.
- (4) *Jenkins v. Inland Revenue Comrs.*, [1944] 2 All E.R. 491; 171 L.T. 355; 26 Tax Cas. 265; Digest Supp.; *affg.* [1944] 2 All E.R. 160.

CASE STATED by Special Commissioners of Income Tax.

The commissioners held that an annual sum payable by the taxpayer under a certain deed of covenant must be treated as his income. The taxpayer appealed. The facts appear in the judgment.

Sir Roland Burrows, K.C., and *L. C. Graham-Dixon* (with them *A. G. Tribe*) for the taxpayer.

The Solicitor-General (Sir Frank Soskice, K.C.) and *Reginald P. Hills* for the Crown.

Cur adv. vult.

ATKINSON, J., read the following judgment. This is an appeal by the taxpayer against a finding by the commissioners that certain settlements which he made in favour of his sisters were of such a nature that he was still assessable in the amount of the income involved. The question is whether the gross equivalent of a sum of £14,612 10s. 0d. (net) paid by the taxpayer under a deed of covenant dated Mar. 26, 1940, is an admissible deduction in computing the taxpayer's total income for sur-tax purposes.

The Case states the following facts. In 1931 a company (then called the New Central Cinema, Stamford Hill, Ltd.) was formed with the object of carrying on a cinema business. The taxpayer was one of the signatories to the memorandum of association. On May 4, 1933, the name of this company was changed to Leonard Gordon Estates Ltd., and since 1933 the company has been used by the taxpayer and his brothers as a private investment holding company. The capital consisted of 1,000 shares of £1 each. The taxpayer at all material times held 700 shares; one brother, Charles, held 100 shares; another brother, Samuel, held 100 shares; and the other 100 were held by the trustees of a settlement made by the taxpayer's father. Each share carried a vote. The taxpayer wanted to make provision for his sisters, and he consulted his solicitor, Mr. Chetham, who was one of the trustees of the father's settlement. That resulted in a deed of covenant, dated Mar. 26, 1940, being entered into between the taxpayer, Charles and Samuel, all called the settlors, of the one part, and Mr. Chetham and the taxpayer in their capacity as trustees, of the other part. The settlors each covenanted as follows:

(1) Each settlor hereby irrevocably covenants with the trustees that he will on the first day of April in each year during the period of 7 years commencing on Apr. 1, 1940, or until his death (whichever period shall be the shorter) pay to the trustees an annual sum calculated according to the provisions contained in cl. 2 hereof each such annual sum to be held by the trustees upon the trusts and subject to the powers herein declared and contained. (2) Each annual sum hereinbefore covenanted to be paid by each settlor shall (subject to the proviso hereinafter in this clause contained) be such an annual sum as after deduction of income tax at the standard rate for the time being in force leaves a sum equal in amount to the net amount in the aggregate of all dividends received by him during the previous 12 months expiring on the said first day of April in each year upon the ordinary shares of Leonard Gordon Estates Ltd. held by him as set out in the first schedule hereto. Provided that if at any time any settlor shall sell or otherwise dispose for value of the said shares in Leonard Gordon Estates Ltd. or any of them now held by him the annual sum thereafter to be paid by that settlor pursuant to cl. 1 hereof shall be such an annual sum as after deduction of income tax at the standard rate for the time being in force leaves a sum equal in amount to the net amount of all dividends received by him during the previous 12 months expiring on the first day of April in each year from any of the said shares in Leonard Gordon Estates Ltd. as may still be held by him together with the net amount of any other dividends or income received by that settlor during the said 12 months from the re-investment pursuant to cl. 4 hereof of the net proceeds of such of the said shares in Leonard Gordon Estates Ltd. as have been so sold or otherwise disposed of for value.

By cl. 3 of the deed it was provided that the trustees should stand possessed of the annual sums paid to them by the settlors upon trust to pay to each of the beneficiaries so long as she should be living out of the sums received by them in each year ending on Apr. 1 such an annual sum as, after deduction of income tax at the standard rate for the time being in force, left £450. By cl. 5 of the deed it was provided that any settlor should be entitled to make any of the annual payments covenanted to be paid by directing Leonard Gordon Estates Ltd., or any other company, individual, firm, institution or concern in or with whom proceeds of sale or disposal should have been re-invested pursuant to cl. 4 of the deed to pay to the trustees on his behalf the net dividends in trust or other income upon the shares or other investments in which the net proceeds may have been re-invested. In the year in question, *i.e.*, in respect of the year ending Apr. 5, 1940, the taxpayer paid £14,612 10s. 0d. net "on account of his liability under the said deed of covenant" to the trustees. The question is whether, in view of the terms of that settlement, the taxpayer is entitled to deduct the equivalent gross sum from his profits for the purposes of sur-tax.

The taxpayer contends that this is a perfectly straightforward settlement made to provide for his sisters. He had shares in an investment company which was paying good dividends and he wanted whatever he had to go to them. He did not want to part with his shares. He may have had good reason, for he could secure wise control over the share transactions of the company so long as he retained voting power. By covenanting to hand over a sum equal to what he received his sisters would get all the benefits, while he retained the power of seeing that this company was as successful as possible. I am told, though it does not appear in the Case, that, in fact, the company has been very successful. The Crown's case is that, while on the face of it the settlement is innocuous, if one goes behind it one finds that the taxpayer had 7/10ths of the shares of the

company and that he could prevent the payment of any dividend and let the profits of the company accumulate, and then, with the help of one brother, could wind-up the company, when 7/10ths of the assets would come to him in the form of capital.

The main question to determine is the meaning of s. 38 (1) of the Finance Act, 1938. That section begins in this way:

(1) If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement; or (b) the settlor or the wife or husband of the settlor may, whether immediately or in the future, cease, on the payment of a penalty, to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement; any sums payable by the settlor or the wife or husband of the settlor by virtue or in consequence of that provision of the settlement in any year of assessment shall be treated as the income of the settlor for that year and not as the income of any other person. . .

The taxpayer contends that only the terms of the settlement can be looked at, and that the terms of this settlement do not give any person the power to revoke or otherwise determine the settlement or any provision thereof. On the other hand, the Crown contends that one can go further afield than the settlement, and that, if there is some person who can stop payment of the dividends or wind-up the company alone or with the consent of another person, that is enough to bring the settlement within sub-s. (1) of s. 38.

Reading the section unaided by authority, I should say, without much hesitation, that the contention of the taxpayer is right. I think the words mean that the power must be found in the terms of the settlement. I am confirmed in that view by the following considerations: (1) The contrary view would give no effect whatever to the words in the opening line "If and so long as the terms of any settlement are such . . ." Those words might just as well not be there. (2) The contrary view would lead to results which would shock the sense of justice of any reasonable mind. For example, a settlor might settle shares in a company on persons dependent on him. Quite unknown to him, A. and B. might between them hold enough shares to put the company into voluntary liquidation. According to the Crown, that settlement is hit by the section, and would still be hit even if A. and B. acquired their shares after the date on which the settlement had been made. (3) Section 21 of the Finance Act, 1936, contains a provision as to income settled on children. The section may not be easy to understand completely, but, at any rate, it is clear with regard to when a settlement is not to be deemed to be irrevocable. The relevant provisions as to that matter are contained in sub-s. (8) and are that a settlement shall not be deemed to be irrevocable "if the terms thereof provide . . ." If it were the intention of the draftsman or of Parliament in extending the code relating to settlements in the Act of 1938 to make so drastic a change as that contended for by the Crown, a change which, after the passing of that Act, would apply to settlements already within s. 21 of the Act of 1936, surely different language would have been used, language such as, for example, "notwithstanding the terms of the settlement"—something to make it clear that the words hitherto applicable, "if the terms thereof provide," were to cease to apply and that the new language was to be construed as meaning "notwithstanding what the terms provide." It seems to me that anyone desiring to express an intention of that kind, which is a complete reversal of that part of s. 21 of the Act of 1936 to which I have referred, would have used some such words as those I have suggested. No one would use the words which are used to make a really fundamental change in the law applicable to settlements.

I find, however, something which, I think, is still more conclusive in s. 38 itself. By sub-s. (1), (which I have read): "If and so long as the terms of any settlement are such that—(a) any person has or may have power . . ." to determine and on determination ceases to be liable to make any annual payment. By sub-s. (2): "If and so long as the terms of any settlement are such . . ." There follows the same provision about having power to determine a settlement, and then: "(b) in the event of the exercise of the power, the settlor," or his wife, "may become entitled to . . . any part of the property or . . . income." Neither

sub-s. (3) nor sub-s. (4) is introduced by the words "If and so long as the terms of any settlement are such that." Sub-section (3) provides :

If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year, and not as the income of any other person . . .

Sub-section (4) is :

A For the purpose of the last foregoing sub-section, the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement, if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever . . .

B There one has what seems to me to be a very striking contrast. The first two sub-sections are introduced by the words : "If and so long as the terms of any settlement are such that," and sub-ss. (3) and (4) contain no such language, but incorporate the words : "in any circumstances whatsoever." The Crown, in effect, are asking me to construe the first two sub-sections, ignoring the words : "If and so long as the terms of any settlement are such that . . ." and as if the words "in any circumstances whatsoever" were in those two sub-sections as well as in sub-ss. (3) and (4). That is, in effect, what the argument comes to.

C It is said one can ignore the terms of the settlement and go behind it, and, if one finds that the settlement can be determined "in any circumstances whatsoever," the income is to be deemed to be the income of the settlor. It seems to me that, if that had been the intention of sub-ss. (1) and (2), the language would have been very differently phrased. The contrast between the wording of sub-ss. (1) and (2) and that of sub-ss. (3) and (4) is so strikingly clear. Unaided by any authority, that would be the view I should form. Is there anything in D any case which is inconsistent with that view ?

The first case referred to was *Inland Rev. Comrs. v. Payne* (1). There the point could have been raised in the simplest way. On Mar. 13, 1937, the taxpayer incorporated a company with a capital of £100. He held 95 shares himself, and had complete control of the company. By a deed of covenant in Mar., 1938, he covenanted with the company to pay it £72 a week after deduction of tax during his life or until an effective resolution to wind-up. E During the following year he paid £3,744, and then there was a resolution to wind-up, and he claimed a corresponding gross sum as deduction from his income to reduce his liability for sur-tax. If the contention of the Crown today is right, that was a simple case. There was the covenant, the settlor was in control of the company, and he could wind it up at any time, and so put an end to his liability. It is the same sort of case as that with which I have to deal, F but no one suggested that you could go behind the deed and consider what the settlor could do. The taxpayer was held assessable, because the court took the view that, in considering the settlement, it could look at the whole transaction—the formation of the company, the constitution of the company, the shareholding of the company—but the court, apparently, took it for granted that the power had to be found within the settlement. SIR WILFRID GREENE, M.R., said (23 Tax Cas. 626) :

G The word in the definition clause of "settlement" which is relevant to that question is the word "arrangement." The word "arrangement" is not a word of art. It is used, in my opinion, in this context in what may be described as a business sense, and the question is : can we find here an "arrangement" as so construed ? It is said that the only element in this transaction which falls within the definition of "settlement" is the deed of covenant itself. I am unable to accept that argument. It appears to me that the whole of what was done must be looked at ; and when that is done, the true view, in my judgment, is that Mr. Walter Payne deliberately placed himself into H a certain relationship to the company as part of one definite scheme, the essential heads of which could have been put down in numbered paragraphs on half a sheet of note-paper . . . Now, if a deliberate scheme, perfectly clear cut, of that description is not an "arrangement" within the meaning of the definition clause, I have difficulty myself in seeing what useful purpose was achieved by the legislature in putting that word into the definition at all.

He goes on to discuss the voting power, and says (*ibid*, 627) :

The question in the present case is not as to the bare exercise of a voting right looked at by itself. That voting right was brought into the scheme and was an essential part

of the scheme, and it was used as the mechanism by which Mr. Walter Payne should be in a position to bring his liability to an end. It so happens that under the particular device adopted the method of bringing that liability to an end was by exercise of the votes attached to his shares. But those voting rights, used for the purpose for which they were used, and playing the part in the scheme which they did play, are, in my opinion, properly described in the context of this section as a "power."

That seems to me to mean that one has to find a power in the settlement, but the settlement is not the mere document containing the covenant. It is the whole arrangement. If one looks at the whole arrangement one sees there a power carefully created for the purpose intended. All that was absolutely unnecessary if the argument of the Crown today is right. All that the court need have said was: "There is the covenant. There is, in fact, the power. That is an end of it."

The next case, and a most important one, is *Chamberlain v. Commissioners of Inland Revenue* (2). There the settlor had formed an unlimited investment company with capital divided into preference and ordinary shares to which he transferred certain assets in consideration of the issue to him of preference capital which gave him complete control of the company. In Mar., 1936, he executed a settlement in favour of his wife and four children. He paid a sum of money to the trustees to be held on certain trusts, and the money was invested in the purchase of ordinary shares in the company, but that settlement contained a power to declare that the trust should cease and the trust funds should be held on trust for any one of the beneficiaries, and his wife was one of the beneficiaries. Therefore, it was a settlement under which in certain events the wife might obtain benefit. In Dec., 1936, the structure of the company was altered. The capital was divided into A, B, C, D and E shares, and a power was given to the company to redeem the shares on payment of a sum equal to the capital paid. The shares issued to the trustees of the settlement already in existence were designated "A" shares, and in Dec. the settlor executed four deeds of settlement paying the trustees equal sums of money to be invested as he should direct and to be held on irrevocable trusts for each of his four infant children. The money was invested in the purchase of the "B," "C," "D" and "E" shares of the company. In 1937-38 dividends were paid. The settlor was assessed to sur-tax for the year 1937-38 under s. 38 (2) in sums representing the difference between the company's income and the amount distributed on his preference shares. He was assessed on all the dividends paid on the ordinary shares and also on the undistributed profit. They were deemed to be the income of the settlor. It was agreed that the first settlement came within the section because of the possibility of the trust fund being applied for the benefit of the settlor's wife. It was held by the commissioners that he could be assessed in all these sums. There was no appeal as to the first settlement, but there was an appeal as to the four settlements. One of the Crown's contentions was a contention, founded on *Payne's* case (1), that one was entitled to look at the whole transaction—not merely the settlement, but the formation of the company, the power to redeem, the power to control the payment of dividends, and/or the power to wind-up the company and so on—which all amounted, it was said, to a power to determine the provisions of the four settlements when the wife might benefit under the March settlement.

Section 38 is not easy to construe. The purpose of the section is described as: "Income arising under certain settlements to be treated as income of settlor." Up to a point sub-ss. (1) and (2) are in precisely the same language:

If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof, and, in the event of the exercise of the power, the settlor or the wife or husband of the settlor. . .

So far, they are the same, and then they branch out in different ways, sub-s. (1) dealing with the case where "the settlor or the wife or husband of the settlor will or may cease to be liable to make any annual payments," and sub-s. (2) dealing with the case where "the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property comprised in the settlement." In other words, sub-s. (1) deals with the case where the settlor merely ceases to be liable; sub-s. (2) deals with the case where

he or his wife becomes entitled to any of the settled property. *Chamberlain's* case (2) was concerned with the latter, and, in so far as it deals with the meaning and effect of the language common to sub-ss. (1) and (2), it is equally relevant to both sub-sections. The event is the exercise of a power. That power may be one to be found in the settlement, or it may be a power existing independently of the settlement. The powers relied on by the Crown in that case, and in the case with which I am dealing, are very much the same. They are twofold : (1) A power to prevent the payment of dividends to the trustee either by withholding dividends or by redemption of the shares ; (2) the power to wind-up the direct or indirect source of the settlement income. In *Chamberlain's* case (1) it was the company in which the trustees held shares ; in the present case it is the company on whose continued existence and payment of dividends the covenant to pay depends for its value. It seems to me clear that the Court of Appeal in *Chamberlain's* case (2) took the view that the power must be found in the settlement, but that following *Payne's* case (1) they also took the view that the settlement as defined in the Act was not merely the contents of the four deeds, but was the whole arrangement. It was said that the whole of what had been done must be looked at, including the fact that the settlor had placed himself in a certain relationship with the company as part of a definite scheme. They held that the whole scheme was an arrangement and, therefore, a settlement, and, as a consequence, that the power was within the settlement. It followed that the power to revoke or otherwise determine the settlement was to be found within the settlement itself. It further followed that the income arising under the settlement included the income of the company, and that the whole of the assets of the company constituted property comprised in the settlement and that the taxpayers could be assessed with respect to the whole income of the company. DU PARCQ, L.J., read the judgment of the court in *Chamberlain's* case (2) and I want to refer to a passage which, to my mind, indicates that they were clearly accepting the view that the power had to be found in the settlement. Again, one would ask the question : Why all this pother about what constituted the settlement ? Why discuss the question whether the whole arrangement was the settlement or not, if it does not matter where the power is to be found ? That was not the view taken by the court. Dealing with what happened, DU PARCQ, L.J., says (25 Tax Cas. 324) :

There need be no apportioned dividend payable, because under article 3, as it stood at the material time, each class of ordinary shares was to be entitled only to such dividend as the company should from time to time in general meeting determine. Further, these shares could be redeemed out of income in a few years, so that there need be no loss of capital or of the future income to be enjoyed by the remaining shareholders. After redemption, the only shareholders would be the appellant with his large holding of preference shares, and the trustees of the March settlement. The next step might be a winding-up of Staffa, when all the assets of that company, after the par value of the appellant's preference shares had been provided, would go to the trustees of the March settlement. Now the March settlement provided that the trustees should have power at any time during the appellant's life to declare that the trusts therein declared should cease to apply to the trust fund, and to hold the trust fund " upon trust for . . . any one . . . of the beneficiaries," who might be the appellant's wife. Either the redemption of the shares or the winding-up of the company, or both these acts taken together, might properly be described as a determination of a " provision of the settlement," and the terms of the arrangement constituting the " settlement " gave the appellant power to determine the provisions of the settlement in the sense that the matter was so arranged that his voting rights enabled him to do so.

That seems to be a very plain statement. The terms of the arrangement gave the settlor the power to determine the provisions of the settlement. DU PARCQ, L.J., goes on :

If the power to redeem and to wind-up the company were exercised, then the wife of the settlor might become beneficially entitled at least to part of the property then comprised in the settlement. Thus the terms of s. 38 (2) appear to be completely satisfied.

I think one is justified in saying that the Court of Appeal clearly expressed the view that what one had to look for was power in the settlement, but that they also took the wide view that the settlement comprised the whole " arrangement."

The case went to the House of Lords who took the view that the settlement consisted of the four deeds, and, therefore, that the assessment was bad. Their

Lordships had not to consider the precise point raised in the present case because there the taxpayer had been assessed with regard to the whole income of the company. Once one took the constitution of the company out of the settlement, there could be no power to make an assessment of the kind made there, and that was sufficient to dispose of the appeal. There is, however, one passage in LORD MACMILLAN'S opinion (*ibid.* 332) which is worth bearing in mind. He said :

It is essential to the Crown's case that it should make out that the whole assets of the Staffa Investment Co. are comprised in a settlement or arrangement made by the appellant within the meaning of the statute. In my opinion, the Crown has failed to establish this.

That, he said, made it unnecessary for him to say more, but he continued :

But I may say that I find it difficult to characterise the redemption by the Staffa Investment Co. of the shares held under the trust deeds, or the winding-up of the company, as a determination of a "provision" of the settlement.

One of the matters relied on here is a power to determine the provisions of the settlement with the aid of another by winding-up the company. That observation of LORD MACMILLAN is not a final decision, but it makes the point which is relied on here more difficult.

The next case was *MacAndrew v. Commissioners of Inland Revenue* (3), which the commissioners in this case held, gave them no option but to decide as they did. When that case came before the commissioners the appeal to the House of Lords in *Chamberlain's* case (2) had not been heard. *MacAndrew's* case (3) was a simple and straightforward case. The taxpayer had acquired all the shares in a private company, and he transferred all the preference shares and 5,590 ordinary shares to his wife and daughter who executed a declaration of trust declaring that they held the shares as to both capital and income for the taxpayer's wife and children as he should by will appoint. The remaining shares were held as to five by the taxpayer and five by his son. The income was accumulated and no dividends were declared. The whole of the company's income was treated as income of the taxpayer by virtue of s. 21 of the Finance Act, 1922, which gave the commissioners power to apportion the income if a reasonable part of the profits of the company had not been distributed in dividend. By the deed in question, of July, 1940, the taxpayer's wife, his only son, and his only surviving daughter consented to the payment to the taxpayer of all income arising from the shares subject to the declaration of trust which had been or should be treated for the purposes of the Income Tax Acts as the income of the taxpayer and the taxpayer covenanted to pay under the same deed of covenant to his daughter H. as trustee for her two children in each year commencing with the following year an amount equal to the gross of the income he should have received in that year from the company under the foregoing consent. It is a covenant which is very like the one here.

The question arose whether the taxpayer could be assessed in respect of that income. MACNAGHTEN, J., held he could. He read the relevant sections and said (25 Tax Cas. 506) :

The contention on behalf of the Crown is that the transfer of the shares to Mrs. MacAndrew and the deed of July 11, 1940, constituted a "settlement" within the meaning of the Finance Act, 1938, s. 38, and that Mrs. MacAndrew has power to determine it by putting the company into liquidation. Both those propositions are, in my opinion, well founded. . . . That Mr. MacAndrew is a "settlor" is indisputable. It is also indisputable that Mrs. MacAndrew can wind-up the company and can thereby put an end to the covenant made by the appellant.

That case is not very satisfactory because, first, it was argued in person, and, secondly, there is no reference whatever to the *Chamberlain* case (2). It is clear that the commissioners had decided the case on the decision of the Court of Appeal in *Chamberlain's* case (2). They had said :

We hold the conditions of s. 38 (1) are fulfilled in this case and that the creation of the original trust, the machinery of the company, and the provisions of the deed of July 11, 1940, constitute an arrangement or settlement with power to revoke or otherwise determine it. Should that power be exercised the settlor would cease to be liable to make annual payments.

It is very strange, if the decision of the House of Lords had been called to the attention of MACNAGHTEN, J., that he made no reference to the fact that the

A ground on which the commissioners had decided the case could no longer be relied on. It is very strange that no reference should be made to the *Chamberlain* case (2). It is also to be observed, that even the learned judge did not limit the settlement to the document itself, but said that the contention relied on was "that the transfer of the shares to Mrs. MacAndrew and the deed of July 11, 1940" both "constituted a 'settlement.'" Therefore, I am not satisfied that the point which has to be decided here was really present to the mind of MACNAGHTEN, J., particularly as *Chamberlain's* case (2) was not referred to.

B The only other case to which my attention has been drawn is *Jenkins v. Commissioners of Inland Revenue* (4). I will put the facts in that case as simply as I can. The taxpayer formed two companies, the Dilnot Investment Co. and the Woodlands Investment Co. The shares of both companies were divided into classes A and B. The taxpayer held all the A shares, and the constitution of the company gave him complete control of both. In June, 1934, he settled £500 on each of three daughters by three settlements. He lent to the trustees of each settlement £6,500 free of interest and the trustees used the £500 and the money lent in the purchase of all the B shares in Woodlands. Woodlands thereupon subscribed for all the B shares in Dilnot. The case concerned the dividends paid in the year 1936-37 and the year 1937-38. The trustees used the dividends in repaying part of the loans. The taxpayer had been assessed for C both years in respect of the income received by the trustees. The assessment as to the first of those two years depended on how far the settlement was a revocable settlement within the meaning of s. 21 of the Act of 1936. The second of the two years was governed by the Act of 1938. It will be remembered that sub-s. (7) of s. 38 of the Act of 1938 provides :

D The foregoing provisions of this section shall apply for the purposes of assessment to income tax for the year 1937-38 and subsequent years and shall apply in relation to any settlement, wherever made and whether made before or after the passing of this Act. . .

E The income received in the second year was, therefore, subject to s. 38 of that Act, but the income received in the year 1936-37 was only subject to s. 21 of the Act of 1936. The taxpayer could wind-up these companies, and in that event everything would have come to him. The commissioners decided the case under the rule in *Payne's* case (1), and the Court of Appeal's decision in *Chamberlain's* case (2). The taxpayer thus failed before the commissioners. On appeal, the case was heard by MACNAGHTEN, J., who began by dealing with the income for the year 1936-37. He said this. (26 Tax Cas. 275) :

F So far as the assessment for the year 1936-37 is concerned, since the claim of the Crown is based on the Finance Act, 1936, s. 21, and that section does not apply to irrevocable settlements, it was necessary for Mr. Stamp to rely on the provisions of sub-s. (8) of that section, which provides as follows : "For the purposes of this section, a settlement shall not be deemed to be irrevocable, if the terms thereof provide (a)—for payment to the settlor . . . of any income or assets in any circumstances whatsoever during the life of any child of the settlor to or for the benefit of whom any income, or assets representing it, is or are or may be payable or applicable by virtue or in consequence of the settlement." Mr. Stamp's argument, as I understood it, was this. The appellant can wind G up these companies whenever he pleases, and if he does so he will revoke the settlements, because the whole of the trust fund will disappear.

He goes through the figures, saying that the argument was well-founded and that the trust fund would and could be extinguished, and then he said :

H Mr. Stamp argued that the appellant, by means of the liquidation of the two companies, could revoke the settlement. It so happens that by s. 38 (1) (a) of the Finance Act, 1938, provision is made for the case where a person has power "to revoke or otherwise determine the settlement." I agree that the appellant in this case can, by putting the two companies into liquidation, determine the settlement otherwise than by revocation. But I do not think it can be said that, by putting an end to the trust fund, he revokes the settlement. The settlement still remains, but what has happened is that the trust fund has been destroyed. It is true that the trust fund, in the case supposed, has been destroyed by the act of the appellant ; but I do not think that is revoking the settlement within the meaning of s. 21 (8) of the Finance Act, 1936. I also agree with the argument of Mr. Talbot on behalf of the appellant that there are no terms in the settlement which provide for the payment to the settlor of any of the income or assets of the settlement. It is quite true that the appellant can get into his hands the whole

of the trust funds, but that is not by reason of any terms contained in the settlements. It is by reason of the unhappy investment, if I may so call it, which the trustees thought fit to make of the £500 entrusted to their care for their infant beneficiaries. Therefore, in my opinion, s. 21 of the Finance Act, 1936, does not apply to the settlements made by Mr. Jenkins on June 22, 1934; and the assessment to sur-tax made upon him for the year 1936-37 must therefore be discharged.

Why stop there? If the argument for the Crown is right, what could have been easier than for MACNAGHTEN, J., to have said: "But this has no application to the second dividend, the dividend for 1937-38, because, under the Act of 1938 the power to wind-up and so put an end to the settlement need not be found in the settlement itself."

It is clear that the taxpayer there had the power to do exactly what it is said the taxpayer has power to do here, *viz.*, to knock the bottom out of the settlement in the simplest way, but no such suggestion was made against the taxpayer in that case. He was hit in respect of the year 1937-38, not under sub-ss. (1) or (2), but under sub-ss. (3) and (4) of s. 38. Under those sub-sections the Crown succeeded, because there all the court had to do was to find whether in any circumstances whatsoever any of the settlement money could go to the settlor. It was held that it could, because of the power the trustees had to use the trust monies to repay the money lent by the settlor. Exactly the same thing happened in the Court of Appeal who upheld the view taken by MACNAGHTEN, J. LORD GREENE, M.R. (with whom the other members of the court agreed) began (26 Tax Cas. 279) dealt with the second year simply and solely under s. 38 (3) and (4). All that would have been unnecessary if the argument of the Crown today was right. Turning to the Act of 1936 (*ibid.*, 281), LORD GREENE, M.R., expressed the same view as MACNAGHTEN, J., and dealt at some length with the meaning of the word "irrevocable." He thought that to treat the power to wind-up the company as a power to revoke the settlement was placing much too wide a construction on it.

I think that the view I have formed is in accord with that of the Court of Appeal on this point in *Chamberlain's* case (2), and again in *Jenkins' case* (4). It would have been so easy, to my mind, to have dealt with the second year in *Jenkins' case* (4) in a word if the argument advanced for the Crown today was right. As to *MacAndrew's case* (3), which was relied on by the commissioners, I do not know what weight ought to be attached to that case, but it was decided before *Jenkins' case* (4), and I am not satisfied that *Chamberlain's case* (2) was called to the learned judge's attention. I only want to add that I do not think that the withholding of the dividend would revoke or otherwise determine the settlement or any provision thereof. The covenant would remain and become effective when dividends were resumed. As to winding-up, the settlor had no power himself to wind-up. He needed the co-operation of another shareholder with the requisite shareholding. It is said that he could bring that about with the consent of another person, but I do not think he could. I think that the language is not apt for that. No mere consent can give him power to wind-up the company. He needs the co-operation of another shareholder. The ability of two shareholders acting together to bring about a certain result seems to me something different from the ability of one to bring about the result with the consent of another, and I bear in mind what LORD MACMILLAN said in *Chamberlain's case* (2) (25 Tax Cas., at p. 332). The conclusion I have come to is that the appeal must be allowed, and that the taxpayer was not liable to be assessed for the purposes of sur-tax in the income received under these settlements.

Appeal allowed with costs.

Solicitors: *Harris, Chetham & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

MAYNE v. JOHNSTONE & CUMBERS, LTD.

[KING'S BENCH DIVISION (Lynskey, J.), June 3, 4, 5, 1947.]

Factories and Shops—Safety provisions—Floor—“Of sound construction and properly maintained”—Test to be applied—Factories Act, 1937 (c. 67), s. 25 (1).

In deciding whether the floor of a factory is of “sound construction and properly maintained” within the Factories Act, 1937, s. 25 (1), regard must be had to the purpose for which the premises are to be used. “Sound construction” and “properly maintained” mean that the floor should be of such construction and so maintained as to be fit to be used for the purpose for which the factory is intended to be used. The test is not that the floor should be of such construction and so maintained as to be sufficient to withstand some stress which would not occur during its normal user, even although caused by an accident which might have been anticipated.

[FOR THE FACTORIES ACT, 1937, s. 25 (1), see HALSBURY'S STATUTES, Vol. 30, p. 220.]

ACTION under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of the plaintiff's husband while working on the defendants' premises.

C The plaintiff's husband was installing a heavy machine in the defendants' premises when the floor beneath a jack supporting the machine gave way. The machine tilted over, pinning the workman to a wall, and he received fatal injuries. The floor was at least 24 years old, and it was found that there were local variations in its thickness to the maximum extent of $\frac{3}{4}$ inch, the whole floor being $6\frac{1}{2}$ inches deep. Certain parts of the concrete facing had been worn unevenly and in some places worn away.

D *Paull, K.C., N. Parkes and Lermom* for the plaintiff.

Edgedale, K.C., and C. J. A. Doughty for the defendants.

LYNSKEY, J. [having stated the facts]: On behalf of the plaintiff it is said that the real cause of this accident was the fact that the floor was not of sound construction and properly maintained within the meaning of the Factories Act, 1937, s. 25 (1). It is said that in view of s. 25 (1) one must have regard to the purpose for which the premises are to be used—namely, as a factory—and that “sound construction” and “properly maintained” means that the floor should be of such sound construction and so maintained as to be fit to be used for the purpose for which the factory is intended to be used. In my view, that is a correct interpretation of the section. Counsel for the plaintiff submitted that the test ought to be put a little higher, and that the section meant that the floor should not only be of sound construction and properly maintained for the purpose for which the factory was intended to be used, but that it should also be of such construction as to be sufficient to withstand the stress caused by an accident which although it might have been anticipated would not occur in the course of the normal user of the factory. In my view that is not the true construction of s. 25 (1). The section requires that the floor must be of such construction and so maintained as to be fit for the work which it is anticipated is to be done on it.

G The floor in the present case had been in existence certainly since 1921, and, in view of the date of the deeds, possibly for fifty years. It was to outward appearances a concrete floor, but, in fact, it consisted of three layers. There was a layer of what was called “facing”—half an inch of cement concrete. Underneath that there was about five inches of coke breeze concrete, and underneath that there was another half an inch of concrete. There were local variations in the thickness of the floor to the maximum extent of three-quarters of an inch, the whole floor being said to be six and a quarter inches in depth. I am satisfied on the evidence that in certain parts of the floor the concrete “facing” at the top had been worn unevenly, and that in other parts the “facing” had been either worn away or practically worn away.

I The plaintiff submits that what happened here was that when the deceased man was jacking up the machine the jack sank to some degree into the floor, and that it was at a slight angle with the result that it was thrust out by the weight of the machine which fell over and killed the deceased man. It is said

that that accident was the result of the employers' breach of statutory duty. The defendants deny that. They say that this floor was quite sound in construction and was properly maintained for the purpose for which it was to be used—the installation of ink mixing machines and the use of those machines thereafter for the purpose of mixing ink. They say, first, that the floor would have stood the weight of the machine if it had been erected without negligence, and that the real cause of the accident was the negligence of the deceased man in the installation of the machine. They say that the machine was caused to fall by his negligence and the effect of that fall off the jack, a distance of some eight inches, was to impose an undue stress on the floor which the floor was never intended to take, so that the break in the floor was the result, not of the unsound construction or maintenance of the floor, but of the deceased's own negligence in the handling of the machine. [His LORDSHIP reviewed the evidence and found as a fact that the accident was not due to the negligence of the deceased man, to the fact that he was working alone, or to the defective condition of the jack used, and continued:—] In the result, I take the view that the real cause of the accident was the fact that the floor at this particular point was in a defective condition, and that in those circumstances there was a breach by the defendants of their statutory obligations to have the floor properly maintained.

Judgment for the plaintiff with costs.

Solicitors: *Lewis & Lewis & Gisborne and Co.* (for the plaintiff); *William Charles Crocker* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BROWN v. BROWN (otherwise GRAYSON) (by her guardian).
[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.),
February 26, 1947.]

Divorce—Desertion—Continuance of desertion—Animus deserendi—Feeble-minded person committed to institution for mental defectives—Release on licence—Matrimonial Causes Act, 1937 (c. 57), s. 2 (b).

In March, 1938, the wife left the husband in circumstances which amounted to desertion. In October, 1938, she was convicted before justices of theft, but the justices, being satisfied that she was a feeble-minded person within s. 1 of the Mental Deficiency Act, 1927, postponed sentence and directed that a petition be presented under the Act, and she was in due course committed to an institution for mental defectives where she remained until November, 1940, when she was released on licence. In a petition by the husband for divorce on the ground of the wife's desertion, presented on May 31, 1945:

HELD: the wife was capable of continuing the intention to desert which she plainly manifested in March, 1938, and the husband was entitled to a decree.

[AS TO CONTINUANCE OF DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 654, para. 964; and FOR CASES, see DIGEST, p. 319, Nos. 2974-2977].

Cases referred to:

- (1) *Williams v. Williams*, [1939] 3 All E.R. 825; [1939] P. 365; 108 L.J.P. 140; 161 L.T. 202; Digest Supp.
- (2) *Drew v. Drew* (1888), 13 P.D. 97; 57 L.J.P. 64; 58 L.T. 923; 27 Digest 319, 2975.

PETITION by the husband, presented on May 31, 1945, for divorce on the grounds *inter alia* of the wife's desertion. The relevant facts appear in the judgment.

J. Gardner for the husband.

Stuart Horner for the wife.

LORD MERRIMAN, P.: This petition by a husband was originally presented on three alternative grounds for divorce and nullity of his marriage. The prayer for nullity and one of the prayers for dissolution have been withdrawn and now the only part of the case left is the prayer for dissolution on the ground of desertion.

A There is, in my opinion, sufficient evidence on which I can hold that the wife deserted the husband on or about Mar. 18, 1938, but that is not the whole question, and it is here that a point of some difficulty arises. Counsel for the wife argues that I ought not to find that the desertion continued throughout the whole period preceding the presentation of the petition, although in the ordinary course desertion is presumed to continue unless the contrary is shown, the reason for this submission being that during part of the period the wife was subject to the Mental Deficiency Acts, 1913-1927. On Oct. 24, 1938, the wife was charged before the Leeds justices with stealing two watches and a chain. The justices found the charge proved, but, being satisfied on medical evidence that the wife was a defective within the meaning of the Mental Deficiency Acts, they postponed passing sentence and directed that a petition be presented to the proper authority. When the matter came before them finally on Nov. 22, 1938, an order was made on the ground that she was a feeble-minded person and she was committed to an institution at Gateshead. About Nov. 4, 1940, she was transferred to Meanwood Park Colony in Leeds. Subsequently, she was released on licence to her mother who was living at Leeds, and there she has been ever since. She has not, therefore, been under restraint.

C It is clear that at no time since she left home in March, 1938, has the wife ever made the slightest overture to bring the state of desertion to an end, but it is said that, because from Oct., 1938, she has been treated as a mental defective under the Mental Deficiency Acts, I must hold that she was incapable of continuing to have the intention to desert, and, therefore, that she has not been guilty of desertion from the time she came within those Acts. If that be correct, it follows that I cannot find her guilty of desertion for three years immediately preceding the presentation of the petition.

D I have been referred to *Williams v. Williams* (1), in which it was held that a person of unsound mind, certified as such, in respect of whom a reception order has been made under the Lunacy Acts is incapable, from the date when he or she is found to be of unsound mind, of continuing to have an *animus deserendi*. If this case were such as that, I should have no option but to give full effect to that decision, but the present matter is a long way removed from that for these reasons. The Lunacy Act, 1890, deals with what were then called "lunatics." By s. 341 of that Act, 1890, a "lunatic" means an "idiot or person of unsound mind." By the Mental Treatment Act, 1930, s. 20 (5), the word "lunatic" is no longer to be used, and wherever it would have been appropriate to use that word Parliament has enjoined that the words "person" or "patient" of "unsound mind" shall be used.

F One of the classes of persons now within the Mental Deficiency Acts is "idiots." There are four classes of people who are deemed to be defectives under both the Act of 1913, s. 1, and the Act of 1927, s. 1. The only essential difference between the two sections is that, whereas the Act of 1913 provided that, in the case of idiots and imbeciles, the mental defectiveness must have existed from birth or at least an early age, that provision is omitted from the Act of 1927. The definitions in the sections of "mental defectives" are framed on a diminishing scale. They start with "idiots," go on to "imbeciles" whose defectiveness is stated not to amount to idiocy, and then refer to "feeble-minded persons" whose mental defectiveness does not amount to "imbecility," and "moral imbeciles." The definition of feeble-minded persons in the Act of 1927 is:

G Persons in whose case there exists mental defectiveness which, though not amounting to imbecility, is yet so pronounced that they require care, supervision and control for their own protection or for the protection of others.

Imbeciles are

H Persons in whose case there exists mental defectiveness which, though not amounting to idiocy, is yet so pronounced that they are incapable of managing themselves or their affairs...

A feeble-minded person within the Mental Deficiency Acts is, therefore, three statutory removes from a person of unsound mind. First, idiots have been taken out of the definition of a lunatic, or, as he is now called, a person of unsound mind, and are outside the Lunacy Act altogether. The second remove is from idiots to imbeciles, and the third remove is from imbeciles to feeble-minded persons. The whole basis of the judgment in the Court of Appeal in *Williams*

v. *Williams* (1) is that persons of unsound mind are incapable of forming any intention. I can see no reason whatever for importing that reasoning into a case like this where the person is not of unsound mind but is merely a mental defective and in the third category of such persons.

It is also said that the wife is physically unable to return to her husband, as she is merely released on licence issued under the Mental Deficiency Regulations, 1935, reg. 100. My attention has been called to para. (4) of that regulation :

A patient who is absent on licence shall reside with the person named for that purpose in the licence, unless the persons granting and the persons (if any) concurring in the grant of the licence otherwise permit.

Be it so, there is nothing to prevent her walking about Leeds, nothing to prevent her going to see her husband and sounding him as to whether he would be prepared to take her back, in which case it would remain to be seen what the authorities would be prepared to do. She has never made any attempt to do that although she has been physically at large ever since November, 1940, and living in the same town. So far as the mere physical inability to resume cohabitation is concerned, that matter has already been dealt with in *Drew v. Drew* (2), an authority the validity of which is specifically recognised in *Williams v. Williams* (1). It comes back to the point that *Williams v. Williams* (1) decided that a person who is of unsound mind in the full sense of the word cannot be said to be capable of desertion. I cannot bring myself to hold that the wife in the present case, who by statute is three degrees lower in the scale of mental illness, is incapable of continuing the intention to desert which she plainly manifested in March, 1938. That being so, there is no reason why I should not pronounce a decree of divorce on the ground of desertion.

Decree nisi.

Solicitors : *Dale H. Parkinson* (for the husband) ; *Official Solicitor* (for the wife).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

Dictum of JENKINS, J., at p. 166, applied. Re GILLET'S WILL TRUSTS. [1949] 2 All E.R. 893.

Followed. In re GILLET'S WILL TRUSTS [1950] 1 Ch. 102

Re OLIVER, WATKINS v. FITTON AND OTHERS

[CHANCERY DIVISION (Jenkins, J.), June 5, 6, 1947.]

Wills—Construction—Accumulations—Direction to accumulate and invest surplus income for 21 years from testator's death—One third part to be held for residuary legatees—Income of two third parts to be paid to widow during her lifetime—Residuary trust fund to be divided on widow's death—Whether accumulations of two third parts undisposed of or included in residuary trust fund.

By his will, made on Feb. 6, 1909, the testator directed his trustees to hold his "residuary trust fund," (which he defined as consisting of the balance of the "proceeds of sale and ready money remaining over" after payment of his debts, funeral and testamentary expenses and any pecuniary legacies given by the will) on trust to invest, and, out of the resulting income, to pay certain annuities to his wife and daughters. Then, by cl. 6 (3) of the will, he directed : "As to any surplus income remaining over my trustees shall during the life of my said wife or if she shall survive me for a longer period than 21 years then for the period of 21 years computed from the date of my death invest and accumulate the same and shall hold one equal third part of such surplus income and all investments and accumulations thereof upon the same ultimate trusts as are hereinafter declared with reference to the capital of my residuary trust fund and as to the remaining two equal third parts of such surplus income and all investments and accumulations thereof my trustees shall pay the same unto my wife during her life." By cl. 7 of the will, on the death of the widow the residuary trust fund was to be divided in equal parts, in the events that had happened, on trust for two of the testator's daughters. The testator died on Feb. 17, 1909, and in 1931, on a summons taken out by the trustees, MAUGHAM, J., held (i) that there was no intestacy with regard to the one third share of the surplus income and investments and accumulations thereof, that the accumulations made in

the 21 years period became capital for the purposes of cl. 7, and that the surplus income became income for the purposes of cl. 7 and immediately distributable as if the widow were not living; (ii) that, as regards the two thirds share, the surplus income accruing after the period of accumulation and the income of the investments representing the accumulations made during that period should be paid to the widow until her death. The widow died on Apr. 27, 1946, and the question now to be determined was whether the accumulations of the two thirds parts of the surplus income made during the period of 21 years after the testator's death were undisposed of by the will, or whether they passed under cl. 7 of the will:—

HELD: on the true construction of the will, in view of the direction to accumulate, which showed an intention to capitalise the income accumulated, and the direction to divide the residuary estate on the death of the widow, the investments representing the accumulations of surplus income of the two third parts were to be held, on the death of the widow, as capital of the residuary trust fund under cl. 7 of the will.

Weatherall v. Thornburgh (8 Ch.D. 261), *Re Blake, Berry v. Geen* ([1938] 2 All E.R. 362) and *Re Mellor, Alvarez v. Dodgson* ([1922] 1 Ch. 312) considered.

[AS TO ACCUMULATIONS DURING PERMITTED PERIOD, see HALSBURY, Hailsham Edn., Vol. 33, p. 122, para. 210; and FOR CASE, see DIGEST, Vol. 37, p. 149, No. 751.]

Cases referred to:

- (1) *Weatherall v. Thornburgh* (1878), 8 Ch.D. 261; 47 L.J.Ch. 658; 39 L.T. 9; 37 Digest 146, 724.
- (2) *Re Blake, Berry v. Geen*, [1938] 2 All E.R. 362; 107 L.J.Ch. 173; *sub nom.*, *Berry v. Geen*, [1938] A.C. 575; 159 L.T. 122; Digest Supp.
- (3) *Re Mellor, Alvarez v. Dodgson*, [1922] 1 Ch. 312; 91 L.J.Ch. 393; 126 L.T. 562; 43 Digest 791, 2289.

ADJOURNED SUMMONS to determine whether accumulations of surplus income made during the period of 21 years from the testator's death were undisposed of by his will or were to be held on the trusts of the residuary trust fund. The facts appear in the judgment.

Droop for the trustee.

J. V. Nesbitt for the personal representatives of a daughter, Kate.

Denys Buckley for a daughter, Ruth.

Tonge for a daughter, Ethel.

JENKINS, J.: This summons raises a somewhat difficult question of construction of the will of Thomas Underwood Oliver which has already been before the court. The will is dated Feb. 6, 1909, and there was a codicil of the same date with which I need not trouble for the present purpose. The testator died on Feb. 17, 1909, and his will was proved on Apr. 17, 1909, by his widow and the present plaintiff, Mr. John Henry Watkins. The testator left him surviving his widow and three daughters, Kate, Ruth and Ethel. Kate died in 1914, and, as her interest in a settled share of the testator's residuary trust fund devolved by virtue of her exercise of a general power of appointment on her representatives, those representatives are before the court as the first two defendants. The remaining defendants are the two surviving daughters of the testator. The widow died on Apr. 27, 1946, and that event makes it necessary for this application to be made to the court.

By his will, so far as is material for the present purpose, the testator appointed his wife, Mr. Watkins and one other person to be executors and trustees thereof. Then there was a specific bequest of household furniture, and so on, a gift of pecuniary legacies to executors accepting office, certain pecuniary legacies to two of his daughters and a legacy to another daughter, Ethel, subject to a condition against her marrying a certain person, whom she did, in fact, marry. Then, by cl. 6, the testator made a general residuary devise and bequest in these terms:

I devise and bequeath all my property both real and personal of whatsoever description and wheresoever situate and not otherwise disposed of by this my will unto my trustees upon trust. . .

There were the usual directions to sell, call in and convert and pay debts and funeral and testamentary expenses

. . . and any pecuniary legacies bequeathed by this my will or any codicil thereto and as to the balance of such proceeds of sale and ready money remaining over (hereinafter referred to as "my residuary trust fund") upon trust to invest the same and to pay and apply the resulting income as follows . . .

Pausing there, it will be noted that what the testator has defined as "my residuary trust fund" consists of :

. . . the balance of such proceeds of sale and ready money remaining over . . . It does not include by definition anything in the way of income of, or accretion to, such net proceeds and ready money. It would, no doubt, include by implication the investments representing such net proceeds and ready money, although it does not expressly do so.

Then the trusts were these :—

(1) to pay to my said wife during the remainder of her life if she shall so long remain my widow the sum of £600 per annum but if my said wife shall marry again then as from the date of her remarriage and until the date of her death my trustees shall pay to her the sum of £100 per annum only. (2) To pay out of the said income to each of my daughters Kate Oliver, Ruth Winifred Oliver, and Ethel Oliver during the life of my said wife the sum of £100 per annum to be increased in each case to £200 per annum if and when my said wife shall marry again but as to my daughter Ethel Oliver subject to the provisions of cl. 9 hereof. (3) As to any surplus income remaining over my trustees shall during the life of my said wife or if she shall survive me for a longer period than 21 years then for the period of 21 years computed from the date of my death invest and accumulate the same and shall hold one equal third part of such surplus income and all investments and accumulations thereof upon the same ultimate trusts as are hereinafter declared with reference to the capital of my residuary trust fund and as to the remaining two equal third parts of such surplus income and all investments and accumulations thereof my trustees shall pay the same unto my said wife during her life or until she shall marry again for her own use and benefit and if my said wife shall marry again then my trustees shall as from the date of such remarriage and until her death pay and divide two such equal third parts of surplus income unto and equally between such of my three daughters as shall for the time being be living but as to my said daughter Ethel Oliver subject to the provisions of cl. 9 hereof.

Clause 7 contains the trusts to take effect on the death of the testator's wife :

Upon the death of my said wife my trustees shall hold my residuary trust fund upon trust to divide the same into three equal parts and as to one equal part thereof they shall hold the same upon trust to invest the same and to pay the income thereof to my said daughter Kate Oliver during her life and after her decease upon trust to pay the capital thereof to such person or persons and in such shares or proportions as she by her last will or any codicil thereto shall direct or appoint and in default of any such direction or appointment they shall pay the same to such person or persons as would be entitled to such third share if it formed part of my said daughter's own personal estate and she had died intestate.

The remaining two equal one-third parts were to be held on the same trusts for the benefit of the other two daughters respectively.

There was a provision in the case of Ethel to the effect that any accretion to her share should be subject again to the provisions of cl. 9, and cl. 8 contains a provision carrying over to the other daughters, again subject to the special conditions in the case of Ethel, of the share of any daughter in the residuary estate of the testator. Clause 9 contains a provision to the effect that if, as happened, Ethel married a named person, her share should go over to the other daughters on the same trusts as their original shares, and Ethel was to take in substitution under the will a sum of £1 a week only. Ethel having infringed the condition, the result was that Kate and Ruth became entitled in equal shares under the trusts of cl. 7 for their respective lives with remainder as they should appoint. Kate exercised the general power of appointment and died in 1914.

The testator having died on Feb. 17, 1909, the period of 21 years from his death expired in 1930. The widow being still alive—she lived until Apr. 27, 1946, and never re-married—on the expiration of the period of 21 years, it became necessary to determine how the surplus income referred to in cl. 6 (*i.e.*, the income remaining after the payment of the annuities payable) ought to be dealt with, having regard to the directions contained in that clause. On

Feb. 20, 1931, an originating summons, asking for directions on this matter, came before MAUGHAM J.

There were really two branches of the clause to be considered. The first dealt with one equal third part of the surplus income and was a direction that, after the 21 years, the trustees should :

... hold one equal third part of such surplus income and all investments and accumulations thereof upon the same ultimate trusts as are hereinafter declared with reference to the capital of my residuary trust fund . . .

The other branch was :

... and as to the remaining two equal third parts of such surplus income and all investments and accumulations thereof my trustees shall pay the same unto my said wife during her life or until she shall marry again for her own use and benefit . . .

The matters of doubt, in effect, were these : What did the testator mean by saying "shall hold one equal third part of such surplus income and all investments and accumulations thereof upon the same ultimate trusts as are hereinafter declared ?" Did he mean that the accumulations should go as capital of the settled shares and the future surplus income as income, or did he mean all to be income ? As regards the other branch, it was obviously arguable that the widow might claim to be entitled not only to the surplus income accruing after 21 years, but also to the accumulations of surplus income of previous years. In fact, it seems that the trustees had acted on the supposition that this view was the right one, and, accordingly, that there was not really any effective direction for accumulation at all as regards the two-thirds.

On that summons coming before MAUGHAM, J., he gave judgment on Feb. 20, 1931, and he began by saying : "To my mind this will is not easy to construe, because it is expressed in inaccurate language . . ." Dealing with cl. 6, he said that, in his opinion, the whole of cl. 6 (3) was confined and related to the resulting income of the residuary trust fund during the period that would elapse before the death of the wife. He continued :

The first operative part of cl. 6 is confined to the giving of an annuity to the widow, which will be diminished in the event of her re-marrying. The second part is concerned with the giving of annuities to three daughters during the life of his wife, and then comes the third part of the operative part of cl. 6, which is in this form . . .

He then read the words of cl. 6 (3). Dealing with cl. 7, he said :

Some things at least are clear with reference to cl. 6 (3). The first thing is that it relates to the surplus income of the residuary trust fund after deduction of the annuities provided for in paras. (1) and (2). The second thing is that the testator is directing an accumulation for the lifetime of his wife, or 21 years, whichever shall be the shorter period, and I have no doubt at all that that is a positive direction. It may in some respects be inoperative if someone is entitled to stop the accumulation. His will is that the surplus income shall be accumulated for that period. Then he directs that there is to be an investment of the accumulations, and he proceeds as follows : "and shall hold one equal third part of such surplus income and all investments and accumulations thereof upon the same ultimate trusts as are hereinafter declared with reference to the capital of my residuary trust fund." To my mind, it is reasonably clear that he is there dealing with two separate things. First, he is dealing with accumulations of one third, which will be held by the trustees in the form of investments, and, as from the date when the period of accumulation ceases, with one equal third part of the surplus income, and he is saying that both those things are to go as mentioned in cl. 7. It is true that cl. 7 relates to the death of the wife, but that does not contradict the fact that these two items of property, one of which is capital, so to speak, and one of which is income for a period which will come to an end on the death of the wife, are to be held upon the ultimate trusts declared in cl. 7, which means the trusts to be operative at the death of the wife. There was, in my opinion, no intestacy with regard to that one third share. The accumulations, which are capital, are to be held as mentioned in cl. 7, and the income, for the period I have mentioned, will also go as provided in cl. 7.

The effect of that was that, as regards the one-third, the accumulations made in the 21-year period became capital for the purposes of cl. 7, and the surplus income became income for the purposes of cl. 7 and immediately distributable as it would have been if the widow had not been living.

MAUGHAM, J., then came to the provision about the two-thirds, which is the one with which I am concerned to-day, and he said :

Then comes a clause which I think is more difficult to construe, and that is as to the remaining two equal third parts. I have to bear in mind that the testator has directed the accumulation for the period I have mentioned, the life of his wife, or the period of 21 years, whichever is the shorter. Having done that, he says "as to the remaining two equal third parts of such surplus income and all investments and accumulations thereof." That is the same phrase which he has used, *mutatis mutandis*, with regard to the one third of the residue, and, I think, again he is dealing here with two separate things, the capital of the accumulations, or investments representing the accumulations—whichever you please—and two equal third parts of the surplus income during the period from when the accumulations come to an end to the death of the wife, and then there is a slip in the will, because he says, as regards those two items: "My trustees shall pay the same unto my said wife during her life or until she shall marry again for her own use and benefit . . ." That opens up the argument, which has been very fairly put, that the investments representing these accumulations, are to be paid to the wife. To my mind, though the argument, as I say, is a reasonable argument, it ought not to succeed. I think, having regard to the circumstances that there is an intended trust for accumulation, and that the only object of the accumulation is to capitalise this surplus income, and to the fact that the phrase is "shall pay the same unto my said wife during her life or until she shall marry again for her own use and benefit," the true construction of that clause is that the income of the investments and accumulations for the 21 year period and the income resulting from two equal third parts of the surplus of the residuary trust fund are to be paid to the wife during the period until her death.

MAUGHAM, J., then dealt with the resulting position at the death of the testator's widow :

It is true that, as the result of that construction, a question of some difficulty may arise as to the accumulations of the two third parts of the surplus income upon the death of the widow. I think that is inevitable. It is a future question, and it is impossible for me to know now what the parties would desire to argue when that point becomes material. It may very well be that, by some family arrangement, it will never arise for discussion. I cannot deal with it now. I must answer the first question by saying that the two third parts of the surplus income were not payable during the period of accumulation to the widow, but they ought to have been accumulated in accordance with the directions in the will. With regard to the second question, I answer it by saying that the accumulations representing one third of the surplus income on the expiration of the period of accumulation were to be divided or distributed or held as directed in cl. 7 of the will. That means that one half will be handed over to the representatives of Kate Oliver.

In the course of a discussion about the form of the declaration to be made, MAUGHAM, J., disclaimed having held that there was an intestacy. He said: "So far there is no intestacy." From what he said in the body of his judgment, he intended to keep open the question of some difficulty which he thought might arise on the death of the widow. The widow now being dead, the question has become a present question and it is now before me for decision. The question, in substance, is whether the accumulations made during the period of 21 years are undisposed of by the will, or whether they pass under cl. 7 so as to become divisible between the settled shares of the two daughters.

I think it is right to begin one's consideration of that question by remembering what I think is well settled, namely, that a gift expressly limited to take effect on a future date does not carry the intermediate income, and the gift in cl. 7 is a vested gift limited to take effect at a future date, as opposed to an immediate gift on a contingent event. If authority is needed for the proposition that a gift of that character does not carry the intermediate income, it is to be found in the authorities cited to me, the first of which was *Weatherall v. Thornburgh* (1). In that case the testator gave freehold and leasehold estates to trustees on trust for his wife for life or second marriage, and, in case she should marry again, then from and after that event, during the remainder of her life, on trust to receive the rents and to hold the same during her life on the trusts thereafter mentioned, and after her death to the use of G. absolutely. He gave his personal estate to the same trustees, and directed them to pay the income to his wife during her widowhood, but, if she should marry again, then from and after such marriage all these bequests in her favour were to cease, and in lieu thereof they were to pay her, out of the rents and income, an annuity of £500, and, during her life, to invest the surplus (if any), and after her decease such trust moneys, surplus, rents, funds, and accumulations of income were to be disposed of by the trustees in paying certain legacies, and

the residue he gave to T.M. absolutely. The widow married again two years after the testator's death and, after her remarriage the surplus income had been invested and accumulated. There was no limit there of 21 years for the period of accumulation, and, accordingly, on the expiration of that period, the direction to invest the surplus income was avoided by virtue of the Thellusson Act [Accumulations Act, 1800] and the question was the destination of the surplus income during the rest of the widow's lifetime. The decision of the Court of Appeal was :

. . . that as to the surplus rents and income which would accrue between the expiration of 21 years from the testator's death and the death of his widow, there was an intestacy ; and that T.M. was not entitled during the life of the widow to ask for payment of the accumulated funds . . .

The basis of that decision was that, where a trust for accumulation is put an end to by the Thellusson Act, one must construe the will as if the direction to accumulate *quoad* the excessive period was struck out of the will and see what the result is. That operation having been applied in *Weatherall v. Thornburgh* (1), it was found that there was a gap and that the persons entitled under the future gift could not claim the intermediate income because there was no express gift of it to them, and the gift to them was not of such a character as to carry that result by implication. It will be noted, however, that *Weatherall v. Thornburgh* (1), was not concerned with the destination of the accumulations so far as lawfully made, which were, indeed, expressly disposed of.

In *Re Blake, Berry v. Geen* (2), a recent decision in the House of Lords, their Lordships arrived at a similar conclusion to that arrived at in *Weatherall v. Thornburgh* (1). The question in that case was what was to be done with surplus income directed to be accumulated until the death of the last survivor of certain annuitants, there being a gift after the death of such survivor on certain charitable trusts. The period of accumulation having been excessive, the question arose what was to happen to the income in the meantime. LORD MAUGHAM, L.C., said ([1938] 2 All E.R. 365) :

The next point argued is that the words " I give the whole of my property after the death of the last personal annuitant " are wide enough to include the surplus income illegally directed to be accumulated and released, so to speak, by the Act [the Thellusson Act, re-enacted in the Law of Property Act, 1925, s. 164]. It is well settled that the proper method of approach to this question is to construe the will as it stands, without regard to the statutory limit of accumulation, and then to consider the effect of the Act upon the dispositions contained in the will. If a specific fund is directed to be accumulated for a period beyond that which is allowed by the Act, the released income (as I shall call the income not validly disposed of by the testator) will generally pass under the residuary gift.

That, of course, is not the present case, because the questions all relate to the residuary trust fund itself. LORD MAUGHAM, L.C., then said (*ibid*) :

If the direction refers to the income of residue, the released income, generally speaking, is undisposed of, and will devolve (as regards a will coming into operation before 1926), in the case of personal property, upon the next of kin, and, in the case of real property, upon the heir . . .

He then cited certain cases, and said (*ibid*, 365, 366) :

On the other hand, there may no doubt be cases where the final gift of residue is so worded as to include all income not effectually disposed of in the preceding dispositions. In the present case, such a construction seems to me to be impossible, since it is clear that the Congregational Union is given nothing until the death of the last personal annuitant. The words " after the death of the last personal annuitant " cannot be disregarded, and it is to be observed that the phrase is in effect a repetition of the previous sentence " and on the death of the last personal annuitant " which introduces the gifts of pecuniary legacies to the four named Congregational Churches. It follows that, unless the accumulations can be stopped, the released income down to the death of the last surviving personal annuitant will pass as on an intestacy to the next of kin and the heir-at-law.

By parity of reasoning, I think it is clear that, if this had been a case of an invalid direction to accumulate, the income during the period of excessive accumulation would have been undisposed of, because it could not be claimed that the gift under cl. 7 was one which would have carried the intermediate

income if the excessive direction to accumulate had been struck out of the will, but it should be borne in mind that what is in question here is, not the destination of income invalidly directed to be accumulated during some excessive period, but the destination of accumulations, in fact, lawfully made. As to that, it is interesting to note that in *Re Blake, Berry v. Geen* (2), it was held by BENNETT, J., when the matter was before him—and, apparently, not questioned in the Court of Appeal or the House of Lords that the accumulations, so far as validly made, did pass to the recipients of the residuary capital. Under the will in *Re Blake, Berry v. Geen* (2), there was a gift and devise of all the testator's property, both real and personal, to his trustees on trust to pay certain annuities, then there was the direction to accumulate the surplus income, and then, after the death of the last personal annuitant, there was a gift of the whole of the testator's property to the Congregational Union of England and Wales on certain trusts. It was held there that, although there was no disposition in so many words of the income validly accumulated, it did pass.

In *Re Mellor, Alvarez v. Dodgson* (3), there was a gift to a class of beneficiaries "who, being males, attained the age of 25 years or being females attained that age or married in equal shares." This was a case of a contingent gift and was, therefore, a gift which carried by implication of law the intermediate income, and the testatrix, having made that contingent gift, went on to direct that the share of each beneficiary acquiring a vested interest should be settled on trusts under which the beneficiary took a life interest only. One of the beneficiaries in the class duly acquired a vested interest after the death of the testatrix, and the question was what was to be done with the income which, pending the contingency, had been accumulated, and, in accordance with the law applicable to a case in which there is a contingent gift, carrying intermediate income. The decision of EVE, J., and the Court of Appeal was that the accumulations must be treated as capital. That, of course, is a somewhat different case from the one now before me, because there was by implication of law an actual gift of the intermediate income, and the testatrix, having made a gift in that form, then proceeded to settle the shares in question. The only question was whether that settlement included the accumulations of income as income or capital, and it seems to me that, in those circumstances, the natural conclusion was that the testatrix must have intended that that which she directed should be settled should include as part of the capital the income which had been accumulated pending the happening of the contingency, but *Re Mellor* (3); does show, at all events, that accumulated income acquires what might be described as a capital flavour.

Be that as it may, in the present case there must be an intestacy unless I can find something amounting to a gift of the accumulations on the trusts of the residuary trust fund, and the question is whether I can do so on the construction of this will, which, as MAUGHAM, J., said, is expressed in inaccurate language. It is to be noted that, as regards the one-third, the testator directed his trustees to hold :

... one equal third part of such surplus income and all investments and accumulations thereof upon the same ultimate trusts as are hereinafter declared with reference to the capital of my residuary trust fund . . .

Thus, there was, as regards this one third, an express direction that the accumulations should be held as capital. That express direction is strongly relied on by those who contend for an intestacy in this case. It is said that, inasmuch as, in dealing with the first third, the testator gave an express direction to capitalise, it is clear he well recognised the distinction between the accumulations, on the one hand, and the capital of the residuary trust fund on the other, and appreciated the necessity of an express direction to treat the accumulation as capital. Furthermore, it is said that that express direction as regards the one-third excludes the possibility or propriety, as a matter of construction, of implying such a direction in the branch of the clause which deals with the two-thirds. I appreciate the force of that argument, but I cannot say I regard it as conclusive in construing an inaccurate and inadequately drawn will of this character. Then, again, it was said—and said, I think, with some force—that one cannot spell a gift of the accumulations out of the gift, in cl. 7 of the will, of "my residuary trust fund," inasmuch as the testator

has been at pains to define the residuary trust fund as including, and including only, the net proceeds of sale and ready money remaining over after payment of his debts, funeral and testamentary expenses, and the legacies bequeathed by his will.

I quite appreciate the force of these arguments, but it is to be remembered that in considering cl. 6, MAUGHAM, J., found himself able to construe the provision regarding the two-thirds of the surplus income as a provision, not for the payment to the widow of the surplus income and the investments and accumulations thereof, but for the payment to the widow of the surplus income accruing after the period of accumulation and the income of the investments representing the accumulations made during that period. He was able to arrive at that conclusion, as I understand it, because he found in the direction to accumulate an intention to capitalise the income accumulated. Therefore, the testator in this branch of the clause, as construed by MAUGHAM, J., directed that the accumulations should be treated as capital during the widow's lifetime and that she should only receive the income of it. That is what he meant to happen, and, therefore, he must have contemplated that, at the widow's death, the trustees would have in hand, to be dealt with somehow, the residuary trust fund as it stood, or the investments representing it, *plus* investments representing accumulations which, as MAUGHAM, J., said, the testator intended to capitalise.

That being the state of affairs which the testator must be taken to have contemplated as existing when c. 7 came into operation, he said in cl. 7 :

Upon the death of my said wife my trustees shall hold my residuary trust fund upon trust to divide the same into three equal parts. . .

It seems to me that the direction to divide the residuary trust fund on the death of the wife, coupled with the direction in cl. 6 (3) as construed by MAUGHAM, J., provides a sufficient context to enable me to hold that what the trustees were to divide was the whole of the residuary trust fund then in hand, as defined in cl. 6, together with those further investments which the trustees would then have in hand, representing the accumulations of surplus income which the testator had directed to be made. I am fortified in reaching that conclusion by the decision of BENNETT, J., in *Re Blake, Berry v. Geen* (2), as regards the valid accumulations in that case (see [1938] A.C. 577) : As I have said, I appreciate the force of the argument founded on the express reference to capital in the passage dealing with the one third of surplus income, but it is to be noted that it was necessary as regards this one third for the testator to give some special directions, because what he wanted to do, so far as this one third was concerned, was, in effect, to accelerate the trusts which normally were only going to come into operation on the death of his wife. I think that that to some extent, at all events, accounts for this express reference to the capital in that part of the clause. Furthermore, in a will of this kind, I do not think that alterations in expression, or changes in language, are matters to which such strict regard should be had as to defeat what appears, on looking at the whole will, to have been the testator's intention, imperfectly expressed though it may have been.

For these reasons, I propose to declare that, on the true construction of the will, these accumulations as from the death of the widow fell to be held as capital of the trust fund under cl. 7, having regard, of course, to any events such as the exercise of a general power of appointment.

Declaration accordingly. Costs of all parties between solicitor and client to be paid out of the residuary trust fund.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Underhill, Willcock & Taylor*, Wolverhampton (for the plaintiff) ; *Last, Sons & Fitton* ; *W. F. Gillham and Taylor, Jelf & Co.* (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

R. v. ST. EDMUNDSBURY AND IPSWICH DIOCESE
(CHANCELLOR) AND ANOTHER : *Ex parte* WHITE
AND ANOTHER.

[COURT OF APPEAL (Scott, Wrottesley and Evershed, L.JJ.), May, 12, 13, 14, 15, 16, 19, 20, 21, 22, June 23, 1947.]

Crown Practice—Certiorari—Consistory court.

An order of *certiorari* does not lie to bring up to be quashed an order of a consistory court. There is no precedent for the making of such an order or the issue of a writ of *certiorari* by the Court of King's Bench or the King's Bench Division, and in the interests of all concerned, and, particularly, of litigants, a long settled practice of a court of record is not to be disturbed except by establishing that a departure from it is necessary to do justice to an applicant who can get justice in no other way and to whom the court has always had jurisdiction to grant the relief which is prayed for. A heavy burden lies, therefore, on those who challenge a practice so long settled. If applicants for an order of *certiorari* to an ecclesiastical court have, in fact, suffered from an excess of jurisdiction the writ of prohibition is available to put an end to their grievance.

Decision of the Divisional Court, [1946] 2 All E.R. 604, *affirmed*.

[AS TO WHAT COURTS CERTIORARI MAY ISSUE, see HALSBURY, Hailsham Edn., Vol. 9, pp. 851-873, paras. 1442-1475; and FOR CASES, see DIGEST, Vol. 16, pp. 400-402, Nos. 2438-2466.]

Cases referred to :

- (1) *Ricketts v. Bodenham*, (1836), 4 Ad. & El. 433; 5 L.J.K.B. 102; 111 E.R. 850; *sub. nom.* *Bodenham v. Ricketts*, 1 Har. & W. 753; 6 Nev. & M.K.B. 170, 537; 19 Digest 308, 1069.
- (2) *St. David's (Bp.) v. Lucy*, (1699), as reported in 1 Ld. Raym 539; 91 E.R. 1260; *sub. nom.* *Lucy v. St. David's (Bp.)*, Brod. & F. 332; 19 Digest 323, 1270.
- (3) *Mackonochie v. Penzance (Lord)*, (1881), 6 App. Cas. 424; 50 L.J.K.B. 611; 44 L.T. 479; 45 J.P. 584; 19 Digest 224, 16.
- (4) *Longbottom v. Longbottom*, (1852), 8 Exch. 203; 22 L.J. Ex. 74; 17 J.P. 169; 13 Digest 544, 993.
- (5) *Ackerley v. Parkinson*, (1815), 3 M. & S. 411; 105 E.R. 665; 19 Digest 241, 229.
- (6) *R. v. Boaler*, (1892), 67 L.T. 354; 56 J.P. 792; 16 Digest 401, 2448.
- (7) *Cardiff Bridge Case*, (1700), 1 Salk 146; 91 E.R. 135; *sub. mon R. v. Glamorgan-shire (Inhabitants)*, 12 Mod. Rep. 403; 1 Ld. Raym 580; *sub. nom.* *R. v. —*, 1 Com. 86; 16 Digest 401, 2458.
- (8) *R. v. Boaler*, (1888), *Times*, Jan. 25; 16 Digest 403, 2487.
- (9) *Re Gassock*, (1656), 1 Lilly's Register, 253, 363; *Style's Practical Register*, 4th edn. 154; 16 Digest 400, 2432.
- (10) *Burder v. Veley*, (1840), 12 Ad. & El. 233; Arn. & H. 175; 4 Per & Dav. 452; 9 L.J.Q.B. 267; 4 J.P. 379, 394; 113 E.R. 801; *affd. sub. nom. Veley v. Burder* (1841), 12 Ad. & El. 265, Ex. Ch.; 16 Digest 372, 2109.
- (11) *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; Digest Supp.
- (12) *Re Heapphy*, (1888), 22 L.R.Ir. 500.
- (13) *Lalor v. Bland*, (1858), 8 I.C.L.R. 115.

APPEAL from a decision of a King's Bench Divisional Court (LORD GODDARD, C.J., LEWIS and OLIVER, JJ.) dated Nov. 7, 1946, and reported [1946] 2 All E.R. 604.

On Sept. 9, 1944, in the consistory court of St. Edmundsbury and Ipswich, the chancellor of the diocese granted a licence or faculty to Mrs. Florence Paddy, of 17 White City, Haughley, in the county of Suffolk. The licence recited (*inter alia*) that, on Apr. 16, 1944, the vicar of the parish, the Rev. W. G. White, wrote to Mrs. Paddy demanding that she apply to the chancellor for a faculty. The letter ran : "No flowers may be placed on the grave [of Mrs. Paddy's child] and no memorial set there, without a faculty." The operative part of the licence was (so far as material) in the following terms : "We do hereby (so far as by law we may or can) give and grant unto [Mrs. Paddy] our licence or faculty authorising her . . . at all reasonable times to have access to the grave of her child Patricia Ann Paddy in the churchyard of the parish church of St. Mary, Haughley, for the purpose of keeping the same neat and tidy

and placing upon or removing from the said grave from time to time fresh natural flowers." The licence proceeded to inhibit all persons from interfering with Mrs. Paddy's exercise of the faculty granted to her, and ordered the Rev. W. G. White and the churchwardens jointly and severally to pay the court fees and Mrs. Paddy's costs of an incidental to the faculty, such costs, unless agreed, to be taxed by the registrar of the diocese, as between solicitor and client. On June 6, 1946, the applicants, the Rev. W. G. White and one of the churchwardens, Mrs. Rosie Helen Bloom, obtained leave from a Divisional Court of the King's Bench Division to apply for an order of *certiorari* to bring up the licence or faculty of Sept. 8, 1944, to be quashed for want of jurisdiction in the chancellor. The motion came on for hearing in Nov., 1946, before a Divisional Court consisting of LORD GODDARD, C.J., LEWIS and OLIVER, JJ. Mrs. Paddy, by her counsel, took the preliminary objection that the court had no jurisdiction to make an order of *certiorari* addressed to a consistory court, or at least no jurisdiction so to do in the present case, and the court, being of opinion that this objection was well founded, refused the motion with costs. The vicar and Mrs. Bloom appealed.

M. O. Strandens and R. A. Scaramanga for the applicants.

J. Neville Gray, K.C., and Humphrey H. King for the respondent, Mrs. Paddy. The Chancellor was not represented.

Cur adv. vult.

SCOTT, L.J. : I have read the judgments of WROTTESELEY and EVERSHED, L.JJ., and I agree with them. I will ask WROTTESELEY, L.J., to read his judgment.

WROTTESELEY, L.J., read the following judgment. In this case the applicants applied to a Divisional Court of the King's Bench Division for an order of *certiorari* to bring up and quash a faculty granted on Sept. 9, 1944, by the chancellor of the diocese of St. Edmundsbury and Ipswich, on the ground that the faculty was in excess of the jurisdiction of the chancellor. The faculty contained *inter alia* a grant to the petitioner, Mrs. Paddy, of the right of access to her child's grave in the churchyard of the parish church, and an inhibition against all the world (including the vicar) not to let or hinder her in the exercise of the grant, and also an order against the vicar and a churchwarden for the payment of costs as between solicitor and client. It was proposed, on behalf of the vicar and churchwarden, to contend that the faculty was one which the chancellor had no jurisdiction to make, but before the merits of the case were gone into the respondent, by her counsel, submitted that, in any event, the King's Bench could not, in accordance with its principles and practice, issue a writ, now an order, of *certiorari* to any ecclesiastical court. After argument, the court upheld this contention. The grounds of this decision were summarised by LORD GODDARD, C.J., as follows ([1946] 2 All E.R. 608) :—(1) In fact, no case had been found in the books of such a writ, in itself a reason for the court not to make a precedent by issuing it now, for *communis opinio* obviously had been that no such writ would issue to such a court. (2) The ecclesiastical courts are not inferior courts. In spiritual causes they are as unfettered as is the superior court in temporal causes, subject, however, to restraint from trespassing beyond the spiritual field by the writ of prohibition issuing from the High Court. (3) The ecclesiastical courts are not bound by decisions of the common law courts, and the common law judges did not issue writs of *certiorari* for the reason that they had not such knowledge of the civil or canon law with which ecclesiastical courts were concerned as to enable them to deal satisfactorily with matters controlled by an exotic law.

The question, therefore, with which this court is concerned is whether the Divisional Court was right in holding that it is no longer open to it to grant a *certiorari* to quash a proceeding in an ecclesiastical court which is in excess of the jurisdiction of the court. If the Divisional Court was right, the appeal must be dismissed. If it came to a wrong decision, the case must go back to enable the court below to decide whether in the circumstances and on the merits of the case the order ought to be made.

Before going into the matters in issue, it is well to state one thing on which both parties to the appeal are agreed. The order for *certiorari* is the modern substitute for the old writ of *certiorari*, and the researches of all concerned have failed to discover any case of a writ of *certiorari* issuing to an ecclesiastical court

to bring up and quash any proceedings. Writs of *certiorari* have issued to bishops calling on them to certify to the common law courts, or to the chancery, matters peculiarly within the knowledge of the bishop, such as a list of the incumbents in a parish, whether a parson who has pleaded benefit of clergy in a criminal case is, in fact, a clerk, and so forth, but these instances do not give us any real help on the question which we have to decide, and there can be no doubt that when the Lord Chief Justice said that no case had been found of *certiorari* issuing to ecclesiastical courts he was referring, and was understood to refer, to writs of *certiorari* to courts to bring up the record or its equivalent in order that the King's Bench should cause to be done what of right it should see fit to do according to the law and custom of England, and not a writ or writing to certify something which it was desired merely to put in evidence. It will be seen that in the court below the Lord Chief Justice, while holding that the fact that this writ of *certiorari* to quash had not issued to the ecclesiastical courts over a period of 400 or 500 years was sufficient to justify the court in concluding that there was no jurisdiction to issue it, yet went on to explore the history of the matter in order to see what reasoning underlay the undoubted practice of the court. Similarly, in this court the parties have found it necessary, in the course of a hearing which occupied nine days, to investigate very fully the history, both of the writ of *certiorari* and also that of prohibition, and from that history the applicants claim to establish that the Lord Chief Justice was wrong (i) in concluding that the ecclesiastical courts are not inferior courts; (ii) in asserting that writs of *certiorari* have not lain to admiralty courts; (iii) in saying that there was such a doctrine as *communis opinio*, and that, even if there were, that it was to the effect that the writ of *certiorari* did not lie to the ecclesiastical courts; (iv) in saying that ecclesiastical courts were not bound by decisions of the High Court, at any rate, in matters of jurisdiction; (v) in saying that the judges of the common law courts have not knowledge of civil or canon law sufficient to enable them to prevent excess of jurisdiction by the courts which administer such laws. For the respondent, Mr. Neville Gray, while conceding that in certain respects the judgment of the Lord Chief Justice (which was not a reserved judgment) may have gone beyond what was necessary for the decision of the case and may have included propositions which could not, on a closer scrutiny of the history be supported, yet claimed that the decision was right and was in substance correct, both in the conclusion to which the Lord Chief Justice came and in substance in the reasons given.

One of the matters most in controversy, both in the Divisional Court and here, was the question whether the ecclesiastical courts were and are inferior courts, and the more this matter was investigated the clearer it became that the word "inferior" as applied to courts of law in England had been used with at least two very different meanings. If, as some assert, the question of inferiority is determined by ascertaining whether the court in question can be stopped from exceeding its jurisdiction by a writ of prohibition issuing from the King's Bench, then not only the ecclesiastical courts, but also palatine courts and admiralty courts are inferior courts, but there is another test, well recognised by lawyers, by which to distinguish a superior from an inferior court, *viz.*, whether in its proceedings, and, in particular, in its judgments, it must appear that the court was acting within its jurisdiction. This is the characteristic of an inferior court, whereas in the proceedings of a superior court it will be presumed that it acted within its jurisdiction unless the contrary should appear either on the face of the proceedings or *aliunde*. In the latter sense it is nowhere suggested that the ecclesiastical courts were inferior. Indeed, in *Ricketts v. Bodenham* (1), counsel on both sides and LITTLEDALE, J., expressed a contrary opinion, SIR JOHN CAMPBELL saying that they were courts christian and superior, though liable to prohibition if they exceeded their jurisdiction. SIR FREDERICK POLLOCK said (4 Ad. & El. 446):

The fact that this court will restrain the ecclesiastical courts by prohibition shows that they are inferior to this court, so far as the present argument is concerned; though, in some sense, they may be termed superior courts.

He went on to point out want of jurisdiction appearing, as he said, on the face of the proceedings. LITTLEDALE, J., when pressed with the point that, since it did not appear on the face of the proceedings that the dispute was as to the

validity of the rate, the writ should go on the authority of cases cited by SIR FREDERICK POLLOCK, said (*ibid.*):

Those are cases of common law courts, which are inferior to the courts of Westminster Hall; but ecclesiastical courts are not so.

and later he pointed out that prohibition lay to courts of a county palatine if they held plea of lands out of the county. Palatine courts were, of course - at any rate, in earlier times—superior courts of equal standing with the High Court and of co-ordinate jurisdiction. In this respect I find myself unable to agree with the author of the article in the April, 1947, issue of the LAW QUARTERLY REVIEW, at pp. 210 and 211, in throwing doubt on the report of the case. The observations of the judge are so interwoven with carefully reported arguments that they cannot be imaginary.

The matter is really one of terminology, and the true view is that the King's Bench, because it was the court in which the King sat, originally in fact and always in theory, was charged with the general duty of seeing that all courts of limited jurisdiction kept within those limits. At any rate, in early times it was the King in Council who set out the limits of those jurisdictions, though later this was done by statute. Some of these jurisdictions were limited only by local boundaries, such as palatinates where the King abandoned the regalia, including the administration of justice, to the head of the palatinate. Sometimes the limits were extremely wide as in the case of the Cinque Ports, whose inhabitants could only be sued at home. At the other end of the scale were the courts of *pie poudre* attached to fairs, for the settlement of disputes during the currency of the fair. There were the various courts which administered the law merchant. There was the court of the admiral in the time of Edward III, followed by the court of admiralty in the 15th century. There was the court of the constable and the marshal, administering martial law, which, in 1384, had to be controlled by statute. There was the court of heraldry which, in addition to its jurisdiction over coats-of-arms, exercised at one time a jurisdiction as to slander upon men of noble blood. These are only some of the many courts of limited jurisdiction which existed and sometimes flourished side by side with King's Bench, Common Pleas, Exchequer and later the Chancery courts: see HOLDSWORTH'S HISTORY OF ENGLISH LAW, Vol. 1, *passim*; but all these limited jurisdictions were subject to the jurisdiction of the King's Bench court in this respect, that if they transgressed their limits the writ of prohibition would go to put an end to the proceedings, and to prohibit both judges and parties from taking any steps to enforce anything that had been done. To this general overriding authority of the King's Bench the ecclesiastical courts, old as they were, were no exception, nor did the fact that prior to the reformation they derived some part of their authority from another sovereign, the Pope, afford any protection. Thus, in 1285, when the boundaries of the territory within which the church was supreme were still to some extent fluid, we find the King in Council laying down in the "*Circumspecte Agatis*" (13 Edw. I., stat. 4) the limits, and setting out some of the matters in which the courts christian could, and some in which they could not, hold plea. In 1315 the matter was more fully dealt with in the "*Articuli Cleri*" (9 Edw. II., stat. 1). These struggles continued down to the Reformation. The limits of the jurisdiction of the ecclesiastical courts were extremely wide, and at one time included, in addition to the jurisdiction concerning matrimony and probate, and, of course, heresy, the power to try and punish by spiritual measures, or through writs from Chancery in case of contumacy, various offences against morality and good behaviour, many of which were subsequently made criminal offences, subject either to indictment or to trial before justices. Public opinion and Parliament were alike in favour of limiting this part of the jurisdiction of the ecclesiastical courts, and of handing it over to the common law or criminal courts for reasons well known to readers of Chaucer. And no sooner did this occur than, to use the words of COKE in COKE UPON LITTLETON, 96 b:

... where the common or statute law giveth remedy *in foro seculari* (whether the matter be temporal or spiritual) the consans of that cause belongeth to the King's temporal courts only; unless the jurisdiction of the ecclesiastical court be saved or allowed by the same statute to proceed according to the ecclesiastical laws.

In 3 Jac. I came the "*Articuli Cleri*" of Richard Bancroft, Archbishop of

Canterbury, which are fully set out with the unanimous answers of all the judges of England and the barons of the Exchequer in COKE'S INSTITUTES, II, pp. 601 *et seq.* It is not necessary to go through them in detail, but they show two things clearly. What was complained of by the clergy was the "multiplication of prohibitions" to the ecclesiastical courts; what is justified by the judges is the issue of prohibitions whenever those courts transgress the limits of their jurisdiction. The only other writ touched upon is *habeas corpus*, which the judges say they are bound to issue, and to release the prisoner if on return no cause or no sufficient cause appears. *Certiorari* is not even referred to.

I make no excuse for going in some slight detail into these matters of history, for what emerges from them is that the ecclesiastical courts were courts to which one would not expect a writ to go in order to remove into the King's Bench courts the record to decide what should be done in the case. Nor does the history indicate that it was by chance merely that a writ of *certiorari* never issued. Still less is it possible to read the history of the matter without seeing that the King's Bench was by no means backward in performing its duties of keeping the ecclesiastical courts, or any other courts, within their proper sphere, but the weapon which the King in Council had entrusted to his own court for this purpose was the writ of prohibition, which went to all courts of limited jurisdiction regardless of their position or of the law they administered. For this purpose, particularly where the court concerned did not administer the common law, prohibition was the logical remedy, one not open to abuse by the court issuing the writ, nor to criticism by the court prohibited, as *certiorari* would have been. Thus HOLT, C.J., in *Bishop of St. David's v. Lucy* (2) (1 Ld. Raym. 544):

It is without precedent, to grant a prohibition to the ecclesiastical courts, because they proceed there contrary to the canons;

meaning that not even this writ could be resorted to to correct ecclesiastical courts, so long as they erred within their jurisdiction. Similarly, in *Mackonochie v. Lord Penzance* (3) (6 App. Cas. 444), LORD BLACKBURN pointed out that prohibition did not enable the temporal courts to act as a court of appeal from courts ecclesiastical, so to correct irregularity or injustice which may have been done in exercise of their jurisdiction. *Certiorari*, on the other hand, might have led to the very intermeddling which, when done by the ecclesiastical courts, was the principal ground of prohibition: see the first answer in "*Articuli Cleri*" of 3 Jac. 1 (COKE'S INSTITUTES, II, p. 601):

No man maketh any question, but that both the jurisdictions are lawfully and justly in his majesty, and that if any abuses be, they ought to be reformed: but what the law doth warrant in cases of prohibition to keep every jurisdiction in his true limits, is not to be said an abuse, nor can be altered but by parliament.

Longbottom v. Longbottom (4) provides an admirable example of the difference between the two writs. Prohibition, though asked for to a county court, was not granted; *certiorari* was, for the subject-matter lay within the jurisdiction of the county court and so it should not be prohibited, but it was so difficult a matter that it was removed for trial into the King's Bench.

The relationship between the common law courts and the ecclesiastical courts is admirably set out by BAYLEY, J., in *Ackerley v. Parkinson* (5) (3 M. & S. 428):

The subject-matter is the granting administration of the intestate's effects, and with a view to that all the proceedings are instituted. What the proceedings are to be in order to obtain administration, depends entirely upon the mode and practice of proceeding of the ecclesiastical court. Whether that court will grant administration or not to any person before citation goes, or certain previous steps be taken, is a matter which they must know as connected with their practice: but how are we, as judges of the common law, to know whether their proceedings have been such as the civil or canon law requires? Our knowledge of what is conformable or not to that law is chiefly derived from our practice of exercising jurisdiction over those courts in the matter of granting prohibitions. If it appears that the ecclesiastical judge has either no jurisdiction, or has exceeded his jurisdiction, this court is in the habit of interposing by granting a prohibition. But if the spiritual court has jurisdiction, I am not aware of any instance in which this court has granted a prohibition, except in cases where it proceeds to the trial of a matter triable only by the common law, or allows a thing not allowed by the common law, or where the construction of a statute, which is peculiarly confined to the common law, comes in question.

It is not, therefore, surprising to find that BLACKSTONE, writing in 1768 and approaching the matter, as he does, from a different angle, *viz.*, that of the subject

who is injured by encroachment of jurisdiction, calls the writ of prohibition the remedy provided by the common law. Here is the passage (BLACKSTONE'S COMMENTARIES, Bk. III, p. 111) :

The other injury, which is that of encroachment of jurisdiction, or calling one *coram non judice*, to answer in a court that has no legal cognizance of the cause, is also a grievance, for which the common law has provided a remedy by the writ of prohibition. A prohibition is a writ issuing properly only out of the Court of King's Bench, being the King's prerogative writ ; but, for the furtherance of justice, it may now also be had in some cases out of the Court of Chancery, Common Pleas, or Exchequer, directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. This writ may issue either to inferior courts of common law ; as, to the courts of the counties palatine or principality of Wales, if they hold plea of land or other matters not lying within their respective franchises ; to the county courts or courts-baron, where they attempt to hold plea to any matter of the value of forty shillings ; or it may be directed to the courts christian, the university courts, the court of chivalry, or the court of admiralty, where they concern themselves with any matter not within their jurisdiction ; as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made or to be executed within this kingdom. Or, if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England ; as where they require two witnesses to prove the payment of a legacy, a release of tithes, or the like ; in such cases also a prohibition will be awarded. For, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original question clearly within their jurisdiction ; it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal law, else the same question might be determined different ways, according to the court in which the suit is depending : an impropriety, which no wise government can or ought to endure, and which is, therefore, a ground of prohibition. And, if either the judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it ; and an action will lie against them, to repair the partly injured in damages.

It is interesting here to note how BLACKSTONE catalogues the courts to which the writs will lie—"inferior courts of common law," including "courts of the counties palatine," etc., "county courts or courts baron," etc., and then he continues : "or it may be directed to the courts christian, the university courts, the courts of chivalry, or the court of admiralty" etc. It is true that later on in a discussion as to procedure, he uses the phrases "superior courts" and "court below," but this is clearly in the sense of issuing and receiving the writ of prohibition. It is unthinkable that BLACKSTONE would have described the writ of prohibition as being the remedy open to a person wronged by being cited to a court which exceeds its jurisdiction, and, in particular, an ecclesiastical court, if, in fact, there was another such remedy, *viz.*, the writ of *certiorari*, for those were the days when remedies in the main still took the form of writs, adapted to the particular case.

In the course of his argument, Mr. Stranders was fain to admit that it involved the proposition that *certiorari* had always been open to the person proceeded against in the ecclesiastical courts in excess of their jurisdiction, and, indeed, it is implicit in that argument, unless some change can be pointed to which made the writ of *certiorari* for the first time the appropriate remedy. No such change has been found.

On the above material, the court might have said, as was said in the court below, that there was no necessity to go further. In *R. v. Boaler* (6), CAVE, J., held that absence of authority for the grant of a writ in a particular kind of case, *i.e.*, to quash a conviction at the Central Criminal Court, on which sentence had been passed, was conclusive against the application. Speaking for myself, I have always understood this to be the case. It was argued by the applicants here that the issue of the writ lay "in principle." I am not sure that I understand what that means. We are concerned here, not with the application of an acknowledged principle of law to a new set of facts, to which it applies as a matter of logic ; we are concerned, on the one hand, with a writ issuing as a matter of history out of the King's Bench or the Chancery to courts of record or to officials, and, on the other, with courts whose history goes back beyond the first such writ. It is not as though the ecclesiastical courts were a new jurisdiction created

by Act of Parliament administering the common law. To such courts it is clear that *certiorari* would lie, unless expressly excluded : see the case of *Cardiff Bridge*, also known as *R. v. Inhabitants of Glamorganshire* (7).

A rule of practice, rigidly enforced for many hundreds of years, and not challenged as failing to afford redress to persons wronged, is not to be over-set by saying that one kind of *certiorari*, viz. a *certiorari* to quash, and prayed for on one ground only, viz., that the decision was one which exceeded the jurisdiction of the ecclesiastical court, would be a convenient alternative remedy for the applicant, and would not be open to any objection since it achieved the same result as prohibition, and would not intermeddle with what was within the limited jurisdiction. It is true that MATTHEW, J., in the earlier case of *R. v. Boaler* (8), is reported as saying that he was reluctant to hold that *certiorari* would not lie if no other way of obtaining justice should be available. There is an advantage in adhering to a practice which is several hundred years old, in the interests of litigants generally. Moreover, as far as this case is concerned, I have not been able to see in what respect the writ of prohibition would not give the applicants (provided they are entitled to it) all necessary remedies.

I turn to the history of the writ of *certiorari*. SIR ARTHUR FITZ-HERBERT (1470-1538) in the new *NATURA BREVIVM*, with the commentary ascribed to SIR MATTHEW HALE, 9th ed., vol. II, p. 245 says :

The writ of *certiorari* is an original writ, and issueth sometimes out of the chancery, and sometimes out of the King's Bench, and where the King would be certified of any record which is in the Treasury, or in the Common Pleas, or in any other court of record, or before the sheriff and coroners, or of a record before commissioners, or before the escheator ; he may send this writ to any of the said courts or offices, to certify such record before him *in banco*, or in the chancery . . .

Numerous forms of the writ are subjoined, to judges itinerant, coroners, judges of gaol delivery, sheriffs, the Chief Justice of the King's Bench himself (with a view to a pardon) or of Common Pleas, or to a bishop to certify a list of incumbents since the time of Edward IV, but there is not a suggestion that it will go to a bishop in the capacity of judge or his courts or any other ecclesiastical court. Then BACON'S ABRIDGMENT, vol. II, 7th ed., p. 9, under the title "*Certiorari*," says :

A *certiorari* is an original writ issuing out of Chancery or the King's Bench, directed in the King's name, to the judges or officers of (a) inferior courts, commanding them to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause.

Again at p. 13 :

The courts of Chancery and King's Bench may award a *certiorari* to remove the proceeding from any inferior courts, whether they be of an ancient or newly created jurisdiction, unless the statute or charter, which creates them, exempts them from such jurisdiction.

VINER'S ABRIDGMENT, vol. IV, p. 330, title "*Certiorari*"—*Out of what court it ought to issue and to whom ; et c contra :*

If the record be pleaded in a more base court than that in which it is, the court may grant a *certiorari*.

COMYNS DIGEST, vol. II, title "*Certiorari*," pp. 331 *et seq.*, follows FITZ-HERBERT and gives among numerous instances, at p. 334, one of the censors of the College of Physicians to remove a judgment by them for malpractice, and "so to every inferior jurisdiction of record, though it be within the county palatine or in Wales."

LILLY'S PRACTICAL REGISTER, 2nd ed., 1735, vol. 1, p. 363, has this :

Certiorari is a writ which issues out of the King's Bench to any inferior court of record, commanding them to certify to them the *loquela*, viz., the plaint, which is before them *cum omnibus ea tangentibus* ; which when returned, then upon a rule given, bail must be put in before a judge, or else a writ of *procedendo* will be granted. There is also a writ of *certiorari* which issues out of the Crown Office to certify indictments, etc.

In the notes it appears that GLYN, C.J., in the case of one *Gassock* (9), said that the King's Bench would grant a *certiorari* and remove a cause before judgment if the inferior court had no jurisdiction "or do not proceed therein according to the rules of the common law ; but, if an inferior court have jurisdiction and this

court hath not, no *certiorari* ought to be granted, or it would be to no purpose to grant it." Another note doubts whether *certiorari* lies to Cinque Ports, except in an extraordinary case and after judgment with a view to a more efficient execution. Finally, TIDD'S PRACTICE (1828), vol. 1, 9th ed., p. 398, has the following :

A *certiorari* lies, in general, for the removal of all causes from inferior courts . . . and it will lie to remove an ejectment from an inferior court.

After reciting the above passage from LILLY, it illustrates the point by reference to an action brought in London for calling a woman "whore," actionable by the custom of London but not elsewhere, so the court refused to bring up the proceedings as it would have prevented the plaintiff from getting redress.

From all these passages relied on by the applicants it is apparent, not only that the writ never did go to the ecclesiastical court, but also that no text-book writer has ever suggested that it did, unless it be granted that they understood the term "inferior court of record" to include ecclesiastical court. It is, at least, doubtful whether an ecclesiastical court is in this sense a court of record. Generally speaking, it could only imprison by applying in appropriate form to the common law courts, or possibly the Chancery, for a writ, and then only for contumacy. It is true that special commissioners, and later the Court of High Commission, were given special powers to imprison, but the court of the chancellor, the bishop's deputy, never had such powers, and it is clear from the history and account of the writ and the numerous instances given in the text-books that their writers never, in fact, can have intended to include the ecclesiastical courts among the inferior courts to which they said that writs of *certiorari* went, even if they regarded the ecclesiastical courts as inferior courts, which is at least doubtful. The reason is not far to seek. The King's Bench was always careful not to endeavour to interpret ecclesiastical law, which was either civil or canon law, except in a case where it had to do so to exercise its jurisdiction to prevent courts of limited jurisdiction from straying beyond those limits. To this extent only have the judges of the King's Bench the inclination or the knowledge necessary to apply ecclesiastical law : see *per* LORD DENMAN in *Burder v. Veley* (10) (12 Ad. & El., 259). Asked, therefore, for a writ of *certiorari* to an ecclesiastical court, the King's Bench was bound to refuse it for the reason that it would remove into the King's Bench proceedings not capable of being determined there. It was this salutary line of argument which determined the practice of the court of King's Bench since *certiorari* first began to be used, and nothing has happened to make an alteration in the practice desirable. To remedy any grievance from which the appellant may be suffering, the writ of prohibition will lie if the circumstances warrant its issue, provided that the ecclesiastical court has exceeded its jurisdiction.

So far as the admiralty courts are concerned, according to the introduction to vol. II of SELECT PLEAS IN THE COURT OF ADMIRALTY by REGINALD G. MARSDEN, vol. II, SELDEN SOCIETY PUBLICATIONS, p. xli, the practice appears to have been that :

. . . the earliest interference with the Admiralty jurisdiction . . . was by way of *superseas* and *certiorari*, issuing apparently from Chancery ; and that the common law courts were not resorted to for prohibitions, until it was found that applications to the Council and the Chancellor usually resulted in the Admiralty being left to exercise the jurisdiction which it claimed.

That, however, did not prevent a continuous flow, after *certiorari* ceased to go, of writs of prohibition, some of which are set out in the same volume, which continued right down to 1602. When one asks oneself why those early writs of *certiorari* were blocked, either in the council or by the chancellor or by the King himself, at least a likely reason is to be found in the fact that the admiralty courts administered maritime law or the law merchant. It needed a special commission of oyer and terminer to try a case "*secundum legem mercatoriam*." At any rate in 1280, the courts of common law had no jurisdiction to redress any tort committed abroad (*ibid.*, p. xliii and cases cited). The history of *certiorari* in so far as admiralty courts are concerned illustrates the difficulties into which the King's Bench courts got when they endeavoured to try matters not governed by the common law. As to the statement by ATKIN, L.J., in *R. v. Electricity Commissioners* (11) ([1924] 1 K.B.D. 204)* it is sufficient to say that the Lord

* See *per* EVERSHED, J., p. 181, *post*.

Justice treated the matter as one in which the court was at liberty to grant either writ, as indeed was the case, and merely indicated the difference in operation between the two writs, *viz.*, that while the one prevented, the other cured. None the less, it is the fact that the effect of a writ of prohibition is not merely to prevent the making of an order should it arrive in time, but is also to prevent the enforcement of it should it arrive after it has been made.

I am of the opinion, therefore, that the court below came to a right conclusion, and in all matters of substance for the right reasons. In the interests of all concerned, and, particularly, of litigants, a long settled practice of a court of record, extending in this case over hundreds of years, is not to be disturbed except by establishing that a departure from it is necessary to do justice to an applicant who can get justice in no other way, and to whom the court has always had jurisdiction to grant the relief prayed for. A heavy burden lies, therefore, on those who challenge a practice so long settled. Nothing of the kind can possibly be suggested here. If the applicants have, in truth, suffered from an excess of jurisdiction in the ecclesiastical court concerned, the writ of prohibition is there to put an end to the grievance. In addition, a scrutiny of the history of *certiorari* and prohibition shows that the practice was not merely settled, but was settled for reasons which would have prevailed throughout the period during which the writ of *certiorari* has existed. Hence arose the "*communis opinio*" which must have existed when FITZ-HERBERT, COKE, BACON, VINER and BLACKSTONE wrote, and these are some of the reasons: First, the ecclesiastical courts were always liable to be kept within the limits of their jurisdiction by the writ of prohibition, issuing during the last 400 or 500 years out of the King's Bench whenever they should transgress those limits. Secondly, so long as the ecclesiastical courts acted within those limits, no process was available issuing from the common law courts to control or correct them. There was, of course, the channel of appeal referred to by the Lord Chief Justice. Thirdly, the writ of *certiorari* has always been a writ designed to bring up to the King's Bench proceedings of courts to which it lay, in order that the King's Bench should do what was necessary to be done in the interests of justice. This might be a trial in a better qualified court, whether the King's Bench or elsewhere; it might be a more efficient form of execution, *e.g.*, in that wider sphere where the King's Bench writs ran; it might be in order that after judgment a pardon should be granted by the King; it might be that the proceedings ought to be corrected or quashed. But none of these, except the very last, was appropriate to proceedings in an ecclesiastical court, and the last was sufficiently provided for by the writ of prohibition, which issued on the only ground upon which the King's Bench could presume to quash the decision of an ecclesiastical court, *viz.*, excess of jurisdiction. For these reasons, the decision of the Divisional Court of the King's Bench Division ought to be upheld and the appeal dismissed.

EVERSHED, L.J., whose judgment was read by SCOTT, L.J., recited the facts and continued: The only question before the court has been that raised by the preliminary objection, and we have not been invited or been able to consider at all the merits of the application or whether, in the exercise of the discretion appropriate to the making of an order of *certiorari*, the present case is one in which the jurisdiction, if it insists, ought to be exercised. Nevertheless, the hearing in this court has occupied some nine days. Mountains of research and learning have been brought to bear on what may be thought a somewhat unedifying and even ridiculous subject-matter.

Pursuant to the Administration of Justice (Miscellaneous Provisions) Act, 1938, and R.S.C. Ord. 59, r. 5, made thereunder, the old writ of *certiorari* has been abolished and in its place the court may make on motion an order of *certiorari*. It is, however, conceded by both sides that this alteration in form in no way affects the substance of the matter, which must, accordingly, be judged in the light of the statutes, authorities and text-books, some modern and many very ancient, applicable to the old historic writ.

The Lord Chief Justice, as I read his judgment, based his conclusion primarily on the absence of any precedent in the books for the issue of a writ of *certiorari* to an ecclesiastical court. If the profound researches of counsel failed to discover any instance of the exercise of such a jurisdiction, it is too late in the 20th century to create one, but the learned Lord Chief Justice sought also to find the reasons for the abstinence and held them to consist of the following—that a

consistory court was not an inferior court to the court of King's Bench; that it administers a peculiar system of law foreign to and having "no privity with" the King's common law—a system of law of which the King's Bench judges would have no knowledge; that there had at all material times been a *communis opinio* among lawyers that such a jurisdiction did not exist; and that, if jurisdiction lay to issue a writ (or make an order) of *certiorari* to quash an order of an ecclesiastical court for want of jurisdiction, there must necessarily also exist (having regard to the ancient form of the writ) jurisdiction to bring up the whole case before judgment or sentence for trial, or after judgment or sentence for review, in order that right might be done in the cause—a thing which, because of the difference in the systems of law already noticed, the court of King's Bench could not in any circumstances do.

In the course of his argument, distinguished by its forcefulness no less than by the great care and labour he had taken in its preparation, Mr. Stranders attacked both the conclusion of the Divisional Court and also the reasons given by the Lord Chief Justice which I have summarised above. The gist of Mr. Stranders' argument, stated in the course of his reply in the form of eight propositions, may, I think, be accurately stated thus: Having regard to the superintending powers and duties of the court of King's Bench, the onus is on the party disputing the court's jurisdiction, and such onus is not discharged by referring to the absence of precedent. On the view which I take, it is not necessary or desirable that I should follow through all the stages of the applicants' argument or express opinions on many of the matters raised, of great historical interest, which are cognate to the main question, *e.g.*, the history and jurisdiction of the old admiral's court or courts, later the Court of Admiralty. It does not seem to me that the fact that writs of *certiorari* were issued from time to time to the early admiral's court can greatly assist in the solution of the present problem. At best, such fact is, to my mind, a double-edged sword. For I agree with the conclusion of the Lord Chief Justice that the inevitable inference to be drawn from the absence of any precedent or of any hint of any precedent for the issue of a writ of *certiorari* directed to an ecclesiastical court administering or purporting to administer ecclesiastical law is that so to do was regarded, and must now be regarded, as outside the jurisdiction of the King's Bench Court. It is true that instances have been found of the issue of *certiorari* to bishops for the purpose of obtaining evidence—see, *e.g.*, FITZ-HERBERT'S *NATURA BREVIVM*, 9th ed., vol. II, p. 246; BROWNLOW'S *COLLECTION OF WRITS*, p. 15—but this precedent was wholly different in kind as well as in form from the writ of *certiorari* which was the parent of the order now sought by the applicants. At best, again, such precedents are two-edged swords. When regard is had to the sources which have been examined—and, perhaps, particularly to the objections and answers set out under the title "*Articuli Cleri*" in COKE'S *INSTITUTES*, II, p. 599 *et seq.*, the absence of any precedent or hint of any precedent, is, to my mind, inexplicable save on the view that, whether from the accident of history or otherwise, the King's Bench Court never assumed any jurisdiction to control, by means of the writ of *certiorari*, the transactions of ecclesiastical courts in ecclesiastical matters. The result, in my judgment, is that both the practice and the jurisdiction as regards such matters as are here in question must be taken as settled. If there be some illogicality in this conclusion I am not, for myself, deterred by Mr. Stranders' rebuke that it is an "argument of despair." If there be an illogicality, it is not alone in that respect in the system of our English law. It is not necessary to found this conclusion on, or even to support it by reference to, any "*communis opinio*" to be extracted from the ancient writers, though it may assume the existence of "*communis opinio*" in the sense of a view commonly held among lawyers. And I refer to the observations of CAVE, J., in *R. v. Boaler* (6) (67 L.T. 354), where he thought the absence of any precedent for a *certiorari* to quash an indictment after judgment to be conclusive against the application.

It is tempting to leave the matter there, but out of respect for the strenuous argument of Mr. Stranders I add some observations upon the reasons which may be said to have justified the growth of what I think to be the settled practice, and particularly upon the validity of the reasons to which the learned Lord Chief Justice referred. For my part, I greatly doubt whether the practice can be based on any alleged "superiority" of the ecclesiastical courts. There can,

I think, be no question that the expression "superior court" has been used in more than one sense. I cannot, however, doubt that for the purpose of controlling attempted usurpations of jurisdiction the ecclesiastical courts were and should be regarded as no less "inferior" to the King's Bench courts than, *e.g.*, the old admiral's court or the courts of the counties palatine. It is conceded that writs of prohibition would always have issued against the ecclesiastical courts, no less than against the other courts which I have named, to curb excess of jurisdiction, and, in my judgment, that fact imparts a sufficient "inferiority" of status to have warranted—other things being equal—the issue of the other prerogative writs, including the writ of *certiorari*. I think it is true that the interlocutory observation of LITTLEDALE, J., in *Ricketts v. Bodenham* (1) (4 Ad. & El. 446), in its context does indicate the view that ecclesiastical courts must be treated as "superior" in the sense of being exempt from control by means of any so-called "original" or "prerogative" writs, but that learned judge seemed, at the time he made the observation, to think that the same reasoning applied to the palatine courts. It is, in my judgment, clear that, for the purposes in hand, the palatine courts were not, in fact, considered as "superior," and, as I have already stated, it is conceded that the ecclesiastical courts were at all times regarded as subject to restraint by way of prohibition. As pointed out by the author of the article upon the present case in the April, 1947, issue of the LAW QUARTERLY REVIEW, at pp. 210 and 211, the observation attributed to LITTLEDALE, J., in the report in ADOLPHUS & ELLIS finds no place in others reports of the same case, and, in my opinion, in the light of the exhaustive and authoritative reasoning of Mr. Stranders on the point, the interlocutory observation of LITTLEDALE, J., (if made) cannot be relied on as judicial authority for the view that the ecclesiastical courts ever possessed such a "superiority" of status as would negative the existence of a right to control their activities on the part of the King's Bench by any of their writs including the writ of *certiorari*.

Nor do I think that the absence of jurisdiction can properly or safely be based upon the circumstance that ecclesiastical courts were not (if they were not) courts of record. On the other hand, I am disposed to think that the true ground of the absence of jurisdiction is to be found in the fact that the ecclesiastical courts administered a system of law foreign to and having, in the words of LORD ELLENBOROUGH, C.J., no "privity with" the courts of the common law, the civil law which they administered being concerned primarily with rights and duties of spiritual import. The writ of *certiorari* appears to have become common in the latter half of the 14th century. The form, which seems to have been universally followed, requires the record of the cause to be brought up to the King's Bench Court, so that, on examination, right should be done between the parties to the suit.

I do not desire to express any concluded view on the question whether an order for *certiorari* to quash could lie in any case in which for any reason the King's Bench Court might itself be incompetent to try the issue between the contestants. Mr. Stranders relied on the Irish cases of *Re Heaphy* (12) and *Lalor v. Bland* (13) for the proposition that the Court of King's Bench will never "allow a nullity to remain on the record," whatever be the power or competence of the King's Bench Court as regards the question in issue. Nor do I forget the general language of HOLT, C.J., in VINER'S ABRIDGMENT, vol. IV, p. 336, that there is no court or jurisdiction which can withstand a *certiorari*. There is, however, to my mind, a difference in principle between courts having exempt jurisdiction in the sense that by some statute exclusive jurisdiction *quoad* subject-matters is conferred on them (*e.g.*, the recently established Rent Tribunals for assessing the rents of furnished lettings), and courts administering a system of law wholly distinct, both in substance and in matters of procedure, from the system of law administered in the King's temporal courts, and though it may well be, as pointed out, *e.g.*, by LORD BLACKBURN in *Mackonochie v. Lord Penzance* (3) (6 App. Cas. 446), that the common law judges are well able to inform themselves of the principles of ecclesiastical law and even of the practice of the ecclesiastical courts, in my view, the true inference to be drawn from all the considerable material placed before us by the industry and research of counsel is that the writ of *certiorari* as it developed was universally treated as by its nature inapplicable for any purpose to the ecclesiastical courts, at least in so far as they purported to administer a system of law which, albeit was the King's

ecclesiastical law, yet was a law substantially distinct in history and substance from the system administered by the temporal courts. The qualification which I have made is, I think, rendered at least desirable by reason of the point made at the end of the article in the LAW QUARTERLY REVIEW to which I have earlier alluded. For, if by some future Act of Parliament the trial of some class of issues was relegated to the ecclesiastical courts, it must not be supposed that I am now expressing any view on the question whether as regards that class of case an order of *certiorari* would or would not lie. It is sufficient for the present case that the chancellor was, as I understand it, purporting to administer ecclesiastical law properly so called having no affinity to the common law administered in the temporal courts.

The result, and the basis which I think underlies it, are in no sense surprising. The form of writ of *certiorari* makes it, *prima facie*, inapplicable to courts administering a system of law foreign to that administered by the temporal courts. It would, therefore, as it seems to me, have required a stretching by the judges of the natural intendment of the writ to make it in practice applicable to ecclesiastical courts exercising ordinary ecclesiastical jurisdiction, even for the limited purpose of quashing a judgment in excess of jurisdiction. I am, therefore, far from accepting Mr. Stranders' contention that the onus lies on the party seeking to deny the jurisdiction of the King's Bench, though if the onus does so lie, it is, in my judgment, discharged by the inference which I think must inevitably be drawn from the absence of any precedent for the exercise or attempted exercise of such jurisdiction. Nor does the result leave a party without remedy against whom some "judgment" has been pronounced by an ecclesiastical court in excess of or in want of jurisdiction. For, although an order of the King's Bench Court quashing altogether such a judgment might be regarded as a cleaner or more complete form of redress, an order of prohibition directed to prevent any enforcement of the judgment would, so far as I can see, be, at least, practically effective, and, though I appreciate that I am not in the present very remarkable case entitled to enter upon any discussion of the merits, the terms of the licence of Sept. 8, 1944, and its recitals make me disinclined to lay any emphasis on any defect in remedy to which Rev. W. G. White and Mrs. Bloom might be supposed to be subject by reason of the absence of jurisdiction to quash the licence.

Mr. Stranders very naturally relied, and relied strongly, on the *dictum* of ATKIN, L.J., in *R. v. Electricity Commissioners* ([1924] 1 K.B. 204) as follows :

Both writs [of prohibition and *certiorari*] are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; *certiorari* requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a court of justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

That *dictum* has since been quoted many times with approval, and its general validity it is neither possible nor proper to doubt. In my judgment, however, it is clear that the question which has been raised in the present case was not present to the mind of the Lord Justice, and certainly was in no sense necessary to the decision in that case. Whenever, as a result of the establishment by Act of Parliament of some new jurisdiction or some new tribunal exercising judicial or quasi-judicial functions, it is necessary to consider the application thereto of well established forms of remedy, the court will not be afraid to extend the older principles to new circumstances. But the present case is not, in my judgment of that character. We are considering, not the application of established principle to a new jurisdiction, but the scope of the principle itself in regard to a jurisdiction no less ancient than the principle.

For the reasons which I have attempted to state, I am of opinion that, as a

matter of principle, the ecclesiastical courts administering ecclesiastical law must at all times be treated as outside the ambit of the writ of *certiorari*, and for that reason the present appeal must, in my judgment, fail.

Appeal dismissed with costs.

Solicitors: *Evill & Coleman* (for the applicants); *Tamplin, Joseph & Flux*, agents for *Gudgeons, Peacock & Prentice*, Stowmarket (for the respondents).
[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

Re TABRISKY.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), June 18, 1947.]

Bankruptcy—Discharge—Suspension—Suspension for two years—Condition for payment of instalments to continue after discharge—Bankruptcy Act, 1914 (c. 59), s. 26 (2).

On an application by a bankrupt for his discharge certain of the facts specified in s. 26 (3) of the Bankruptcy Act, 1914, were proved. The registrar ordered that the discharge be suspended for two years under para. (ii) of s. 26 (2) of the Act, and attached a condition, the effect of which was that the bankrupt would have to continue the payment of instalments to the official receiver for two or three years after his discharge became effective.

HELD: the proviso to s. 26 (2) did not destroy the general power to attach conditions given by the body of the subsection, and, therefore, although on proof of the facts specified in s. 26 (3) the court must follow one of the courses set out in the proviso, there was nothing to prevent the court also imposing a condition under the main part of the sub-section, and, therefore, the condition as to payment of instalments was valid.

Re Dallmeyer, Ex p. Dallmeyer (1906) (22 T.L.R. 445), followed.

[AS TO CONDITIONAL ORDER OF DISCHARGE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 328-331, paras. 447-448; and FOR CASES, see DIGEST, Vol. 4, pp. 569-575, Nos. 5237-5285.]

Cases referred to:

- (1) *Re Dallmeyer, Ex p. Dallmeyer* (1906), 22 T.L.R. 445; 4 Digest 574, 5277.
- (2) *Re Gardner, Ex p. Official Receiver v. Gardner*, [1942] Ch. 50; 166 L.T. 81; sub. nom. *Re Debtor* (No. 6 of 1934), *Ex p. Official Receiver*, [1941] 3 All E.R. 289; 111 L. J. Ch. 75; Digest Supp.

APPEAL by the Board of Trade from an order of Mr. REGISTRAR PARTON, dated Apr. 22, 1947. The facts appear in the judgment of LORD GREENE, M.R., and are summarised in the headnote.

V. R. Aronson for the Board of Trade.

I. H. Jacob and *W. R. Lawrence* for the debtor.

LORD GREENE, M.R.: This is an appeal by the Board of Trade against an order made by a registrar in relation to the discharge of two bankrupts. The appeal only relates to the order as it affects one of those two, namely, Abraham Tabrisky, and the point raised is whether or not the registrar had jurisdiction to make the order.

The bankrupts were adjudged bankrupt on June 25, 1930. They had committed in their business certain acts which fall within the Bankruptcy Act, 1914, s. 26 (3). Regarding an application for discharge, s. 26 (2) of the Act provides:

On the hearing of the application the court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs (including a report as to the bankrupt's conduct during the proceedings under his bankruptcy), and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property. . . .

By the proviso to the sub-section the court shall refuse or suspend the discharge or impose the condition that the bankrupt shall consent to a judgment on proof of any of the facts specified in s. 26 (3). Sub-section 8 provides:

The powers of suspending and of attaching conditions to a bankrupt's discharge may be exercised concurrently.

The order which the registrar made was as follows, so far as it affected Tabrisky :

It is ordered that the discharge of the bankrupt Abraham Tabrisky be suspended for two years, and that he be discharged as from Apr. 22, 1949, subject to the following condition as to his future earnings, after acquired property and income, which condition shall operate concurrently with the aforesaid suspension and shall continue to operate, if necessary, after Apr. 22, 1949, that is to say, the bankrupt Abraham Tabrisky shall pay to the official receiver as trustee for distribution among the creditors in the bankruptcy £110 per annum by equal monthly instalments of £9 3s. 4d. the first payment to be made on May 1, 1947, and subsequent monthly payments to be made on the first day of each succeeding month thereafter until the creditors in the joint estate shall have received a dividend of 2s. 3d. in the pound.

Counsel for the Board of Trade does not contest that the part of the order which suspends discharge for two years is within the powers of the registrar. What is complained of is the attachment of a condition with regard to the payment of sums of money out of the bankrupt's future earnings, that payment being one which will continue after the discharge has become effective, provided, of course, that the bankrupt does not pay up in advance. Assuming he makes the payments mentioned in the order and no more, it will take four or five years to comply with that part of the order, *i.e.*, the payments will continue for two or three years after the order of discharge becomes effective. That condition, it is said, was not competent to the registrar to impose. The argument proceeds on these lines. The general power to impose conditions under s. 26 (2), which admittedly would include power to make such an order as the present, is cut down by the proviso which enacts :

Provided that the court shall refuse the discharge . . . where the bankrupt has committed any misdemeanour under this Act, or any enactment repealed by this Act, or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the court otherwise determines, and shall on proof of any of the facts mentioned . . . [in s. 26 (3)] either (i) refuse the discharge ; or (ii) suspend the discharge for a period of not less than two years : provided that the period may be less than two years, if the only fact proved of those hereinafter mentioned is that his assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities ; or (iii) suspend the discharge until a dividend of not less than 10s. in the pound has been paid to the creditors ; or (iv) require the bankrupt as a condition of his discharge to consent to judgment being entered against him by the official receiver or trustee for any balance or part of any balance of the debts provable under the bankruptcy which is not satisfied at the date of the discharge, such balance or part of any balance of the debts to be paid out of the future earnings or after-acquired property of the bankrupt in such manner and subject to such conditions as the court may direct . . .

Counsel for the Board of Trade maintains that in a case to which the proviso applies no conditions can be attached to an order for discharge other than the one condition mentioned in para. (iv) of the proviso—in other words, if the registrar thought it right to suspend discharge and also to extract from the bankrupt something from his future earnings, the only thing he could do was to require the bankrupt to consent to a judgment such as is mentioned in para. (iv). The effect of the proviso, he says, is to destroy the general power to attach conditions given by the body of the subsection and to substitute a limited power confined to the attachment of one condition only.

That, in my opinion, is a misconception of the effect of the sub-section. The sub-section starts with a general power, expressed in very wide language, to attach conditions to an order of discharge, and under sub-s. (8) it is competent both to suspend a discharge and to attach conditions. All the proviso does is to qualify the power to attach conditions, and that qualification is, of course, limited to precisely what the proviso says. It is common learning that the object of a proviso is to cut down or qualify something which has gone before, but, once the requirements of this proviso are complied with, there is nothing left to affect or cut down the general power to attach conditions in the body of the sub-section. The provision which has preceded the proviso is of a general power to give a discharge, absolute or suspended, and to impose conditions of the widest possible kind, and it would be contrary to the ordinary operation of a proviso to give it an effect which would cut down those powers beyond what

compliance with the proviso renders necessary. The proviso, therefore, does not give powers. It qualifies powers already given, and provides that in the exercise of those powers the court shall be subject to certain limitations in the sense that one or more of the stated alternatives is made obligatory. There are four courses open to the court. They are not cumulative obligations; they are alternative obligations. The court may refuse the discharge, it may suspend the discharge for a period, it may suspend the discharge until a dividend of not less than 10s. is paid, or it may require as a condition of discharge consent to judgment. The court, therefore, in carrying out its duties in a case to which the proviso applies, finds that it must select one of those four courses. Once it has complied with that minimum requirement of the proviso, the proviso, it seems to me, has finished its work. It is no longer in operation, because the court can say: "I have done exactly what the legislature has told me to do, namely, that I must do one or other of the four things mentioned." That being so, what is there left to take away the general power to impose conditions given by sub-s. (2)? I can see nothing. It appears to me that to give the proviso the effect that counsel for the Board of Trade contends for would involve re-writing it. It would mean not only that the court is compelled to choose one of those four courses, but also that it must not impose any other condition. Nowhere does the proviso say that. When, therefore, one has carved out of the general power that limitation which the proviso requires to be carved out of it, one has done all that is required. In the result, the power to impose conditions remains as laid down in the body of the sub-section.

The matter is not without authority in this court, by which, in my opinion, we should be bound. *Re Dallmeyer* (1) was decided under the Bankruptcy Act, 1890, s. 8. That Act did not in any material respect for present purposes differ from the section we have to consider, save in one particular, that alternative (ii), mentioned in the proviso, referred only to suspension of the discharge for two years, in other words, the minimum punishment, so to speak (using that phrase in a general way for convenience), which was to be imposed was a suspension for two years. That has now been altered, and the period of suspension under the proviso may be whatever period the court thinks proper. *Re Dallmeyer* (1) was a case where certain of the necessary facts to bring the proviso into operation had been proved and, to that extent, it was similar to the present case. The registrar made an order granting an immediate discharge, but added a condition that the bankrupt, after setting aside £500 a year out of his earnings for his own support, was to pay the surplus, if any, to the trustees until the creditors had received 10s. in the pound on their debts. The bankrupt appealed. It is perfectly obvious, if I may say so, on the face of that order, that it did not comply with the proviso. It granted an immediate discharge, and so did not comply with paras. (i), (ii) and (iii) of the proviso. It did not require as a condition of discharge the bankrupt's consent to judgment being entered, and, therefore, it did not comply with para. (iv) of the proviso. The result, therefore, was that the registrar had not done what the proviso required him to do, and it was admitted by counsel that the order could not stand. It is to be noted that the condition imposed by the registrar was a condition to pay all earnings over £500 a year to the trustees until the creditors had received 10s. in the pound. It was a totally different condition, as I have already said, from that mentioned in para. (iv) of the proviso. When the matter came to this court all that the court did was to put the order into shape by inserting in it one of the obligatory terms which the proviso requires. They inserted a suspension for two years, which was one of the four courses open to the court (*i.e.*, that mentioned in heading (ii) of the proviso), but they did not interfere with the other condition which the registrar had imposed. If the argument of counsel for the Board of Trade in the present case is right, that decision was wrong, because it was a case where the proviso applied, the discharge had been suspended, and a condition had been imposed which was not the condition mentioned in para. (iv) of the proviso, but could only have been lawfully imposed under the general power contained in the body of sub-s. (2). That is a decision on which the registrar says in his judgment in the present matter the practice has been based and innumerable orders have been made. The order now appealed from is an order of that type. Even if I had not come to the conclusion that I have, I should feel myself bound to follow that decision. Counsel

for the Board of Trade wished us to hold that it was a decision which we were not bound to follow, because, he says, the point was not argued. With all respect to him, the point is one which I cannot help thinking stands out immediately one reads the sub-section, and I certainly do not claim for myself any extraordinary measure of perspicuity when I recall the fact that I raised this point the moment I read the section. I certainly think LORD COLLINS, M.R., and ROMER and COZENS-HARDY, L.JJ., were much more capable than I am of noticing a point which stands out clearly for everyone to see. I, therefore, cannot draw the inference that the point was not argued. There is nothing in the report to suggest that it was not argued, and, in my opinion, we are bound to follow that decision. In the result, the appeal will be dismissed.

COHEN, L.J. : I agree. The registrar, in the last paragraph of his judgment, said that he desired to secure for the creditors a sum of some £500, and he, therefore, imposed the condition which my Lord has read. Then he said this :

As, for the reasons above stated, this cannot, in my view, be achieved by an order under s. 51 (2) or a judgment and suspension order under s. 26 (2), paras. (iv) and (ii). It must be achieved by a *Dallmeyer* (1) order.

Counsel for the Board of Trade invited us to say that the registrar was wrong in thinking that no order could be made under s. 51 (2), or under paras. (iv) and (ii) of the proviso to s. 26 (2). So far as concerns the point relating to s. 51 (2), which enables the court during a bankruptcy to secure the appropriation of a portion of a debtor's salary for the creditors, counsel relied on a decision of MORTON, J., in *Re Gardner* (2). On the other alternative of a judgment and suspension under paras. (iv) and (ii) of the proviso to s. 26 (2), he relied on sub-s. (8). Counsel addressed to us an interesting argument on those points, but they do not arise in view of the conclusion to which we have come, that the registrar had jurisdiction to make the order which he did make under *Re Dallmeyer* (1). As there is nobody really interested to present the contrary argument to that advanced by counsel for the Board of Trade, I think it would be most undesirable to express any opinion about the correctness of the argument. I only mention the point in order that it may not be assumed that because we have confirmed the registrar's decision we necessarily agree with the observations in the concluding paragraph of his judgment. I agree that the appeal should be dismissed.

ASQUITH, L.J. : I also agree.

Appeal dismissed.

Solicitors : *The Solicitor, Board of Trade ; Samuel Dalton* (for the debtor.)
[Reported by J. A. CROCKETT, Esq., Barrister-at-Law.]

WARREN v. AUSTEN.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), June 13, 16, 17, 1947.]

Landlord and Tenant—Rent restriction—Possession—Reasonableness—Tenant taking paying guests to augment income—Use of gardens as playground for children—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1).

The tenant of a dwelling-house had the right under his lease to take paying guests, and, in common with neighbouring residents, to use the lawns and pleasure grounds in front of the house. The landlord required the house, which was one in a block, in order to convert it, together with adjoining houses, into a hotel, and he offered the tenant, who was a married man with five children and who worked as a clerk in a labour exchange, alternative accommodation which lacked amenities for the taking of paying guests and had no garden.

HELD : there was evidence on which the county court judge could come to the conclusion that it was not reasonable that he should grant the landlord an order for possession of the dwelling-house.

[AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-334, paras. 392-399; and FOR CASES, see DIGEST Vol. 31, pp. 576-578, 582-584, Nos. 7256-7269, 7311-7330.]

APPEAL by the landlord from an order of His Honour JUDGE CLEMENTS, made at Ramsgate County Court, on Apr. 9, 1947, dismissing the landlord's claim for possession of a dwelling-house. The facts appear in the judgment of LORD GREENE, M.R.

Safford, K.C., and *R. W. Vick* for the landlord.

The tenant appeared in person.

LORD GREENE, M.R.: In the county court action out of which this appeal arises the landlord was seeking to recover possession of a house subject to the Rent Restrictions Acts. He was engaged in converting into a hotel a number of houses numbered 3 to 18 in a crescent in Ramsgate called Royal Crescent. One house in that crescent constituted an obstacle to his plans, namely, No. 5, of which the defendant is the occupier. We are told that No. 5 is really a most important element in the landlord's scheme of conversion in that its omission would involve the omission from the scheme of Nos. 3 and 4 as well, and that that would mean 41 fewer bedrooms for the projected hotel and considerable inconvenience in the matter of the domestic services, electric lighting, heating and so on. That, from the landlord's point of view, is a most intelligible case, and nobody, I think, in the present circumstances could regard that enterprise of the landlord as a thing to be judged solely from the pecuniary results to himself which might follow. The question, however, that we have to consider is whether he is entitled to recover possession of No. 5.

Of the various matters which may be relevant in considering the landlord's claim to recover possession in such a case, two matters only come into question. Under s. 3 (1) of the Rent & Mortgage Interest Restrictions (Amendment) Act, 1933, there is one overriding matter with which the court must deal before it can make an order for possession, and that is that, under sub-s. (1), the court must consider it reasonable to make an order. In addition to that, the sub-section provides a number of conditions. The only relevant one with which we are concerned is condition (b), which provides that the court must be :

... satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect.

Suitable accommodation is dealt with in sub-s. (3), which provides that :

... accommodation shall be deemed to be suitable if it ... is, in the opinion of the court, reasonably suitable to the needs of the tenant and his family as regards proximity to place of work, and ... (ii) otherwise reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character.

It is said before us, and it was said before the county court judge, that certain accommodation at No. 5, Zion Hill, Ramsgate, offered by the landlord, was alternative accommodation which satisfied the tests laid down by the Act. The judge, in his judgment, started by saying that the landlord had failed to satisfy him that he had offered suitable alternative accommodation to the tenant within the meaning of the Rent Restrictions Acts. He then set out a number of matters which were established in the evidence in respect of which he compared the accommodation offered with that already enjoyed by the tenant.

I should refer, before examining the judgment further, to two matters which formed important elements in this case. Under the lease held by the tenant he had a right, in common with the occupiers of other houses in Royal Crescent, to use the lawn and pleasure grounds there mentioned. It appeared on the evidence (and the judge accepted it) that that right was one which was of importance to the tenant having regard to the fact, among others, that he had five children and the right for the children to use those grounds was valuable to him. The other matter is that under the agreement with the landlord the tenant was entitled to take in paying guests. We are told that the tenant is a clerk in the Labour Exchange at Ramsgate and that he supplements his income by taking in paying guests. I think it is not difficult to infer that the supplementing of his income in that way is a matter of some consideration for a man with five children who is receiving the sort of salary that a clerk in a labour exchange receives.

The judge had to consider two matters. The first was alternative accommodation. If he found, correctly on the facts and without misdirecting himself, that there was no proper offer of alternative accommodation, that, of course, would be the end of the case. The landlord's case would also be defeated, even if the issue as to alternative accommodation were found in his favour, by a finding by the judge that it was not reasonable to make the order for possession. The first point which arises, is whether or not the finding of the county court judge is confined to the matter of alternative accommodation, or whether, in addition to that, he finds that it would be unreasonable to make the order. It is said that his only finding is that the alternative accommodation offered is not sufficient, and that he came to that conclusion by taking into account facts which it was not open to him to take into account under s. 3 (3) (ii). For instance, it is said that what he has done is to compare the present accommodation with the accommodation offered and find that the accommodation offered is less in quality than that already enjoyed. That, it is said, is not the right approach to this question because the tenant is not entitled to demand in the alternative accommodation the existing standard enjoyed by him, but he is only entitled to demand something which may well be less in size and amenity. Providing it is reasonably suitable to his means and the needs of his family as regards extent and character, he is bound to be content with it even although it is not so good as what he had before. It is further said that the county court judge took into account, on the question of alternative accommodation, the circumstance that the tenant, having in his present house a certain standard of size and amenity which enables him to take in paying guests, would not have the same standard in the suggested premises, with the result that his business of taking in paying guests would be affected. It is said that the judge ought not to have taken those two matters into account, and that, therefore, the finding of no alternative accommodation cannot stand. Moreover, it is said that on the evidence the only finding open to him was that the alternative accommodation offered, was suitable.

The reasons for the judgment given by the county court judge, in my view, deal both with the issue of alternative accommodation and with the issue of reasonableness. It is true that, having decided the issue of alternative accommodation, there was no necessity for him to decide the issue of reasonableness, because the lack of alternative accommodation was sufficient to defeat the landlord, but I construe his judgment as meaning that he did, in fact, deal with both those matters. I am prepared to assume in favour of the landlord that the facts which the judge took into account on each of those two issues were the same, and I am also prepared to assume that some of the facts which he took into consideration were not relevant on the question of alternative accommodation, but, on the issue of reasonableness, I cannot see that any of the facts set out in his judgment would have been irrelevant. Counsel for the landlord has also submitted that the judge based his conclusion on the question of reasonableness on his finding that the alternative accommodation was not suitable. If he had done that and if his finding that the alternative accommodation was not suitable was due to a misdirection of himself in law, obviously his finding on the issue of reasonableness could not stand, but I do not read the judgment in that way. It is not a finding of no suitable accommodation which leads the judge to the conclusion that it is not reasonable to make an order, but it is on the facts set out in his judgment that he relies for his conclusion on both issues. All those facts were relevant for him to take into consideration on the issue of reasonableness, and I cannot agree that it would not be open to him, on those facts, to come to a conclusion adverse to the landlord on the issue of reasonableness. The difference between the two views is, of course, important. To use a decision that there was no suitable alternative accommodation as a ground for finding that it was unreasonable to make an order would involve, I cannot help thinking, a certain confusion of mind, because the one does not necessarily lead to the other and it is possible to have a conclusion on the ground of reasonableness on facts which are not sufficient to support a conclusion on the ground of no suitable accommodation. But I cannot see in the language of the judge, reasonably construed, anything to suggest that his finding on the issue of reasonableness was based on his conclusion of no suitable alternative accommodation. That being so, it seems to me that the judge's decision on the ground of reasonable-

ness cannot be attacked on the ground of misdirection, and we have no option but to dismiss this appeal.

COHEN, L.J. : I agree. Junior counsel for the landlord told us that, at the close of the hearing in the court below, the county court judge did not desire to hear him on the question of reasonableness, having regard to his conclusion on alternative accommodation, but I do not gather therefrom that the county court judge had not in mind the question of reasonableness. Indeed, having regard to the concluding sentence of his written reasons it is plain that the point was present to his mind, and I think that all he meant by his observations to counsel was that, in view of his conclusion on the alternative accommodation point, prolonged argument on the other point would not help him. If that be the true view, and if, as I agree with my Lord, the question of reasonableness was present to the mind of the county court judge, I entirely agree with my Lord that there was evidence on which the county court judge could come to the conclusion which he reached on the question of reasonableness and that we cannot disturb his finding. I, therefore, agree that the appeal fails.

ASQUITH, L.J. : I also agree. I would only add that I am not fully persuaded that the county court judge's conclusion on alternative accommodation could not be supported. He would, of course, have been applying an entirely wrong criterion if he had said: "All I have to do is to compare the two sets of premises, and if, on a comparison, the alternative accommodation is proved to be inferior, it follows necessarily that it is unsuitable." That would be a patent misdirection. I am not certain that that is what he actually did, but the matter is an academic one, because I agree with my Lords that he did apply his mind to the issue of reasonableness and that there were materials on which he could reach the conclusion that he did on that issue.

Appeal dismissed with costs.

Solicitors: *Patersons, Snow & Co.*, agents for *Daniel & Edwards*, Ramsgate (for the landlord).

[*Reported by J. A. CROCKETT, ESQ., Barrister-at-Law.*]

Re BAYER PRODUCTS, LTD'S APPLICATION.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), June 9, 10, 11, 1947.]

Trade Marks—Application to register—Mark "likely to deceive or cause confusion" with mark already on register—Mark in respect of sulphadiazine preparations—Scheduled poison, supplied only under statutory regulations—Trade Marks Act, 1938 (c. 22), s. 12 (1).

Where application is made for the registration of a trade mark in respect of a pharmaceutical substance the supply of which is regulated by statutory regulations, in determining whether registration would be contrary to the Trade Marks Act, 1938, s. 12 (1), it is essential that the court, in considering the possibilities of deception, should take into account the extent to which such a possibility is minimised, or even completely obliterated, by the statutory regulations. Although the onus is on the applicant to show that there is no reasonable probability of confusion, his application is not to be defeated by constructing imaginary and unlikely cases in order to bring s. 12 (1) into operation.

Application for registration of the mark "Diasil" in respect of sulphadiazine preparations in the class of pharmaceutical substances was resisted by the owners of the mark "Alasil," which was registered in respect of goods of the same description. Sulphadiazine is a scheduled poison and, under the Pharmacy and Poisons Act, 1933, and the Poisons Rules, 1935, it can be supplied only by a registered pharmacist on a written prescription from a doctor:—

HELD : in view of the fact that legislation had ensured that the scheduled poisons could be dealt with only by skilled and responsible persons and subject to careful regulation, registration of the mark "Diasil" was not likely "to deceive or cause confusion," within s. 12 (1) of the Act of 1938, by reason of its similarity to the mark "Alasil."

[AS TO RESEMBLANCE OF MARKS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 564-570, para. 873; and FOR CASES, see DIGEST, Vol. 43, pp. 160-165, Nos. 178-217, and Supplement.]

A APPEAL by the opponents, A. Wander, Ltd., from an order of WYNN-PARRY, J., dated Nov. 13, 1946, affirming the decision of the Assistant Comptroller of Trade Marks allowing the registration of the mark "Diasil" in respect of sulphadiazine preparations in the class of pharmaceutical substances. The opponents were the owners of the mark "Alasil," which was registered in respect of goods of the same class. The court dismissed the appeal. The facts appear in the judgment of LORD GREENE, M.R.

Lloyd-Jacob, K.C., and Stuart Bevan for the opponents.
Drewe, K.C., and Hignett for the applicants.

B LORD GREENE, M.R.: The application that was before the Assistant Comptroller was a double-headed one, in this sense. The demand of the applicants, in the first instance, was for registration of the mark "Diasil" in class 5 of sched. IV to the Trade Marks Rules, 1939. I am not sure whether their demand covered the whole of the class, but it is sufficient, for my purposes, to say that it covered the whole of the class of pharmaceutical substances. There was also an alternative claim, which had been offered by the applicants to the opponents, limiting the registration to a particular type of pharmaceutical preparation, namely, sulphadiazine preparations. Those preparations contain poison and can only be dealt with in accordance with the Pharmacy and Poisons Act, 1933 and the rules made thereunder [Poisons Rules, 1935]. The Assistant Comptroller did not accept the wider of those two demands, but he decided in favour of the applicants in respect of the one confined to sulphadiazine preparations. The opposition was based on the Trade Marks Act, 1938, ss. 11 and 12. Section 11 provides:

D It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would, by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design.

By s. 12 (1):

E Subject to the provisions of sub-s. 2 of this section, no trade mark shall be registered in respect of any goods or description of goods that is identical with a trade mark belonging to a different proprietor and already on the register in respect of the same goods or description of goods, or that so nearly resembles such a trade mark as to be likely to deceive or cause confusion.

F The opponents' mark "Alasil" is registered under the class as it existed before the Act of 1938, but it is common ground that the goods in respect of which the applicants now seek registration, namely, sulphadiazine preparations (because their claim is limited to that), are of the same description as those covered by "Alasil," the mark of the opponents. The opponents have, in fact, only marketed under that mark a preparation of somewhat similar character and use to aspirin. It is not a poison subject to the poisons legislation, but their registration, in view of the width of the class in respect of which it was made, would entitle them to the monopoly of that mark in connection with poisons, if they elected to apply it to products of that character—poisons in general, including sulphadiazine preparations, to which the applicants' application is limited. As counsel for the opponents correctly pointed out, s. 12 (1) looks to the register rather than to the use, which is what s. 11 looks to.

G The primary question really turns on s. 12 (1). If the opponents fail on that, I do not see—any more than WYNN-PARRY, J., or the Assistant Comptroller could see—how they can succeed on s. 11. I shall, therefore, devote my observations to s. 12 (1). Counsel for the opponents is in a very difficult position, because he has against him concurrent findings by the Assistant Comptroller and by WYNN-PARRY, J., to the effect that, in the circumstances of this case, and in reference to the only application which is now made, namely, the limited application, there is no such possibility of deception or confusion as to bring the case within s. 12 (1), and, therefore, make it illegal for the registrar to register the applicants' mark. I do not think it necessary to go any more fully into the facts of the case, because I propose to confine myself to the two substantial points that were put before us.

The Assistant Comptroller and the judge, by way of a different approach, but in the result arriving at the same conclusion, tested the possibility of confusion by reference to the circumstances which would attend the dealings with the applicants' proposed product. Counsel for the opponents did not dispute the proposition that the question whether there is a likelihood of deception or confusion cannot be considered under s. 12 (1) without reference to surrounding circumstances. In other words, the court is not confined merely to looking at the register and comparing the two marks as words in the English language or some invented language. It has to consider to what extent, in all the circumstances, deception or confusion is likely. What counsel for the opponents really complained of on this branch of his argument, as I understood him, was that both the Assistant Comptroller and the judge had given much too much weight to those special circumstances and that that led them to a wrong conclusion.

The special circumstances are these. Sulphadiazine, as I have said, is a poison. It can only be dealt with under the very stringent regulations of the poisons legislation, and the consequence of that is that, apart from exceptional cases, which do not require to be considered, sulphadiazine can only be supplied on the written prescription of a doctor. The legislation ensures that the scheduled poisons shall only be dealt with by skilled and responsible persons, subject to very careful regulation. Both the Assistant Comptroller and WYNN-PARRY, J., really based on that circumstance their conclusion that, having regard to the surrounding circumstances, there was not likely to be deception or confusion caused by the similarity of these two marks. In other words, the necessary course of trade—not merely a trade practice, which might change or differ from case to case, but a practice laid down by statute, making it illegal to depart from certain channels and methods of distribution and use—was sufficient, they thought, to differentiate this case entirely from cases where you are dealing with products which anybody can order or buy and anybody can supply, so to speak, over the counter. It is obvious that, once you get a statutory regulation of the channels of supply, it is essential that the court, in considering the possibilities of deception, should take into account the extent to which such a possibility is minimised, or, perhaps, obliterated altogether, by the statutory regulations.

Counsel for the opponents says that too much weight was given to that circumstance, but, even if I thought that the Assistant Comptroller and the judge had been disposed to give too much weight to it, I should hesitate long before I ventured to take a different view from their concurrent findings. In my opinion, however, they did not attach too much weight to that circumstance, which I regard as one of the utmost importance when an answer has to be given to the questions which the sub-section propounds to the court. Once you get the position that only a doctor can order sulphadiazine, that he must give a written prescription, and that a chemist cannot supply it without such a prescription, you ensure that the article is only going to pass at that stage through the hands of skilled persons, who by their training, their experience and their knowledge would be most unlikely to refer to it in a way which would admit of any reasonable possibility of confusion.

It is impossible, of course, to exclude entirely the risk of confusion. What we are concerned with are, not unlikely cases which may happen once in one hundred years, but reasonable probabilities, and we have to ask ourselves in relation to those facts: Is there such a risk that a doctor or a chemist, or the two of them in combination, by some carelessness in expression, some obscurity in handwriting, some slip of recollection, or some careless mistake which you would not expect highly trained professional people to fall into, will refer to the product in such a way as will lead the court to say that there is a reasonable probability of confusion? In my opinion, there is not. It seems to me that, if one is really to give weight to such a risk, it involves attributing to those highly skilled, experienced and careful people, to whom—and to whom alone—the legislature has entrusted the precautions necessary under the Pharmacy and Poisons Acts, qualities of carelessness or incompetence which are not usually found in that class of persons. We are concerned, not with hypothetical possibilities, but with the ordinary practical business probabilities, having regard to the circumstances of the case.

I do not think that it is necessary to say more on that aspect of the argument, because it seems to me that, if the matter had stood there, the decisions of the Assistant Comptroller and the judge are not decisions with which we can interfere, but there is one argument which has bulked very largely in the case, and quite rightly so, because it seems to me to be the only serious argument which we have to consider. Hitherto, I have referred to the dealings with the applicants' goods while they are completely under the effective physical control of the supplier and the doctor, or nurse, or whoever it may be, but it is said that the story does not end there, because the medicine has to be taken by a person who probably would not be a skilled or, perhaps, even a careful, person. Many examples were constructed to illustrate that point and I may refer to one or two of them to bring it out. It was said that the patient, having been told by his doctor to take "Alasil" and also having had prescribed for him at the same time "Diasil," might easily confuse the two in his mind and take the wrong medicine, or, if the patient himself did not do that, some unskilled person who happened to be attending on him—his wife, his valet, or a probationer nurse in a hospital—might make such a mistake. Such a mistake, it is argued, might be caused by oral or visual error, or by some usual type of lack of memory. It is perfectly true that in the use of either of these two drugs there may come a stage when, so to speak, the skilled person is out of the room and the drugs are dealt with by an unskilled person, namely, the patient or the person who is attending on him. It is said that there is a reasonable risk that at that stage confusion is likely to arise.

I put a formulation of the point which both counsel agreed correctly brought it out. I suggested that the question was: Is there a reasonable probability of a non-expert contact in such circumstances as to lead to a reasonable probability of confusion? That there is a possibility, and, in fact, one might also say a necessity, of non-expert contact is clear. It is the patient who has ultimately to swallow the medicine and not the doctor, but that is not enough. The contact must be such as to lead to a reasonable probability of confusion. The non-expert contact in such a case as the present is quite different from the non-expert contact of the customer who buys some article in a shop which is at liberty to supply it in the ordinary way. You have there two people, the customer and the shopkeeper. You have a shop in which the same kind of goods, produced by another manufacturer, may very well be, and probably are, sold, and, perhaps, exposed on the same counter at the same time. You are dealing with the ordinary type of customer, who has no special instruction or warnings issued to him, and the possibility of confusion from such non-expert contact, of course, is or may be considerable, according to the facts of the case. In the present case the non-expert contact is not of that character. The kind of case that is assumed is that the patient or his attendant will go, not to a shop and buy the wrong stuff or ask for the wrong stuff by mistake, but to the place in the house where the wrong stuff is kept and bring the wrong stuff instead of the right stuff. It is to be observed that, for the most part, the variations of that suggestion which have been put before us all have to assume the presence, in the same place, at the same time, under the control of the same person, of both the opponents' article and the applicants' article, because that is the way in which the confusion suggested must arise. The matter does not end there, because, in addition to that, you have to assume that there will be a mistake due to bad pronunciation or mis-hearing or mis-recollection or mis-reading of the labels on the bottles and that class of thing. You have, therefore, to make, so to speak, a double assumption. You have to assume two series of possibilities before you can arrive at the confusion which is said to be likely to occur. That, of course, is as different as anything can be from the ordinary case of a purchase over the counter, and many of the considerations that would lead the court in such a case to infer the possibility of confusion are necessarily absent.

It is not for the court to construct imaginary and unlikely cases to bring s. 12 (1) of the Act into operation. The burden is on the applicant, but his application is not to be defeated by constructing rather fantastic or far-fetched possible cases involving a combination of circumstances which, however possible it may be, has no reasonable probability in any business sense. There was an argument, which was rightly put before us, to the effect that for the

purposes of s. 12 (1) it is not the actual state of user that is conclusive or dominant, but the description of goods for which the respective registrations are sought must be considered. It was pointed out that the opponents have a registration which would cover not merely sulphadiazine preparations, but any type of poison. It was said that there will be, therefore, an increased probability of deception if the opponents use their mark to the full extent to which they are entitled to use it, and the sub-section undoubtedly deals with that case and is not concerned with the limits of the actual user of the two marks. It is concerned with the ambit and scope of the registrations. That argument, in my opinion, does not carry the matter any farther. The possibility of confusion in the domestic medicine cupboard or by the invalid on the invalid's bedside table has to assume that by some curious combination of circumstances the two products would be in the medicine cupboard at the same time or on the bedside table at the same time. Otherwise there is no possibility of confusion. If the doctor has prescribed "Diasil," "Diasil" the patient will get into his medicine cupboard. The doctor has to give a written prescription and the chemist has to supply "Diasil," and that only, and I am not going to assume that professional men of that character would make a mistake. The same would apply if the patient got a sulphadiazine preparation with the opponents' "Alasil" mark on it. Both those drugs would have reached the patient under a doctor's prescription and in accordance with the doctor's orders. The "Alasil" product would not necessarily be a sulphadiazine, preparation. It might be some other type of poison, but that really does not carry the matter any farther than the case which we are now considering on the basis of the opponents' present trade, because in each case you have to assume before the possibility of confusion can arise that the patient has in his possession and under his control an "Alasil" product, be it poisonous or non-poisonous, and a "Diasil" product. It seems to me that the argument that s. 12 (1) requires the court to consider the full paper scope of the registrations does not really carry the point any farther. In my opinion, the appeal fails and must be dismissed.

COHEN, L.J.: I agree. Counsel for the opponents has submitted the judgment of WYNN-PARRY, J., to a careful *post mortem* examination, but, in my opinion, he has failed to disclose any poisonous matter which would vitiate the conclusion which the judge reached. WYNN-PARRY, J., summed up his judgment in these terms:

I have to consider what is likely to happen if each of the marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. As I see it, I must postulate the stocking in chemists' shops of preparations under each mark. I must postulate a demand for the various preparations, whether by customers over the counter without or, where necessary, with a doctor's written prescription, or by doctors or hospitals. I must make due allowance for what is commonly called the human element—*humanum est errare*, but I must also postulate reasonable conduct, and, where necessary, the exercise of reasonable care by all concerned. I must bear in mind that, as regards the opponents' mark, it will only be used in respect of goods which can only be supplied on a doctor's written prescription or in hospitals on the authority of a doctor properly given to a nurse. I must bear in mind the conclusion of fact of the Assistant Comptroller, which I do not feel constrained to disturb, that the one mark would not be likely to be "directly mistaken for the other in conversation between two persons over the telephone or otherwise." I must bear in mind the relevant provisions of the Pharmacy and Poisons Act, 1933, and the Poisons Rules, 1935, made thereunder. On the other hand, I do not consider that I am constrained to take into account the possibility of an amendment of that Act or those rules, having as its consequence that sulphadiazine preparations could thereafter be sold freely over the counter without a doctor's written prescription or without the container being labelled "Poison." Taking all those considerations into account, I come to the conclusion that there is no real tangible danger of confusion . . . if the respondents' mark is registered, as the Assistant Comptroller decided, in pt. A of the register in respect of "Sulphadiazine preparations," so as to justify the court intervening under s. 12 of the Act.

It seems to me that the judge considered all the questions that he ought to have considered and the only argument advanced on behalf of the opponents with which he did not deal in terms was the argument to which my Lord has referred and which may be described as "the medicine cupboard argument." That argument was, we were told, fully presented to him and I have no doubt

that it was present in his mind. Indeed, I think that it is implicit in, and is covered by, his finding that it was not likely, despite the medicine cupboard possibility, that there was a risk of confusion so as to disentitle, under s. 12, the applicants to registration. As LORD GREENE, M.R., has pointed out, that argument is based on a number of assumptions of various degrees of probability. Speaking for myself, I feel that the likelihood of these various probabilities being found all to occur in the same case is so remote that I do not think that we would be justified in finding on that ground that the marks so nearly resemble one another that the registration of the applicants' mark would be likely to deceive or cause confusion. For these reasons, in addition to those given by the MASTER OF THE ROLLS, I agree that this appeal should be dismissed.

ASQUITH, L.J.: I also agree. The onus is on the applicants to show that there is no reasonable probability of confusion. They will discharge this onus if they can show that confusion is not probable except in a very rare and unlikely concurrence of events, and this, in my view, they have succeeded in showing.

Appeal dismissed with costs.

Solicitors: *Slaughter and May* (for the opponents); *McKenna & Co.* (for the applicants).

[*Reported by J. A. CROCKETT, Esq., Barrister-at-Law.*]

HUDDERSFIELD POLICE AUTHORITY *v.* WATSON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Lewis, JJ.), July 1, 1947.]

Police—Pension—“Injury received in execution of duty”—Duodenal ulcer—Police Pensions Act, 1921 (c. 31), s. 2 (1) (c).

For some months before September, 1939, a police officer was working very long hours and was subjected to exceptional worry in the course of his duty. He contracted a duodenal ulcer caused, according to medical evidence, by his conditions of work and the consequent irregular meals and rest. He applied for a special pension under the Police Pensions Act, 1921.

HELD: (i) the duodenal ulcer was “an injury received in the execution of his duty” by the officer, within s. 2 (1) (c) of the Act of 1921, and he was, therefore, entitled to a special pension.

Garvin v. Police Authority for the City of London ([1944] 1 All E.R. 378) followed.

(ii) the Divisional Court was bound to follow its own decision in *Garvin's* case. Where, as in matters arising under s. 17 (2) of the Police Pensions Act, 1921, the Divisional Court was made the final court of appeal, it must, as a general rule, follow a previous decision of the court and so avoid a conflict of authority and lack of finality.

Young v. Bristol Aeroplane Co., Ltd. ([1944] 2 All E.R. 293) applied.

[AS TO SPECIAL PENSIONS, see HALSBURY, Vol. 25, pp. 348, 349, paras. 577, 578; and FOR CASES, see DIGEST, Vol. 37, pp. 192-195, Nos. 125-142.]

Cases referred to:

- (1) *Garvin v. City of London Police Authority*, [1944] 1 All E.R. 378; [1944] K.B. 358; 113 L.J.K.B. 305; 170 L.T. 336; 108 J.P. 107; Digest Supp.
- (2) *Brintons, Ltd. v. Turvey*, [1905] A.C. 230; 74 L.J.K.B. 474; 92 L.T. 578; 34 Digest 464, 3799.
- (3) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; 37 B.W.C.C. 51; Digest Supp.
- (4) *Taylor v. Burgess*, (1859), 5 H. & N. 1; 29 L.J.Ex. 7; 1 L.T. 12; 30 Digest 200, 690.
- (5) *Casson v. Churchley* (1884), 53 L.J.Q.B. 335; 50 L.T. 568; 30 Digest 203, 691.

APPEAL by the Huddersfield Police Authority under s. 17 (2) of the Police Pensions Act, 1921, from a decision of the Recorder of Huddersfield.

The recorder held that he was bound by the decision in *Garvin v. City of London Police Authority* (1) to award the police officer a special pension under

s. 2 (1) (c) of the Act. The Divisional Court affirmed this decision. The facts appear in the judgment of LORD GODDARD, C.J.

Streatfield, K.C., and *Wrangham* for the appellants.

G. R. Hinchcliffe, K.C., for the respondent police officer.

LORD GODDARD, C.J.: The respondent in this case was a police officer in the Huddersfield county borough police force. In 1946 he was called on to resign on account of ill-health, and he applied to the police authority for a special pension under the Police Pensions Act, 1921, on the ground that his state of health—he was then suffering from a duodenal ulcer—was brought about by his police service. He contended that he was incapacitated for the performance of his duty by infirmity of mind or body occasioned by an injury received in the execution of his duty without his own default within s. 2 (1) (c) of the Act of 1921. The police authority, although they obviously had the greatest sympathy with the officer, felt unable to accede to his request for a special pension because they were not satisfied that they were entitled to regard his state of health as due to an injury received in the execution of his duty. He appealed, as he was entitled to do under s. 17 (1) of the Act, to the quarter sessions of the borough, and the recorder allowed his appeal.

From the facts found by the recorder, it seems that this officer, who is admitted to have shown exceptional devotion to duty, for some months before September, 1939, had been exposed to very long hours of duty and subjected to exceptional worry, with the result that he had irregular hours for his meals, irregular times of rest, and so forth, and that this combination of circumstances caused him to suffer from a duodenal ulcer which, in the opinion of the medical witnesses, whose opinions were accepted by the recorder, was the direct cause of his condition. He seems to have gone to hospital, to have been treated and to have returned to duty, but in 1946, after one or two absences from duty on account of his health, he was again found to be suffering from duodenal ulcer, and an operation took place in which a large part of the stomach was removed. The recorder finds that the condition from which he was suffering in 1946 was, to put it compendiously, a continuance of the condition which he suffered in 1939, and that there was a direct causal connection between his state of health and his services and duties as a police officer.

The recorder's findings of fact are not attacked, but the question arises whether it can be said that a duodenal ulcer is an "injury received in the execution of his duty without his own default." I may say at once that no question arises about any default on the part of the respondent. The matter was fully argued before the recorder, and, although he indicated in his judgment that for many reasons he was inclined to accept the arguments of counsel for the police authority, he held that he was bound by the decision of this court in *Garvin v. City of London Police Authority* (1), and he, accordingly, allowed the appeal. Before us, leading counsel for the police authority has challenged the correctness of the decision in *Garvin's* case (1), and he seeks to argue that, on a true view of the provisions of the material sections of the Act of 1921, it cannot be held that an illness or disease can amount to an "injury received in the execution of duty." I understand his argument to be that the injury alleged here is not in the nature of a condition caused by a blow, or the breaking of a bone, or immersion in water owing, perhaps, to a thief pushing the officer into water or the officer jumping into water in pursuit of a thief, or matters of that sort, and that an injury due to a diseased state of body cannot be regarded as an injury within the meaning of this Act. If we were to accept that argument, it seems that we should go directly against the decision in *Garvin v. City of London Police Authority* (1). The head-note in that case sets out sufficiently what the court decided ([1944] K.B. 358):

The appellant, a police constable, was on duty during the aerial bombardments from September, 1940, to the middle of 1941, serving twelve hours a day instead of the usual eight hours. During that time he could only take meals at irregular hours and was subjected to constant wettings. The medical evidence showed that these conditions would render him more liable to contract tuberculosis, and in fact tuberculosis supervened some time after September, 1940:—*Held*, first, that tuberculosis contracted in these conditions was an "injury" within section 2 (1) (c) of the Police Pensions Act, 1921, and secondly, that it was the direct result of and therefore suffered

in the execution of his duty within the meaning of the same sub-section, and that consequently the appellant was entitled to the special pension therein referred to.

It seems to me it is impossible for us to say that the *ratio decidendi* of that case does not apply to the facts of the present matter. There is a difference, no doubt, in that tuberculosis is due to a bacillus or germ and the condition of duodenal ulcer is said, in the recorder's judgment where he sets out the medical opinion he accepts on that matter, to be :

A . . . a continuous process which begins in inflammation, and there may be an imperceptible lesion or abrasion at the point in which the pre-ulcerative condition of the mucous membrane passes into an ulcerated condition. It is a continuous process, probably, from the pre-ulcerated condition, through the whole of the ulcerated condition up to the full flower of the ulcer.

B In my opinion, *Garvin's* case (1) does not depend, as some of the cases under the Workmen's Compensation Acts at one time depended, on whether it can be said that at a particular moment of time a bacillus or germ of some disease entered into a man's body as, for instance, in the early case, under the Workmen's Compensation Act, 1897, of *Brintons, Ltd. v. Turvey* (2). There, the germ of anthrax entered into a man's body causing his death, and it was held that the attack of the disease by means of a germ was an accident arising out of and in the course of his employment. It seems to me that the *ratio* in *Garvin's* case (1) C is that, if it is proved that the bodily condition from which the man is suffering, whether it be rheumatism, tuberculosis, or, I would add, a duodenal ulcer, is directly and causally connected with his service as a police officer, then he has received an injury in the execution of his duty. I can imagine many arguments which may or may not have been addressed to the court in *Garvin's* case (1), but, in my opinion, we have in that decision one which directly covers this case. D The court there laid down in terms that it was not necessary to decide whether or not there had been an accident if it could be shown that there was an injury, and they had no difficulty in holding that a disease was an injury. There was an end of the matter, provided it was sustained in the execution of the police officer's duty.

Delivering the judgment of the court, HUMPHREYS, J., said (*ibid.*, at p. 362) :

E It would probably be impossible in any case of pulmonary tuberculosis to establish by evidence the day or the week, or, perhaps, even the month, during which the infection of the lung occurred, but where it is shown that the conditions of service during the critical period were such as to cause unusual mental and bodily strain which, acting on a frame ordinarily healthy but at the time enfeebled by long hours of duty, frequent wettings and such matters, rendered it more liable than usual to such infection, I think the injury might be described as being the direct result of, and, therefore, suffered in, the execution of duty.

F I do not read that judgment as laying particular stress on the word "infection." I think that HUMPHREYS, J., is using the word "infection" simply to mean the onset of the disease, and I can only read the reasoning and the *ratio decidendi* in that case as applicable to the present matter.

G Counsel for the police authority argued that it is open to us to depart from *Garvin's* case (1) if we think it was wrongly decided, but nothing I have heard satisfies me that *Garvin's* case (1) was wrongly decided. In any event, whether it was rightly decided or not, I am clearly of opinion that we ought to follow it. This court is made a final court of appeal in these matters : see s. 17 (2) of the Act of 1921 ; and I can imagine nothing more disastrous than, where the court has given a decision on the construction or application of this Act, that another court should give a contrary decision so that there would then be two conflicting cases and no finality in the matter at all. For myself, I think we ought to hold H that we are bound by this decision, and I say that for this reason. The Court of Appeal in *Young v. Bristol Aeroplane Co., Ltd.* (3), held, after argument before a full court of six judges, that the Court of Appeal was bound by its own decisions, with certain well-defined exceptions. The MASTER OF THE ROLLS summarised it in this way ([1944] 2 All E.R. 300) :

The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize : (i) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow ; (ii) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords ; (iii) the court

is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*.

What is meant by giving a decision *per incuriam* is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute. The MASTER OF THE ROLLS pointed out in his judgment that in some cases Court of Appeal judgments are final, as in bankruptcy, and in others are reviewable by the House of Lords, and yet he drew no distinction as regards their binding force on the Court of Appeal. If, therefore, that is the position in a court most of whose decisions are reviewable in the House of Lords, how much more important is it that this court, which is a final court in this matter, should follow its own decisions and give full force and effect to them? If it were otherwise, a great deal of uncertainty would be introduced into the law. I know that in the writings of various eminent people the doctrine of *stare decisis* has been canvassed from time to time. In my opinion, if one thing is certain it is that *stare decisis* is part of the law of England, and in a system of law such as ours where the common law, and equity largely, is based on decided cases, it would be very unfortunate if, when a court of final appeal has given a decision and laid down a definite principle and it cannot be said the court has been misled in any way by not being referred to authorities, statutory or judicial, which bear on the question, it should then be said that that case was not to be a binding authority. Counsel for the police authority has called our attention to certain *dicta*, in which judges have said, apparently, that a court is bound by decisions of a court of co-ordinate jurisdiction if they are subject to appeal, but not otherwise. We are not here considering the decision of a court of co-ordinate jurisdiction. I think POLLOCK, C.B., in *Taylor v. Burgess* (4), to which counsel referred, was considering the position in the days when there were three High Courts. He, sitting in the Court of Exchequer, was stating how he regarded the decisions of the other courts which were reviewable by the Exchequer Chamber. We are now one court and we are not considering a decision of a court of co-ordinate jurisdiction. We are considering a decision of this court. So far as the *dictum* of GROVE, J., [in *Casson v. Churchley* (5) (53 L.J.Q.B. 336)] is concerned, I can only say for myself that I think the modern practice is that a judge of first instance, although, as a matter of judicial comity, he would usually follow the decision of another judge of first instance unless he was convinced that that judgment was wrong, certainly is not bound to follow the decision of a judge of equal jurisdiction. A judge of first instance is only bound to follow the decisions of the Court of Appeal and the House of Lords and, it may be also, of the Divisional Court.

For these reasons I am of opinion that we ought to decide this case in accordance with the decision in *Garvin v. City of London Police Authority* (1), and that the recorder was right in regarding himself as bound by it. Therefore, this appeal will be dismissed.

ATKINSON, J. : I agree, and would merely add that *Garvin's* case (1) does not stand alone. The House of Lords has held that broncho-pneumonia, heat-stroke, and rheumatism may be injuries, and, if those conditions and tuberculosis can be injuries, it is very difficult to hold that a duodenal ulcer is not an injury. I should like to say that I think *Garvin's* case (1) is absolutely right, but, right or wrong, I think we are bound to follow it.

LEWIS, J. : I agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for Harry Bann, town clerk, Huddersfield (for the appellants); *Crossman, Block & Co.*, agents for *Eaton Smith & Downey*, Huddersfield (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

K.B.D.]

HOWARD v. WALKER

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HOWARD AND WIFE v. WALKER AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), June 23, 24, 27, 1947.]

Landlord and Tenant—Nuisance—Shop—Defective paving of forecourt—Injury to customer—Liability of landlord—No covenant by landlord to repair—Right of entry to inspect and repair—Repairs previously carried out by landlord.

A A customer, on leaving a shop, which, in common with adjoining buildings, stood back some distance from the pavement, sustained injuries from a fall caused by the defective paving of a forecourt in front of the shop. The forecourt was not fenced or walled off from the highway, but was not part of the highway. The premises were let under an agreement which imposed no obligation to repair on the landlords or on the tenant, but a right of entry was reserved to the landlords to inspect or repair as often as occasion should require, and such repairs as had been required had always been done by the landlords. In an action for damages against both tenant and landlords :

B HELD : the accident occurred while the customer was still the invitee of the tenant whose premises she was at that time leaving, and though, in the absence of contributory negligence, the tenant was liable, the landlords were not.

Wilchick v. Marks (1) ([1934] 2 K.B. 56) distinguished.

C [AS TO LIABILITY FOR INJURIES DUE TO WANT OF REPAIR, see HALSBURY, Halsbury's Laws of England, Vol. 20, pp. 206-208, paras. 225-227 ; and FOR CASES, see DIGEST, Vol. 31, pp. 344-348, Nos. 4867-4905.]

Cases referred to :

- (1) *Wilchick v. Marks and Silverstone*, [1934] 2 K.B. 56 ; 103 L.J.K.B. 372 ; 151 L.T. 60 ; Digest Supp.
(2) *Lane v. Cox*, [1897] 1 Q.B. 415 ; 66 L.J.Q.B. 193 ; 76 L.T. 135 ; 31 Digest 347, 4896.
(3) *Cavalier v. Pope*, [1906] A.C. 428 ; 75 L.J.K.B. 609 ; 95 L.T. 65 ; 31 Digest 348, 4900.
(4) *Bromley v. Mercer*, [1922] 2 K.B. 126 ; 91 L.J.K.B. 577 ; 127 L.T. 282 ; 26 Digest 434, 1520.
(5) *Heap v. Ind Coope & Allsop, Ltd.*, [1940] 3 All E.R. 634 ; [1940] 2 K.B. 476 ; 109 L.J.K.B. 724 ; 163 L.T. 169 ; Digest Supp.
(6) *Owens v. Scott & Sons (Bakers), Ltd. and Wastall*, [1939] 3 All E.R. 663 ; Digest Supp.

E ACTION for damages for injuries sustained by the plaintiff in the forecourt of a shop owned by the first defendants and occupied by the second defendant. The facts appear in the judgment.

B. L. A. O'Malley and Stephen Chapman for the plaintiff and her husband.
Berryman, K.C., and *Marven Everett* for the landlords.
F *J. C. Lawrence* for the tenant.

Cur. adv. vult.

G June 27. LORD GODDARD, C.J., read the following judgment. At about 5.45 p.m., on Nov. 2, 1945, the plaintiff, Mrs. Howard, went to a shop kept by the second defendant, Mr. Crisp, at 72, High Street, Norwood, to make a purchase. This shop, in common with the other buildings in the immediate neighbourhood, stands back some way from the flagged footpath. Originally, no doubt, when this street was a residential neighbourhood, there were either small gardens or forecourts in front of the houses. Now, there is nothing in the shape of a railing or wall separating what were originally the forecourts from the pavement, though there is a line which indicates where the forecourts ended and the pavement began, and the strip which formerly was the forecourt is of an appreciable width. The forecourt in front of Mr. Crisp's shop was at some time paved over with concrete. In the course of time this concrete has become broken and uneven and no repairs have been done to it. It was in just the sort of condition which invites an accident, especially in the dusk or at night. A person walking across it might easily catch his or her foot or heel and thereby be caused to fall. On the evening in question Mrs. Howard, having made her purchases, was leaving the shop, and, while still on the forecourt, remembered that she wished to make a call somewhere to her left, turned round, possibly sharply, to go in the direction she desired and fell heavily to the ground. I am satisfied that her fall was due

to the uneven and dangerous surface on which she was walking. I see no reason to attribute any negligence to her. It is true she knew the place and it is true she knew, if she had thought about it at the time, that the concrete was broken, but a person who enters or leaves a shop in the evening can hardly be expected to keep her eyes on the ground. She fell in just the sort of way one knows often happens in streets when a person catches a foot on an uneven flagstone which may be only very slightly raised above that adjoining it. Mr. Crisp was quite frank about it. He had not realised that there was a danger. If he had, it could easily have been remedied. A little gravel or a few shovelfuls of earth rammed down would have rendered the approach to his shop, which I find was unsafe, perfectly innocuous. It was conceded, and the case proceeded throughout on the footing, that this forecourt and the forecourts adjoining (for, as I have already indicated, the shop is in a terrace) were not part of the highway. The highway is the pavement which immediately adjoins and the division can be clearly seen.

The accident to Mrs. Howard proved more severe than one would have anticipated. The special damage was agreed at £95 13s. 6d., and I do not feel that I can award her less than £350 in addition for her pain and suffering and the disability from which she will continue to suffer. So far as Mr. Crisp was concerned, there was no defence except a plea of contributory negligence, but, as I have already said, I am satisfied that the accident was due to the state of the forecourt and not to any negligence on her part. The judgment against Mr. Crisp, however, will probably be of very little value to Mr. and Mrs. Howard, and, therefore, they seek also to recover their damages against the first defendants who, as trustees, are the landlords of the property.

The question of the liability of owners of property of which they are not in occupation has been the subject of many cases, none of which is exactly similar to this, and the case seems to me to raise a point of some importance in a branch of the law which often presents difficulties. The property was held under an agreement dated Dec. 11, 1913, originally for a term of three years, and Mr. Crisp appears to have held over and to be a yearly tenant of the premises. No obligation to repair was imposed on either the landlords or the tenant, but by the terms of the agreement the landlords reserved full right and power to enter at reasonable times on the premises to inspect or repair them or any contiguous building thereto as often as occasion should require. Such repairs as have been required have always been done by the landlords, and, in fact, since this accident they have repaired the forecourt. In these circumstances Mr. and Mrs. Howard seek to make the landlords liable, relying particularly on *Wilchick v. Marks* (1).

Before, however, I turn to the authorities, I desire to make it clear that this accident happened to a person who was visiting the tenant's shop and while she was within its curtilage. It is not a case where a pedestrian on the highway steps aside for some reason on to adjoining land which is in an unsafe condition and meets with an accident. In going to the shop Mrs. Howard was an invitee, but she was an invitee of Mr. Crisp and not of his landlords. The landlords were under no duty to her to keep the premises in repair. As the law stands at present it is clear that, apart from any question of breach of covenant, a landlord who allows a house to become in a ruinous condition is under no liability either to the tenant or to the licensees or invitees of the tenant for any accident which may happen on the premises owing to their want of repair. He may, of course, be liable to the tenant if he has undertaken to repair and has failed in his obligation, but no liability can attach to him for accidents which may happen to the tenant's guests or customers, because no duty is owed by the landlord to them by contract or otherwise. In this regard I need only cite *Lane v. Cox* (2), *Cavalier v. Pope* (3), and *Bromley v. Mercer* (4). *Wilchick v. Marks* (1), however, has decided that a landlord is liable to a person using the highway if, having the right to repair, he fails to exercise it and allows the property to get into a dangerous condition in consequence of which a passer-by is injured. In that case a landlord who had retained the right to do repairs, and had put no obligation on the tenant to repair, allowed a shutter to get into a dangerous condition. The shutter fell and injured the plaintiff, who was walking past the house, and it was held that she was entitled to recover on the ground of nuisance. That case was approved in *Heap v. Ind Coope & Allsop*,

Ltd. (5), which decided that it was not necessary, as I had thought in *Wilchick v. Marks* (1), that the landlord should know of the defective state of the premises, but that he was liable whether he knew or whether he did not. *Wilchick v. Marks* (1), however, as I have said, related to a passenger on a highway, and, in my judgment, I said ([1934] 2 K.B. 66) :

Clearly if the plaintiff had been a visitor to the premises she would have had no cause of action against the landlords, as no duty was owed to visitors by the landlords any more than to the tenant.

In this case Mrs. Howard was a visitor or invitee of the tenant. Her counsel sought to put the case on the ground that she was a user of the highway, that she was about to get on it, and that the accident happened while she was so doing, and he endeavoured to support his case by reference to the well-known series of authorities which decide that, if a person creates a danger, whether by excavation or otherwise on land immediately adjoining the highway, he is liable to a person who inadvertently steps off the highway and is injured. This seems to me really to amount to the same argument as was unsuccessful in *Bromley v. Mercer* (4). There the defendants were the owners of a house and yard abutting on a highway and separated therefrom by a wall which was in such a defective state of repair as to constitute a public nuisance to the highway. The defendants were liable to maintain and keep the outside of the premises in good repair and condition. The plaintiff, who was visiting the tenant of the premises, was in the yard and was injured by a heavy stone falling on her from the wall. It was held that she had no cause of action against the landlords. It was argued that she would have had an action if she had been walking along the road and the wall had then collapsed on her, and it was held in the court below that she was entitled to recover because she was near to the highway, although she was in the yard and not on the highway. The Court of Appeal, however, held that it was wrong to say that where there was a nuisance adjoining the highway everyone who comes in proximity to it has a right of action which he can carry with him on to private premises. If the accident happens while the person is on the highway, he has an action, not in negligence but in nuisance, because the adjoining danger has interfered with his free use of the highway.

I can think of no better definition of nuisance than this, given in WINFIELD'S TEXTBOOK ON THE LAW OF TORT, 3rd ed., p. 426 ;

Nuisance is the unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it.

If a person's right of free passage over a highway is subject to interference he has an action, just as he would have if a private right of way of which he was the grantee was obstructed. It may well be that had Mrs. Howard been walking along the pavement and inadvertently or to avoid some obstruction stepped on the forecourt and had fallen owing to its defective state, she might have been able to recover as did the plaintiff in *Owens v. Thomas Scott & Sons, Ltd.* (6), but she met with the accident while she was still the invitee of the tenant whose premises she was leaving. If she were entitled to recover against the landlords, I can see no reason why a person leaving a house abutting on a highway who was injured by the defective condition of the step should not also have an action, and yet that would be entirely contrary to the line of authority of which the cases I have cited are instances.

It may be that the law is not entirely satisfactory on this point. No doubt, it is difficult for a laymen to understand why, if he is walking along the road and slips into an excavation at the side of it, he should be entitled to recover, whereas if he slips into the excavation as he is endeavouring to get on to the road he is not, but I must take the law as I find it, and I have come to the conclusion that it is not possible for me to hold that Mr. and Mrs. Howard have a cause of action against the landlords. Accordingly, Mr. and Mrs. Howard will have judgment against Mr. Crisp for £455 13s. 6d., with costs, and there will be judgment for the landlords, also with costs.

Order accordingly.

Solicitors : *L. Bingham & Co.* (for the plaintiffs) ; *Berrymans* (for the landlords) ; *Warren & Co.* (for the tenant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re DUKE OF LEEDS' WILL TRUSTS, LEEDS (DUKE) *v.* DAVENPORT AND OTHERS.

[CHANCERY DIVISION (Jenkins, J.), May 14, 15, June 19, 1947.]

*Compulsory Purchase—Mines—Coal mine—Compensation—Disposal as between
beneficial interests under settlement—Coal Act, 1938 (c. 52), sched. III, pt.
IV, para. 21 (2).*

Where compensation is payable under the Coal Act, 1938, ss. 6 and 7, in respect of several holdings comprised in one settlement, in view of the varying lives and fluctuating income of individual holdings, compensation received in respect of each holding should be dealt with separately. Where, however, the effect on the relative interests of successive beneficiaries of dealing separately with the compensation received in respect of each of several holdings would be insignificant as compared with the additional complication and expense involved in making separate calculations instead of a single calculation comprising the aggregate sum, practical considerations might make it proper to dispense with separate calculations and treat the aggregate amount as one fund.

The effect of the directions in regard to interest and accumulation in sched. III, pt. IV, para. 21 (2), to the Act is that, while an accumulation may be directed of any income which, if it had been royalty income from the holding, would have been required to be accumulated under an express or implied provision in the settlement, the process of converting the successive beneficial interests formerly subsisting in the holding, under the settlement, into the like benefits, "or as near thereto as may be," in the compensation moneys is not to involve any capitalisation of income during a period in which the holding, according to the estimates, would, in fact, have produced no royalty income, or only income smaller in amount than that produced by the compensation during the like period.

In determining, under para. 21 (2), the rights of the different beneficiaries in the settlement in respect of the compensation payable under the Act, the compensation received in respect of a holding must be treated as a wasting asset with a life corresponding to the estimated life of the holding, and, subject to the special direction against capitalisation of income in proviso (ii) to the paragraph, the capital and income of the compensation must be applied in such manner as to ensure, so far as possible, that each successive beneficiary receives year by year, during the continuance of his interest, a rateable proportion of the estimated royalty income which he would have received from the holding during the like period, the proportion, arrived at by a uniform abatement of each year's estimated royalty income throughout the estimated life of the holding, being so calculated as to exhaust the entire capital and income by the end of the estimated life of the holding.

Askew v. Woodhead, (1880) (14 Ch.D. 27) and *Re Simpson, Clarke v. Simpson* ([1913] 1 Ch. 277) applied.

Re Barrington, (1886) (33 Ch.D. 523) distinguished.

The requirements of para. 21 (2) will be satisfied by the following procedure: (i) Take the estimated life of the holding (as accepted by the valuation board concerned) as the period during which the capital and income of the compensation received in respect of the holding must be completely consumed. (ii) Assume that the holding would have produced, during each year of its estimated life, the estimated royalty income, if any, for that year (as accepted by the valuation board concerned). (iii) Estimate the yearly rate of interest which the compensation, or the balance of it from time to time remaining in hand, can be reasonably expected to produce during the period represented by the estimated life of the holding, and assume for the purposes of calculation that the rate of interest so estimated (here termed "the conventional rate") will be uniformly maintained throughout that period. (iv) Calculate what abatement, uniformly applied to the estimated royalty income for every year, must be made in the estimated royalty income for each year in order to ensure that the capital and income of the compensation will exactly suffice to provide for the payment in each year of the appropriate abated amount (here

termed "the abated royalty equivalent") to the person for the time being entitled in possession under the settlement during the whole of the period represented by the estimated life of the holding, and will, by means of such payments, be completely exhausted by the end of that period, on the footing that (a) there will be no appreciation or depreciation in the value of the investments representing the compensation; (b) the compensation will produce uniformly throughout the period no less and no more than the conventional rate of interest; and (c) the person for the time being entitled in possession is to receive in respect of each year the income of the compensation for that year or the abated royalty equivalent, whichever is the greater, and the excess, if any, of the abated royalty equivalent for any year over the income of the compensation for that year (here termed "the capital supplement") is to be provided out of capital. (v) The compensation having been duly invested within the range of investments authorised by para. 21 (5), pay the person for the time being entitled in possession the resulting income, together with the capital supplement, if any, for each year, and continue this process until the compensation is exhausted or the balance of it becomes vested in possession in some person or persons absolutely entitled under the settlement, whichever event first happens. For the purposes of apportionment on the death of a tenant for life, the capital supplement attributable to any year should be treated as accruing from day to day during that year. (vi) If a proportion of the royalty income derived from the holding in any year, had it remained subject to the settlement instead of being compulsorily acquired, would, in view of the Settled Land Act, 1925, s. 47, have been liable to be set aside as capital money arising under the settlement, the like proportion of the abated royalty equivalent for the same year must be similarly set aside, but, in view of the prohibition against the capitalisation of income contained in the proviso to para. 21 (2) (which exempts the income of the compensation from accumulation, except in so far as there may be an obligation to accumulate by virtue of the actual limitations of the settlement itself in any particular case), not exceeding the amount, if any, of the capital supplement for that year. Any amounts so set aside and the future income thereof will, thenceforth, cease to be subject to the special provisions applicable to the capital and income, respectively, of the compensation.

The rate of interest appropriate to be adopted for the "conventional rate" is 3 per cent.

The arrangements indicated must be treated as taking effect as from the vesting date, *i.e.*, July 1, 1942, and, therefore, the tenant for life in possession under the settlement is entitled to immediate payment of the interest and income allowed on, or earned by, the compensation since that date, together with the amount of such capital supplements as have accrued since that date, but he is not entitled to an immediate payment out of the capital of the compensation in commutation and satisfaction of all capital supplements accruing during the residue of his life.

With regard to the possibility of appreciation or depreciation in the investments representing the compensation, the persons ultimately entitled must take their chance of gain or loss according to the event.

[AS TO METHOD OF DISTRIBUTION OF COMPENSATION ON COMPULSORY PURCHASE, see HALSBURY, Hailsham Edn., Vol. 6, pp. 153, 154, para. 174; and FOR CASES, see DIGEST, Vol. 11, pp. 247, 248, Nos. 1464-1503.]

FOR THE COAL ACT, 1938, see HALSBURY'S STATUTES, Vol. 31, p. 455.]

Cases referred to:

- (1) *Re Phillips' Trusts*, (1868), L.R. 6 Eq. 250; 11 Digest 247, 1476.
- (2) *Askew v. Woodhead*, (1880), 14 Ch.D. 27; 49 L.J.Ch. 320; 42 L.T. 567; 44 J.P. 570; 11 Digest 247, 1477.
- (3) *Re Hunt's Estate*, [1884] W.N. 181; 11 Digest 248, 1478.
- (4) *Re Barrington, Gamblen v. Lyon*, (1886), 33 Ch.D. 523; 56 L.J.Ch. 175; 55 L.T. 87; 11 Digest 248, 1500.
- (5) *Re Robinson's Settlement Trusts*, [1891] 3 Ch. 129; 60 L.J.Ch. 776; 65 L.T. 244; 11 Digest 248, 1503.
- (6) *Re Fullerton's Will*, [1906] 2 Ch. 138; 75 L.J.Ch. 552; 94 L.T. 667; 11 Digest 248, 1502.
- (7) *Re Simpson, Clarke v. Simpson*, [1913] 1 Ch. 277; 82 L.J.Ch. 169; 108 L.T. 317; 40 Digest 752, 2819.

ADJOURNED SUMMONS to determine the manner of disposal of the compensation moneys received in respect of the compulsory acquisition, under the Coal Act, 1938, of the freehold interests in coal mines formerly comprised in a settlement created by the will of the tenth Duke of Leeds. The facts appear in the judgment.

Andrew Clark, K.C., and *J. V. Nesbitt* for the plaintiff (the tenant for life in possession).

Coen for the trustees of the settlement.

C. A. J. Bonner for the National Coal Board.

Jopling and *Neville Gray, K.C.* and *Lindner* for other defendants (persons beneficially interested under the will).

Cur. adv. vult.

June 19. **JENKINS, J.**, read the following judgment. This is an application under the Coal Acts, 1938-1943, for the directions of the court as to the disposal of the compensation monies received in respect of the compulsory acquisition, under the Coal Act, 1938, of the freehold interests in certain coal or mines of coal formerly comprised in the settlement created by the will, dated July 17, 1925, of the tenth Duke of Leeds, who died on May 10, 1927. The will was proved on Aug. 8, 1927, by the first three defendants in the present proceedings as the executors therein named, the same three persons being also appointed by the will to be trustees thereof for the purposes of the Settled Land Acts, 1882 to 1890, and of any Act amending or consolidating the same. The effect of the settlement created by the will, so far as material for the present purpose, was that, subject to the payment to the testator's widow of a yearly rent charge (which is amply secured without recourse to the compensation moneys in question) and to the payment of a further yearly rent charge to one of his daughters, since deceased, the testator's freehold lands and hereditaments not otherwise disposed of, including the coal or mines of coal in question, were limited (as regards all life estates without impeachment of waste) to the testator's only son, the present plaintiff (who succeeded his father as eleventh duke) for life, with remainder to the plaintiff's sons successively according to seniority in tail male, with remainder to the use in tail male of such person, if any, as should at the time of the failure or determination of the preceding limitations be entitled to the title or dignity of the Duke of Leeds, with remainder to the use in fee simple of the person or persons who at the time of the failure or determination of the preceding limitations should answer the description of the testator's own right heir or right heirs, with a provision revoking any estate in tail male limited to a person born in the testator's lifetime and substituting for the estate so revoked a limitation to the use of that person for life, with remainder to his sons successively according to seniority in tail male, with the like remainders over as were therebefore limited to take effect after the estate so revoked.

The plaintiff, born in 1901, is married, but has no issue. In default of male issue of his, the fourth defendant, Sir Francis D'Arcy Godolphin Osborne, born in 1884 and unmarried, should he survive the plaintiff, will succeed on the plaintiff's death to the dukedom of Leeds, and, consequently, become tenant for life under the settlement. In default of male issue of both the plaintiff and Sir Francis, the fifth defendant, Sydney Hugh Godolphin Osborne, born in 1887 and also without issue, should he survive them both, will in his turn succeed on the death of the survivor of them to the dukedom of Leeds, and, consequently, become tenant for life under the settlement. In default of male issue of the plaintiff and of both these defendants, the limitation in favour of the person or persons answering the description of the testator's own right heir or right heirs at the time of the failure or determination of the preceding limitations will take effect. The persons who would answer that description, if such failure took place to-day, would be the testator's daughter, the seventh defendant, Moira Godolphin Lyttelton, and the two surviving children of the testator's daughter, the late Countess of Strathmore, who was originally joined as the sixth defendant, but has since died. Directions were given at the hearing for the substitution of these two grandchildren of the testator as defendants in place of their mother. It will thus be seen that, while all persons beneficially interested under the settlement so far as at present in existence and ascertainable are before the court, interests of possible unborn male issue of the plaintiff

or of either of the two presumptive life tenants in remainder are necessarily affected, while the persons who will, in fact, constitute the class of right heirs of the testator to become absolutely entitled under the ultimate limitation, if it takes effect, can only be ascertained by reference to the state of the family at a future date, that is to say, the date of the failure of the preceding limitations of the settlement. The remaining defendant in the present proceedings is the National Coal Board, which, under the provisions of the Coal Industry Nationalisation Act, 1946, has, since the issue of the originating summons herein, superseded the Coal Commission constituted by the Coal Act, 1938, and has, accordingly, been substituted for the Coal Commission as a defendant by order to carry on dated Feb. 20, 1947—a substitution now automatically provided for by R.S.C. (No. 2), 1947, r. 1 [R.S.C., Ord. 17, r. 7B]. The National Coal Board is concerned only with the question of costs, to be dealt with at a later stage in this judgment.

[HIS LORDSHIP dealt with the Coal Act, 1938, ss. 1-5, and continued:] Sections 6 and 7 provide for the compensation of existing owners, and it is under those sections, in conjunction with sched. III to the Act and certain rules made pursuant to the provisions of that schedule, that the compensation moneys to which the present proceedings relate were ascertained and paid. These sections, so far as material for the present purpose, are in the following terms. Section 6 provides:

(1) The Commission shall pay, as compensation to existing owners for the acquisition of their interests, sums ascertained in accordance with the provisions of this and the next succeeding section in respect of all coal and mines of coal, of all acquired property and rights, and of all rights to withdraw support that are to vest in the Commission under pt. II of sched. II to this Act. (2) The compensation shall be ascertained separately in accordance with the next succeeding section in respect of (a) all the said matters in respect of which compensation is to be payable, with the exception of (i) minerals . . . other than . . . coal . . . (ii) surface servitudes, which matters are in this Act referred to as "principal coal hereditaments"; (b) the matters within the exception aforesaid, in this Act referred to as "subsidiary coal hereditaments." (3) The aggregate amount of the compensation payable in respect of all principal coal hereditaments shall be the sum of £66,450,000. (4) The central valuation board established under sched. III to this Act shall prepare and deposit with the Board of Trade a map showing a division of the whole of Great Britain into regions (in this Act referred to as "valuation regions"), and shall allocate to each valuation region a part (in this Act referred to as a "regional allocation") of the said sum of £66,450,000, being a part bearing the same proportion to the whole of that sum as they may estimate the value of all principal coal hereditaments in the region to bear to the value of all principal coal hereditaments in Great Britain.

Section 7 provides:

(1) The sums to be paid for compensation as aforesaid shall be ascertained by valuation, in accordance with the provisions of this section, of the interests, other than retained interests, that subsist at the valuation date in coal, mines of coal and acquired property and rights (in this Act referred to as "acquired interests"). (2) The subject of each valuation shall be a unit (in this Act referred to as "a holding") consisting of an acquired interest, or of a group of such interests, that is under the provisions of sched. III to this Act to constitute a unit for compensation purposes.

Sub-section (3) is procedural and relates to the registration of claims or the registration of holdings. By sub-s. (4):

The value of a holding shall be taken to be the amount which the holding might have been expected to realise if this Act had not been passed and the holding had been sold on the valuation date in the open market by the existing owners thereof, selling as willing vendors to a willing purchaser, under a contract providing for completion thereof on the vesting date, so however that, where a right to withdraw support is to vest in the Commission with coal or a mine of coal in which a holding subsisted, it shall be valued as if each of the existing owners thereof, having power to grant that right to the purchaser for an interest corresponding to the existing owner's interest in the coal or mine, had agreed so to grant it in addition to any acquired rights in which the holding subsisted. (5) The said amount shall be ascertained, subject to the provisions of sched. III to this Act, by the regional valuation board established under sched. III to this Act, and where the premises in which a holding subsisted include subsidiary coal hereditaments, the regional valuation board shall also ascertain the parts of that amount that are attributable to principal and to subsidiary coal hereditaments respectively.

Subsection 6 provides for the certification by the regional valuation board of the amounts ascertained by them under the preceding sub-section in respect of each holding, dividing the amounts between principal and subsidiary coal hereditaments. Sub-section (7) provides for payment of the compensation :

There shall be paid in respect of each holding in any valuation region for which compensation is payable (a) a sum bearing to the amount certified in respect thereof as attributable to principal coal hereditaments the same proportion as the amount of the regional allocation for that valuation region bears to the aggregate of the amounts so certified in respect of all such holdings in that valuation region ; and (b) a sum equal to any amount certified in respect thereof as attributable to subsidiary coal hereditaments.

I do not think that there is anything else in the body of the Act to which I need refer, with the exception of some of the definitions contained in s. 44 (1) :

In this Part of this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say :—“ Acquired interest ” has the meaning assigned to it by s. 7 (1) of this Act ; “ Acquired property and rights ” has the meaning assigned to it by s. 4 (1) of this Act ; “ Claiming under ” shall be construed, in relation to a person referred to as claiming under the estate owner in respect of the fee simple, or under the estate owner in respect of a term of years, in any land, as referring to any person interested in that land in respect of (a) any equitable interest enforceable against that estate owner (other than an equitable term of years under a coal-mining lease or an interest created out of such a term of years) . . . “ Coal ” has the meaning assigned to it by s. 3 (4) of this Act . . . “ Existing owners ” means, in relation to any coal or mine of coal, all persons who have at the valuation date an acquired interest therein ; “ Interested ” shall be construed, in relation to a person referred to as interested in any coal or mine of coal, or in any other land, as referring to any person entitled to, or to exercise, or interested in, or in the exercise of, any estate, interest, charge or power (including an option or right of pre-emption, and including a contingent executory or future interest or a possibility coupled with an interest whether or not the object of the gift or limitation of such interest or possibility be ascertained) in, on or over that coal or mine or that other land, as the case may be, or in, on or over the rents and profits thereof, otherwise than in respect only of the benefit of a servitude or restrictive covenant adversely affecting that coal or mine or that other land, as the case may be, and “ interest ” has a corresponding meaning . . .

Schedule III is headed “ Provisions as to compensation payable under s. 6 of this Act,” and is divided into five parts, the second and fifth of which have no relevance to the question before me. In conformity with s. 7 (2), paras. 1 and 2 of pt. I prescribe what acquired interests or groups of such interests are to constitute units for compensation purposes, each such unit being, under the provisions of the last mentioned sub-section, the subject of a separate valuation and referred to in the Act as “ a holding.” Schedule III, pt. I, is headed “ Preliminary ” and the sub-heading is “ Units for compensation purposes.” Paragraph 1 says :

Subject to the provisions of para. 2 of this schedule, each of the following acquired interests, or groups of such interests, in coal, mines of coal, and acquired property and rights, shall constitute a unit for compensation purposes, (a) each freehold reversion (that is to say, in the case of all the coal and mines of coal that are on the valuation date comprised in a coal-mining lease derived immediately out of the fee simple and in the case of acquired property and rights annexed to any such coal or mine, the interest therein of the estate owner in respect of the fee simple in the coal and mines together with the interests therein of all persons claiming under him) . . . (c) each freehold in possession in any valuation region (that is to say, in the case of all the coal and mines of coal in any valuation region that are not on the valuation date comprised in any coal-mining lease, and are in the legal ownership as respects the fee simple of the same estate owner, and in the case of acquired property and rights annexed to any such coal or mine, the interest therein of the estate owner in respect of the fee simple in the coal and mines together with the interests therein of all persons claiming under him).

Paragraph 2 provides for a modification of the system of division into units in particular cases.

The application of these provisions in the present case resulted in the coal hereditaments comprised in the settlement being divided into nine distinct holdings, each of which, accordingly, became the subject of a separate valuation.

Schedule III, pt. III deals with valuation and is largely procedural. The general scheme is that (subject to certain requirements as to lodging of claims and so forth) each holding is to be valued by the regional valuation board in

which it is situate, with a right for any claimant aggrieved by their valuation to have it reviewed in proceedings before a referee appointed as therein mentioned, and that each regional valuation board, when the valuations of all the holdings in its region have been settled, is to certify the amounts to the Coal Commission, such certificates, on publication as therein mentioned, becoming in effect conclusive, subject to a limited right of appeal to the High Court. Reference should perhaps be made to paras. 13 and 14, which are in the following terms :

(13) In the valuation of a holding regard shall be had to the following rules, that is to say (a) no allowance shall be made on account of the compulsory acquisition by the Commission of the premises in which the holding subsisted; and (b) the state in which the said premises were at the valuation date shall be taken into consideration; and also to such rules as may be prescribed for securing uniformity of valuation. (14) The Central Valuation Board shall have power to make, with the approval of the Board of Trade, rules as to the procedure to be followed in giving effect to the three last preceding paragraphs and for prescribing anything that is therein directed to be prescribed, and in those paragraphs the expression "prescribed" means prescribed by rules made under this paragraph: Provided that rules under this paragraph shall not be made until a draft thereof has been approved by a resolution passed by each House of Parliament.

Of the nine holdings to which the present case relates, two were in the North Midland Valuation Region, and the remainder were in the Yorkshire Valuation Region. The value of each holding for the purposes of the Act was duly settled, and agreed with the appropriate regional valuation board, apparently without any occasion arising for review by a referee under sched. III, pt. III. To arrive at the value of each holding, it was necessary for the regional valuation board concerned to proceed on the best estimates that could be formed of (a) the period of years from the vesting date, *i.e.*, July 1, 1942, during which each holding would have been workable, which may be termed the estimated life of the holding, and (b) the royalty income which the holding would have produced during each year of its estimated life, which may be termed the estimated royalty income, and, in effect, to assess by reference to these estimates the price which a hypothetical purchaser on a sale falling to be completed on the vesting date (*i.e.*, July 1, 1942), would have paid for the right to receive in each year during the estimated life of the holding the estimated royalty income for that year. It is obvious that this calculation necessarily involved the deduction of substantial discounts and allowances from the gross figures of estimated royalty income. Charges such as mineral rights duty, miners' welfare levy, and management expenses had to be allowed for in order to arrive at the estimated net return; the hypothetical purchaser's liability for income tax had to be taken into account; the estimated net return for each year had to be suitably discounted by reference to the interval of time between the date of completion and the date at which such return might be expected to come to hand; provision had to be made for a sinking fund for the replacement, over the estimated life of the holding, of the capital laid out by the hypothetical purchaser (express reference is made to this sinking fund provision in the Coal (Valuation Procedure) Rules, 1942, r. 12); and, furthermore, it had to be recognised, as a factor that would have been taken into account by the hypothetical purchaser, that there was a risk, relatively unimportant during the earlier part of the estimated life of the holding, but increasing with the years, that, owing to technical, geological, industrial, or economic causes, the estimated royalty income might never be realised. It is in evidence that, in the course of the valuations, allowance was made for this risk by the deduction from the estimated royalty income of a risk rate of 5 per cent. for the first 20 years and thereafter on a rising scale.

It is clear from the foregoing considerations that, while the values arrived at simply represented the present values as on the appropriate date of the entire freehold interests comprised in the respective holdings, as opposed to aggregations of separate valuations of the successive beneficial interests in the respective holdings under the limitations of the settlement, a dissection of the calculations on which the valuation of each holding was based would show that the proportion of the total value attributable to the estimated royalty income for the period corresponding to the probable duration of the plaintiff's interest as tenant for life in possession—say, the first 25 or 30 years from the vesting date (*i.e.*, July 1, 1942)—represented a very much higher percentage of that estimated royalty income than

the percentage of the estimated royalty income for the residue of the estimated life of the holding represented by the balance of such total value. It is further obvious that the estimates on which the valuations were based necessarily became increasingly speculative and unreliable as they advanced into increasingly remote future periods of time. There are limits to what can be done in the way of forecasting the future working of a mine and the financial results of such future working. The estimated lives of the holdings in the present case range from 68 to 150 years, and an estimate, however carefully prepared, of the coal to be worked and royalty income to be received from a given holding 50 or 100 or 150 years hence must depend on so many assumptions as to amount to little more than a guess. A further complication is introduced by the fact that the estimated royalty income from a given holding does not necessarily consist of a constant yearly figure throughout the period of its estimated life. On the contrary, there are or may be very substantial fluctuations, including periods in which, according to the estimate, there would have been no royalty income at all. These fluctuations, I understand, are due to the relation of the working plans, or assumed working plans, as regards direction of working, order of working of different seams and so forth, to the respective positions of, and areas and seams comprised in, the various holdings in lease to the colliery undertaking concerned.

The values placed by the regional valuation boards concerned on the several holdings to which this case relates, and the respective estimated lives of such holdings as accepted by those boards were as follows. The two in the North Midland Valuation Region were valued at £25,664 and £6,119 respectively, with lives of 150 years and 148 years respectively, so that £31,783 was the total valuation for those in the North Midland Valuation Region. The holdings in the Yorkshire Valuation Region were valued as follows. The first of them was valued at £45,000 odd and there was an estimated life of 150 years. The next one was valued at £105,000 odd, with an estimated life of 140 years. The next one was £10,000 odd, with an estimated life of 80 years. The next one was a small one, valued at £281, with an estimated life of 98 years. The next one was valued at £17,487, with an estimated life of 148 years. Then came one which was not effective at all; the valuation was nil and the life was nil, there being no prospect of working. Finally, there was another small one, valued at £77, with an estimated life of 68 years. That made a total in the Yorkshire Valuation Region of £178,000 odd, and a total for the two regions of some £210,000.

The proportions allocated to these two regions respectively of the total compensation of £66,450,000 payable under the Coal Act, 1938, s. 6 (3), were less than the respective aggregates of the amounts certified by the two regional boards under s. 7 (6), in respect of the holdings in their respective regions as attributable to principal coal hereditaments, the deficiency being slightly larger in the case of the North Midland region than it was in the case of the Yorkshire region. In the result, the compensation as finally ascertained was approximately 17s. 4d. in the £ of the values of the two holdings in the former, and 18s. 9d. in the £ of the values of the six effective holdings in the latter region. The aggregate scaled down value which represented the compensation was £195,210. Out of this total, a sum of £869 3s. 11d. has been paid or is payable to certain surface owners (£260 odd in respect of one holding, £42 odd in respect of another, and £566 odd in respect of a third holding), thus reducing the aggregate sum of compensation moneys with which I am concerned to £194,340 odd.

I now turn to sched. III, pt. IV, which deals with the payment and disposal of compensation. Part IV begins with para. 18, which contains provisions as to the ascertainment of persons entitled and is in the following terms :

For the purposes of any provision of this Act under which a payment is to be made at any date to the person entitled to the compensation for a holding, that person shall be ascertained as follows : (a) if the holding could at the valuation date have been sold and conveyed to a purchaser in such manner as to bind or over-reach all acquired interests comprised in the holding (either in the actual circumstances or if any requisite consent, approval, request or notice had been received or given) either (i) by, or by the direction of, a single person in whom the whole beneficial interest comprised in the holding was vested, (ii) under the powers conferred by the Settled Land Act, 1925, or under any additional powers conferred by a settlement, or (iii) by trustees for sale, or (iv) by a personal representative in the exercise of his paramount powers, or (v)

under powers conferred by any other enactment, the person who could have given a valid discharge for the purchase money arising on such a sale if paid on the date in question shall be the person entitled . . .

It is clear from this paragraph that, in the circumstances of the present case, the proper person to receive the compensation moneys were the trustees for the purposes of the Settled Land Act, 1925, of the settlement created by the will of the tenth Duke of Leeds. It appears from the evidence that the bulk of the compensation moneys had, in fact, already been paid to such trustees by the time the present summons was issued, and I understand that the balance has since been similarly paid. It is further in evidence that the moneys so received have been invested so as to yield interest at the rate of 3 per cent. per annum. Paragraphs 19 and 20 of pt. IV contain provisions as to the making of payments on account of compensation moneys to the persons entitled. Paragraph 19 (1) provides :

At any time before the vesting date, or after that date but before the relevant certificates have become conclusive under para. 17 of this schedule, the Commission, if they are satisfied that the compensation for any holding, or the aggregate of the compensation for a number of holdings to which the same person is entitled, will be not less than a particular amount, may make payment of such sum not exceeding that amount as they may think fit on account of the compensation for the holding or holdings . . .

Paragraph 19 (3), the material sub-paragraph, provides :

A payment on account made under this paragraph before the vesting date, together with interest thereon for the period between the date on which the payment is made and the vesting date at the rate of £3 per cent. per annum less income tax at the standard rate, shall be treated in account as a payment on account of the capital of the compensation made on the vesting date, and the said interest shall be deemed for the purposes of the Income Tax Acts to be paid on each anniversary of the date of the payment on account that occurs before the vesting date and on the vesting date and accordingly shall be treated as a proper deduction from income.

Paragraph 21 contains provisions as to the "Disposal of compensation as between beneficial interests" and is in the following terms :

(1) The compensation for a holding when paid by the Commission to the person entitled to receive it from them, including any sum paid on account thereof under para. 19 or 20 of this schedule, and the income thereof, shall, in order to its being applied as compensation to the persons whose interests are comprised in the holding, be held and disposed of for the benefit of those persons, or their personal representatives or assigns, in accordance with the succeeding provisions of this paragraph. (2) In the case of a holding that consists of or comprises an estate or other interest subject to a settlement within the meaning of the Settled Land Act, 1925, or to a trust for sale the proceeds whereof are subject to a settlement by way of succession, the trustees of the settlement or any court having jurisdiction in relation to the execution of the trusts of the settlement, and in the case of the court on the application of any beneficiary under the settlement, may require and cause the compensation, or the part thereof attributable to that estate or other interest, as the case may be, to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the court, as the case may be, will give to the beneficiaries under the settlement the like benefit therefrom as they might lawfully have had from that estate or other interest, or as near thereto as may be, regard being had to the terms of the settlement and to all relevant circumstances affecting the premises in which the holding subsisted, including (a) the terms of any subsisting coal-mining lease and the operation of any provision therein contained as to undergettings, short workings, and other like matters ; (b) the period within which coal being worked might have been expected to be worked out or coal not being worked might have been expected to come into working and to be worked out ; and (c) the extent to which, having regard to those circumstances, the premises ought to be regarded as property of a wasting character : Provided that (i) where a payment on account of the compensation for the holding has been made under para. 19 of this schedule before the vesting date, the net income accruing to the trustees before the vesting date from the investment of the sum paid, up to an amount sufficient to make good to the capital of the settlement the interest on that sum brought into account under para. 19 of this schedule against the capital of the compensation, shall be set aside as capital of the settlement ; (ii) subject as aforesaid no part of the income of the compensation shall be required or caused by virtue of this sub-paragraph to be set aside as capital of the settlement.

Sub-paragraph (5), which sets out the authorised range of investments, provides :
"Money representing compensation attributable to an estate or other interest

subject to such a settlement or trust for sale as is mentioned in sub-para. (2) of this paragraph, or vested in trustees on or for charitable, ecclesiastical or public trusts or purposes, may, notwithstanding anything in the relevant trust instrument, be invested not only as authorised by law or by the trust instrument but also in or on " [a range of investments set out, and includes, for example] the ordinary or other stock or shares of any company incorporated as aforesaid [i.e., incorporated in Great Britain] being a company which has paid dividends upon its ordinary capital at the rate of at least 4 per cent. per annum for at least 10 years next before the time of investment (of which fact such a letter as aforesaid [i.e., a letter from a bank as to the interest of the previous years] shall be sufficient evidence).

Sub-paragraph (6) provides :

Subject as aforesaid the compensation for a holding and the income thereof shall be held and disposed of in such manner as to confer on the existing owners whose interests are comprised in the holding, their personal representatives or assigns, the like benefits, so far as may be, as they would have had from their respective interests in the premises in which the holding subsisted if those premises had not been acquired by the Commission.

The question which I have to decide turns mainly on the true construction and effect of para. 21 (2), as to which I have the assistance of a number of authorities on certain earlier enactments of a similar character. Before referring to these earlier enactments and the decisions on them, it will be convenient if I express my views on three particular matters which are, I think, peculiar to para. 21 (2) itself. First, it will be noted that, in providing for the disposal of compensation moneys, to which para. 21 (2) applies, the court is to have regard " to the terms of the settlement and to all relevant circumstances affecting the premises in which the holding subsisted, including " and then there are set out in sub-para. (a), (b) and (c) three specific matters, which I need not read again. Those are matters relevant to the holding. As to the terms of this settlement, they are as summarised at the beginning of this judgment. It will be remembered, in particular, that all life estates were thereby declared to be without impeachment of waste. It follows from this that, if the holdings had remained subject to the settlement, the proportion required by the Settled Land Act, 1925, s. 47, to be set aside as capital money of rents received under mining leases granted subsequently to the death of the testator, the tenth duke, otherwise than pursuant to agreements made in his lifetime, would have been one-fourth of such rents. It was not disputed before me and appears to be well settled that this section has no application to rents received under mining leases granted or agreed to be granted by the testator in his lifetime, the whole of which were, and, but for the compulsory acquisition, would, during the residue of the terms of those leases, have continued to be, applicable as income arising under the settlement. The evidence before me shows, by reference to the history of the various leases, the dates from which the obligation to capitalise one-fourth of the royalty income under s. 47 of the Act of 1925 commenced or would, but for the compulsory acquisition, have commenced as regards each holding. So far as the present and the immediate future are concerned, this factor appears to be of relatively small importance, but it is, nevertheless, a factor which should, in my opinion, be taken into account. As to the relevant circumstances affecting the premises in which the holding subsisted, including the matters specifically mentioned in para. 21 (2) (a), (b) and (c), all parties before me were agreed, and I think it is clear from the evidence, that all such relevant circumstances were sufficiently allowed for in the course of arriving at the estimates accepted by the regional valuation boards of the life of each holding and of the royalty income which each holding would have produced during each year of its estimated life. It will also be remembered that the settlement in the present case comprised nine, or, rather, eight effective, holdings. The question therefore arises whether the compensation received in respect of each holding should, in the application of para. 21 (2), be treated as a separate fund to be dealt with by reference to the relevant circumstances as regards estimated life and estimated royalty income affecting that particular holding, or whether the aggregate amount of compensation received in respect of all holdings should, for this purpose, be treated as one entire fund to be dealt with

by reference to a combination of the relevant circumstances as regards estimated life and estimated income affecting the holdings individually.

In my judgment, the former is the correct course. In s. 7 and sched. III, pts. I and III, each holding is clearly treated as a separate subject of valuation and compensation, and para. 21 of sched. III, pt. IV, appears equally clearly to treat the compensation received in respect of any one holding as a separate subject of disposal. I, therefore, see no justification for treating the aggregate amount of compensation received in respect of several holdings as one fund for the purposes of para. 21 (2) merely because the several holdings in question happen to have been comprised in one and the same settlement. In view of the varying lives and fluctuating income of individual holdings, and the provision to which I am about to refer in regard to the disposal of the income of the compensation, it appears that it is, in general, to the advantage of the tenant for life under a settlement comprising several holdings (and I am told it is substantially to the advantage of the plaintiff in the present case) for the compensation received in respect of each holding to be separately dealt with. It may well be that in some cases the effect on the relative interests of successive beneficiaries of dealing separately with the compensation received in respect of each of several holdings would be insignificant as compared with the additional complication and expense involved in making a separate calculation in relation to each of the several amounts of compensation, instead of a single calculation comprising the aggregate sum. In such cases practical considerations might, no doubt, make it proper to dispense with separate calculations and treat the aggregate amount as one fund. Nevertheless, as indicated above, I regard the former as the strictly correct course.

The last of the three particular matters that I have mentioned concerns the interest on the compensation moneys. It will be noted that, while para. 21 (2) provides that the compensation may be required or caused, *inter alia*, "to be accumulated," provisos (i) and (ii) are to the effect that, except as regards income accruing before the vesting date on a payment on account made before that vesting date :

... no part of the income of the compensation shall be required or caused by virtue of this sub-paragraph to be set aside as capital of the settlement.

I take the effect of this to be that, while an accumulation may be directed of any income which, if it had been royalty income from the holding, would have fallen to be accumulated by virtue of an express or implied provision for accumulation in the settlement, the process of converting the successive beneficial interests formerly subsisting in the holding, under the settlement, into the like beneficial interests, "or as near thereto as may be," in the compensation moneys is not to involve any capitalisation of income during a period in which the holding, according to the estimates, would, in fact, have produced no royalty income, or would have produced royalty income smaller in amount than the income produced by the compensation during the like period. For example, the estimates in relation to a particular holding might show a completely unproductive period for, say, ten years from the vesting date. In such a case, were it not for the proviso to which I have referred, it might well have been held that the proper course under para. 21 (2) would be to allow the person entitled in possession no benefit at all from the compensation during that period, inasmuch as he would during that period have received nothing from the holding itself if it had not been compulsorily acquired, and in the meantime to accumulate the income so as to increase the fund available to provide as nearly as possible the equivalent of the royalty income which would have been received from the holding in subsequent years. Proviso (ii) makes it clear that this is not to be done and that the person entitled in possession is to receive in any event a yearly minimum payment consisting of the income actually produced by the compensation.

The earlier enactments of a similar character, to which the authorities I am about to mention relate, are the Lands Clauses Consolidation Act, 1845, s. 74, and the Settled Land Act, 1882, s. 34, now substantially re-enacted by the Settled Land Act, 1925, s. 79. The Lands Clauses Consolidation Act, 1845, s. 74, provides :

Where any purchase money or compensation . . . shall have been paid in respect of any lease for a life or lives or years . . . or any estate in lands less than the whole

fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the court . . . to order that the same shall be laid out, invested, accumulated, and paid in such manner as the . . . court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate or reversion in respect of which such money shall have been paid, or as near thereto as may be.

The Settled Land Act, 1882, s. 34, was as follows :

Where capital money arising under this Act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the court, as the case may be . . . may . . . require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

The Settled Land Act, 1925, s. 79, is in substantially identical terms, but omitting, consequentially on the other real property legislation of the same year, the references to leases for lives.

As to the authorities, *Re Phillips' Trusts* (1) was a case where settled leaseholds had been compulsorily acquired under the Lands Clauses Consolidation Act, 1845, and, on an application under s. 74 of that Act, LORD ROMILLY, M.R., said (L.R. 6 Eq. 251):

I think that the proper course will be to refer it to an actuary to ascertain what ought to be paid every year to the tenant for life out of capital and income. The fund may be invested in the names of the trustees, and they must make such annual payments to the tenant for life as shall be certified by the actuary to be proper.

Askew v. Woodhead (2) was another application under the same section in respect of the proceeds of sale of settled leaseholds compulsorily acquired. SIR GEORGE JESSEL, M.R., said (14 Ch.D. 34):

The question before us is, what is the proper construction of the Lands Clauses Consolidation Act, 1845, s. 74. I will first consider the simple case of a leasehold settled upon a person for life, with a limitation over on his death to another person absolutely. When a property so circumstanced is purchased by a company, what mode of dealing with the purchase money will give the parties interested the same benefit as nearly as may be as they would have had from the lease? This result would clearly be attained by investing the money in the purchase of an annuity having as many years to run as there were years remaining in the term, and by paying it to the tenant for life, and after his death, if the tenant for life dies within the term, then to the remainderman. Generally an annuity cannot thus be purchased which will bring in as large an income as the leasehold, but sometimes it can. The same principle, however, must apply whether the income is more or less. If an annuity is not actually bought, it must be referred to an actuary to calculate what yearly sum, if raised out of the dividends and corpus of the fund, will exhaust the fund in the number of years which the lease had to run, and the amount so ascertained must be paid to the tenant for life.

Then BRETT, L.J., said (14 Ch.D. 35):

The object of the statute evidently is to substitute the money for the lease, and give the parties interests in the money corresponding to their interests in the lease. This can only be done by converting the money into an annuity which will last as long as the lease, and by paying the annuity to the person who would for the time being have been entitled to the possession of the leasehold. There is nothing in the Act which authorises us to say that the tenant for life is only to have the same income as before.

Re Hunt's Estate (3) was a similar case, except that the application was made by the personal representatives of a deceased tenant for life who had, under a previous order, in fact only received the income of the proceeds of sale of the leaseholds. KAY, J., said that ([1884] W.N. 182) "the law had been settled by the decision in *Askew v. Woodhead* (2), and that he could, notwithstanding the order made on a former occasion, divide the fund amongst the representatives and the next of kin upon the principle of that case," and he made an order accordingly. He, therefore, treated the principle as settled by *Askew v. Woodhead* (2). *Re Barrington* (4) was an application under the same section by the tenant for life (subject to a mining lease) of settled minerals which had been compulsorily acquired by a railway company. KAY, J., held that the whole of the lessor's

proportion of the purchase money, amounting to only £136, should be paid to the tenant for life, on the ground, apparently, that the whole of the minerals in question might reasonably have been expected to have been worked out in the lifetime of the tenant for life. *Re Barrington* (4) was distinguished in *Re Robinson* (5), a case in which it was held that no apportionment could be made under the Lands Clauses Consolidation Act, 1845, s. 74, of the proceeds of sale of the fee simple interest (not subject to any lease) in settled minerals compulsorily acquired by a railway company. CHITTY, J., said ([1891] 3 Ch. 132) :

That section [s. 74] does not apply to this case, because the subject-matter of this sale does not come within the definition of the interests dealt with by that section. It is not necessary, therefore, that I should make any observations on the decision in *Re Barrington* (4) beyond saying that I am satisfied that KAY, L.J., did not intend to depart from the meaning of the words in that section, and in the case before him he considered that the sum of £136 0s. 2d., being that part of the compensation which was allotted to the lessor, would fairly represent the value of the reversion in the minerals which the tenant for life could have gotten but for the purchase by the railway company. There are expressions in the judgment which were laid hold of by Mr. Butcher to show that the learned judge took a different view, but, in my opinion, the argument that was founded on these expressions cannot be maintained. If any apportionment had to be made, the right mode of ascertaining the amount of compensation payable to the tenant for life would be, to ascertain the number of years within which the minerals could be worked out. Say, for instance, twenty years; then to divide the compensation money into twenty parts, and give the tenant for life one of such parts every year. That mode of payment would exactly correspond with his rights in the minerals if the railway company had not intervened; but, as I have already said, the 74th section does not, in my opinion, apply to this case.

In *Re Fullerton's Will* (6) settled minerals, subject to mining leases, had been compulsorily acquired under a waterworks Act, which incorporated the provisions of the Lands Clauses Consolidation Act, 1845. SWINFEN EADY, J., followed *Re Robinson's Settlement Trusts* (5) and declined to follow *Re Barrington* (4). He said ([1906] 2 Ch. 141) :

It is then urged that, if the lessees are not entitled to the money in their own right, it has at all events been made over to them by the life tenant, who is entitled to it under *Re Barrington* (4), seeing that the coal would probably have been worked out in his life; but the true principle of apportionment between life tenant and remainderman in these cases is that stated by CHITTY, J., in *Re Robinson's Settlement Trusts* (5). He says: "If any apportionment had to be made, the right mode of ascertaining the amount of compensation payable to the tenant for life would be, to ascertain the number of years within which the minerals could be worked out. Say, for instance, twenty years . . ."

and he reads the rest of the passage which I have already quoted from CHITTY, J.'s judgment. In view of these two later cases, I can only regard the decision in *Re Barrington* (4) as confined to the special circumstances of that particular case and not as laying down any general principle. Finally, *Re Simpson* (7) was an application by a tenant for life under s. 74 of the Settled Land Act, 1882, in respect of the proceeds of sale of a leasehold house which she had sold under her Settled Land Act powers. SWINFEN EADY, J., said ([1913] 1 Ch. 282) :

The widow, who sold the lease as equitable life tenant under the Settled Land Act, 1882, contends that under s. 34 she is entitled to have the purchase money applied in such manner as will give her the like benefit as she might lawfully have had from the lease. This has now eleven years to run, and if the widow had remained in possession till it ran out, she would have obtained the full benefit. As she is entitled to the like benefit under s. 34, she must be paid during her widowhood such an annuity as will exhaust the proceeds of sale, capital and income, in eleven years. If she outlives that term without remarrying, she will obtain all. Otherwise she will obtain a proportion during her widowhood, and the residuary legatees will take what remains. This is the basis adopted in *Askew v. Woodhead* (2) and it is not disputed.

Consideration of the Coal Act, 1938, sched. III, para. 21 (2), in the light of these authorities, leads me to conclude that the compensation received in respect of a given holding must be treated as a wasting asset with a life corresponding to the estimated life of the holding, and that, subject to the special direction against capitalisation of income in proviso (ii) to the paragraph, the capital and income of such compensation must be applied in such manner as to ensure, so far as possible, that each successive beneficiary receives year by year during the continuance of his interest a rateable proportion of the estimated royalty

income which he would have received from the holding during the like period, the proportion, arrived at by a uniform abatement of each year's estimated royalty income throughout the estimated life of the holding, being so calculated as to exhaust the entire capital and income by the end of the estimated life of the holding. More specifically, I think that the requirements of para. 21 (2) will be satisfied by the following procedure. (i) Take the estimated life of the holding (as accepted by the valuation board concerned) as the period during which the capital and income of the compensation received in respect of the holding must be completely consumed. (ii) Assume that the holding would have produced, during each year of its estimated life, the estimated royalty income, if any, for that year (as accepted by the valuation board concerned). (iii) Estimate the yearly rate of interest which the compensation, or the balance of it from time to time remaining in hand, can be reasonably expected to produce during the period represented by the estimated life of the holding, and assume for the purposes of calculation that the rate of interest so estimated (which I will term "the conventional rate") will be uniformly maintained throughout that period. (iv) Calculate what abatement, uniformly applied to the estimated royalty income for every year, must be made in the estimated royalty income for each year in order to ensure that the capital and income of the compensation will exactly suffice to provide for the payment in each year of the appropriate abated amount (which I will term "the abated royalty equivalent") to the person for the time being entitled in possession under the settlement during the whole of the period represented by the estimated life of the holding, and will, by means of such payments, be completely exhausted by the end of that period, on the footing that (a) there will be no appreciation or depreciation in the value of the investments representing the compensation; (b) the compensation will produce uniformly throughout the period no less and no more than the conventional rate of interest; and (c) the person for the time being entitled in possession is to receive in respect of each year the income of the compensation for that year or the abated royalty equivalent, whichever is the greater, and the excess, if any, of the abated royalty equivalent for any year over the income of the compensation for that year (which I will term "the capital supplement") is to be provided out of capital. (v) The compensation having been duly invested within the range of investments authorised by para. 21 (5), pay the person for the time being entitled in possession the resulting income, together with the capital supplement, if any, for each year, and continue this process until the compensation is exhausted or the balance of it becomes vested in possession in some person or persons absolutely entitled under the settlement, whichever event first happens. In the present case it will obviously be the latter. For the purposes of apportionment on the death of a tenant for life, the capital supplement attributable to any year should, I think, be treated as accruing from day to day during that year. (vi) If a proportion of the royalty income derived from the holding in any year, had it remained subject to the settlement instead of being compulsorily acquired, would, in view of the Settled Land Act, 1925, s. 47, have been liable to be set aside as capital money arising under the settlement, the like proportion (in this case one-fourth) of the abated royalty equivalent for the same year must be similarly set aside, but, in view of the prohibition against the capitalisation of income contained in the proviso to para. 21 (2) (which I regard as exempting the income of the compensation from accumulation except in so far as there may be an obligation to accumulate by virtue of the actual limitations of the settlement itself in any particular case), not exceeding the amount, if any, of the capital supplement for that year. Any amounts so set aside and the future income thereof will, thenceforth, cease to be subject to the special provisions applicable to the capital and income respectively of the compensation.

There is in evidence a calculation on the lines indicated in (iv) above (but treating the aggregate amount of compensation received in respect of all the holdings as one entire fund) which has been made by an actuary for the purposes of the present case. I am told, and can well believe, that this calculation is a matter of considerable complication and difficulty. If similar calculations are made separately in relation to the compensation received in respect of each of the eight respective holdings, the amount of work involved will be correspondingly multiplied, but the plaintiff claims that this would be substantially to his advantage as tenant for life in possession and, as already indicated, I regard it as the

interest experienced in actual practice. If the capital supplement were to consist of the excess, if any, of the abated royalty equivalent for each year over the actual income for that year, the tenant for life would be underpaid if the actual income exceeded the conventional rate of interest and overpaid if the actual income fell short of the conventional rate of interest. Accordingly, I think that the capital supplement, if any, for each year must be fixed once and for all by reference to the conventional rate of interest. Thus, if the income actually earned is in excess of the conventional rate, the tenant for life will nevertheless receive, in addition to the actual income, the full amount of the capital supplement computed as if the income had been at the conventional rate only. Conversely, if the income actually earned is less than the conventional rate, the tenant for life will, nevertheless, receive by way of addition to the actual income no more than the amount of the capital supplement computed as if the conventional rate of interest had, in fact, been realised. I appreciate that this involves a slight departure from the theoretical perfection of the calculation as between tenant for life and remaindermen, but the calculation itself is only right if the actual rate of interest precisely accords with the conventional rate.

There remains the possibility of appreciation or depreciation in the investments representing the compensation. I can suggest no feasible method of providing for this and, therefore, think it must be accepted that the person or persons ultimately entitled must take their chance of gain or loss on this account according to the event. In any case, it may be said that this element of uncertainty is as nothing compared with the uncertainties in which the estimates concerning the life and productivity of the various holdings are inevitably involved.

formula necessarily produces the right result. In particular, bearing in mind the right of the person for the time being entitled in possession to receive the whole of the income accrued by the compensation, even in years wholly unproductive in terms of estimated income, it seems to me that the effect of fixing the proportion by reference to the present value of each year's estimated royalty income, on the basis of accumulation at the assumed rate of interest throughout the period from the vesting date to the year in question, might be unduly favourable to the tenant for life, inasmuch as the compensation would not be similarly accumulating for the purpose of meeting the proportion so fixed.

As regards the rate of interest to be assumed, I think that it should be 3 per cent. rather than 4 per cent. Mr. Winterbotham pointed out, and I agree, that 4 per cent. is still the rate applied by the court for the purpose of adjusting rights, for example, under the rule in *Howe v. Lord Dartmouth* (2), and he cited the recent case of *Re Parry, Brown v. Parry* (3). It seems to me, however, that the problem here confronting the court is more nearly analogous to the question which arises in cases under the Inheritance (Family Provision) Act, 1938, in regard to the estimation of the annual income of the net estate, which is defined by s. 5 (1) as "the income that the net estate might be expected at the date of the order, when realised, to yield in a year." The practice in such cases has, I think, generally been to assume a yield of 3 per cent. rather than 4 per cent. on the realised value of the net estate, and I think that for the present purpose also the more conservative estimate is to be preferred.

Mr. Wolfe's calculation is attractively simple. His suggestion is that the tenant for life should receive the whole income, plus a yearly payment out of capital bearing the same proportion to the estimated royalty income for the year as the amount of the compensation bears to the aggregate amount of the estimated royalty income for the whole period of the estimated life of the holding. This formula seems to me to be open to objection as unduly favourable to the tenant for life, since the income produced by the fund of compensation, which on this basis is left entirely out of account, must obviously become progressively smaller as the capital of the fund is consumed. Possibly some form of adjustment to meet this objection might be devised, but it does seem to me to be an objection of some substance to Mr. Wolfe's formula as it now stands. Accordingly, I am not prepared to accept either of the formulae proposed by Mr. Winterbotham and Mr. Wolfe, unless I can be satisfied by evidence, showing the results which would be produced by its application to the actual periods and figures involved in this case, that those results would give substantial effect to the requirements of para. 21 (2), according to the construction which I have placed on that paragraph in the *Duke of Leeds* case (1).

Solicitors: *Ridsdale & Son*, agents for *Shipton, Halliwell & Co.*, Chesterfield (for the trustees); *Ponsford & Devenish*; *C. R. Enever & Co.*; *Farrer & Co* (for the beneficiaries); *The Solicitor, National Coal Board*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

- I have now stated what appears to me to be a method—I do not say the only possible method—of giving effect to the requirements of para. 21 (2) and I think the method, which I have stated substantially accords with the submissions made to me at the hearing. The arrangements I have indicated must be treated as taking effect as from the vesting date, *i.e.*, July 1, 1942, and the plaintiff as tenant for life in possession is, accordingly, entitled to immediate payment of the interest and income allowed on or earned by the compensation since that date,
- A** together with the amount of such capital supplements as have accrued due since that date. I was asked to go further and, having, as it were, quantified the plaintiff's interest substantially as indicated, to direct an immediate payment to him out of the capital of the compensation, in commutation and satisfaction of all capital supplements accruing during the residue of his life, and it was strenuously contended that this course was authorised, if not enjoined, by para. 21 (2). The arguments advanced in support of this contention were, I think,
- B** substantially to the following effect. (a) The proportion of the valuation, and consequently of the compensation, attributable to the earlier years in the estimated life of each holding, and, in particular, the years falling within the probable duration of the plaintiff's interest, was, relatively, far higher than the proportion attributable to the later years. I think that this is clearly so, as will be seen from what I have already said about the method of valuation. (b) The increasing
- C** risk of failure to realise the estimated royalty income in the later as compared with the earlier years, recognised in the valuations, is not reflected in the method of disposal of the compensation stated above. (c) Inasmuch as the valuations allowed for income tax on the estimated royalty income and the plaintiff will be liable for tax on the abated royalty equivalent, the result of the method of disposal stated above will, in effect, be to make his interest suffer a two-fold diminution on account of tax. (d) The plaintiff could have sold his life
- D** interest in the holdings at a price substantially in excess of the value of what he will get from the compensation moneys under the method of disposal stated above, while the proportion of the compensation moneys which, according to this method, will go to the persons ultimately becoming entitled to the absolute interest in remainder will be disproportionately large, both in relation to the provision made for the plaintiff and in relation to the present value of their future interest in this speculative asset.
- E** I cannot regard these arguments as supporting the conclusion contended for. The subject-matter as regards each holding of the compulsory acquisition was, I think, quite clearly the entire freehold interest constituting the holding, and the valuation was made and the compensation paid simply in respect of that absolute interest. That being so, I think the steps taken in arriving at the value—the discounting of the estimated royalty income more heavily in later than in earlier
- F** years, the allowance for tax, the increasing scale of risk allowance and so on—are wholly immaterial for the purposes of para. 21 (2). Different considerations would, no doubt, apply if the transaction had involved the separate acquisition for separate sums of compensation of the plaintiff's life interest in possession, on the one hand, and the interests in remainder, on the other, but that was not the case. The compensation, however arrived at and whatever its amount, must, in my judgment, simply be regarded as representing and as substituted
- G** for the freehold interest constituting the holding formerly subject to the settlement. The compensation thus substituted is required by para. 21 (2) to be dealt with so as to “give to the beneficiaries under the settlement the like benefit therefrom as they might lawfully have had” from the freehold interest in the holding formerly subject to the settlement “or as near thereto as may be.” This I take to mean, first, that the benefits which the successive beneficiaries would have received from the holding must be estimated on the footing that,
- H** apart from the compulsory acquisition, the holding would have remained subject to the settlement and the royalty income would have been applied in accordance with the limitations of the settlement, and, secondly, that the compensation must be applied in providing those beneficiaries with successive interests of a character and amount as nearly similar as may be. This seems to me to point clearly to disposal on the lines I have indicated and definitely to rule out the proposal I am now considering, as giving the plaintiff a benefit radically differing in kind from any benefit which he could lawfully have received from the holding as tenant for life under the settlement. The fact that, apart from

the compulsory acquisition, he could have sold his life interest in the holding for a substantially larger sum than is represented by his interest in the compensation under the method of disposal I have indicated seems to me wholly irrelevant. The proceeds of such a sale would have been a benefit derived from the purchaser and not under the settlement. Moreover, the persons ultimately entitled in remainder under the settlement would still have been left with the full benefit of the absolute interest in the holding on its falling into possession so far as then remaining unrevoked. It is, of course, still open to the plaintiff to sell, if so minded, his abated life interest—if I may so describe it—in the compensation. I fully appreciate that such abated life interest, whether he retains or sells it, is of substantially less value to him than the interest he previously had in the holding under the limitations of the settlement, but I do not see how he can be given anything more, consistently with giving due effect to the interests of the persons interested in remainder. Nor do I see how para. 21 (2) can be construed as authorising the commutation, by means of an immediate capital payment, of his prospective right to the capital supplements accruing during his life by way of *solatium* for the fact that his abated life interest is of substantially less value than the interest which it replaces.

In view of the unanimity of all parties in supporting the plaintiff's contention, I suggested the possibility of authorising the proposed commutation by way of compromise, if it could truly be shown to be for the benefit of all infant or unborn or unascertained persons interested or possibly interested under the settlement. It appeared, however, that this suggestion was not acceptable, and I was asked to decide the point one way or the other as a matter of construction of the Coal Act, 1938, and, in particular, sched. III, para. 21 (2). This I have, accordingly, done. My decision against the plaintiff's contention as a matter of legal right does not, of course, rule out the possibility of giving effect to it as a compromise or arrangement if shown to the satisfaction of the court to fulfil the condition mentioned above.

There remains the question of costs. The Coal Act, 1938, sched. III, pt. IV, para. 22 (1), as amended by the Coal Act, 1943, s. 13, provides :

Subject to the provisions of this paragraph and of s. 39 of this Act, the Commission [now the National Coal Board] shall pay the costs reasonably incurred by any person . . . (c) in a case in which the compensation is paid otherwise than as aforesaid, in connection with any application to the court that may be requisite for the purpose of determining the manner in which the compensation ought to be held and disposed of.

Counsel for the National Coal Board agreed that this provision was applicable to the costs of the present proceedings. Accordingly, the costs reasonably incurred by all parties other than the National Coal Board in connection with these proceedings, up to and including this judgment, will be taxed and paid by the National Coal Board, and the costs of any party (other than the National Coal Board), up to and including this judgment, so far as not included in the costs to be paid by the National Coal Board as aforesaid, will be taxed as between solicitor and client and paid out of the compensation. I was asked to give a special direction as to the inclusion in the costs forming the subject of the second above mentioned taxation of the costs of all expert evidence or advice obtained in relation to the matters in question, although not ultimately used, and, in view of the complication and difficulty of the calculations involved, I think that this is a direction which I can properly give.

Declaration accordingly.

Solicitors : *Lowe & Co.* (for all parties other than the National Coal Board) ;
The Solicitor, National Coal Board.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

NATIONAL ANTI-VIVISECTION SOCIETY *v.* INLAND
REVENUE COMMISSIONERS

[HOUSE OF LORDS (Viscount Simon, Lord Wright, Lord Porter, Lord
Simonds and Lord Normand), February 25, 27, 28, March 3, 4, July 2,
1947.]

A *Income Tax—Exemption—Charity—“Established for charitable purposes only”*
—*Anti-vivisection society—Income Tax Act, 1918 (c. 40), s. 37 (1) (b).*

B The appellant society claimed exemption from income tax on the income
of its investments on the ground that it was “a body of persons established
for charitable purposes only” within the meaning of s. 37 (1) (b) of the
Income Tax Act, 1918. The Special Commissioners were satisfied that
the main object of the society was the total abolition of vivisection and,
for that purpose, the repeal of the Cruelty to Animals Act, 1876, and the
substitution of a new enactment prohibiting vivisection altogether. Had
they not regarded themselves as precluded from so doing by authority
(in particular *Re Foveaux, Cross v. London Anti-Vivisection Society* (1)
([1895] 2 Ch. 501)), the commissioners would have held, on the evidence
that any public benefit in the advancement of morals and education which
would result if the society achieved its object would be far outweighed
C by the detriment to medical science and research, and, consequently,
to the public health which would result, and that, on balance, the object
of the society, so far from being for the public benefit, was gravely injurious
thereto, with the result that the society could not be regarded as a charity :—

D HELD : (i) (LORD PORTER dissenting) in determining whether the object
of the society was charitable, the overriding test was whether it was for the
public benefit, and that question was to be answered by the court by forming
an opinion on the evidence before it and weighing injury to the community
against the ostensible charitable purpose of the society, and so, having regard,
as the court should, to the finding of the commissioners that on balance the
object of the society was detrimental to the public benefit, there could be
no justification for saying that it was a charitable object.

E *Re Foveaux, Cross v. London Anti-Vivisection Society* ([1895] 2 Ch.
501) overruled.

Re Hummeltenberg, Beatty v. London Spiritualistic Alliance ([1923]
1 Ch. 237) approved.

(ii) (LORD PORTER dissenting) a main object of the society was
political, (*viz.*, the repeal of the Act of 1876), and for that reason also
the society was not established for charitable purposes only and was not
entitled to exemption from tax under the section.

F *Per* LORD SIMONDS : A purpose regarded in one age as charitable may
in another be regarded differently, but this is not to say that a charitable
trust, when it has once been established, can ever fail. If, by a change in
social habits and needs, or, it may be, by a change in the law, the purpose
of an established charity becomes superfluous or even illegal, or if, with
increasing knowledge, it appears that a purpose once thought beneficial
is truly detrimental to the community, it is the duty of trustees of an
G established charity to apply to the court, or, in suitable cases, to the
Charity Commissioners, or, in educational charities, to the Minister of Educa-
tion, and ask that a *cy-pres* scheme may be established. There might
be cases in which the Attorney-General would think it his duty to intervene
to that end. A charity once established does not die, though its nature may
be changed.

H *Decision of the Court of Appeal*, [1946] 1 All E.R. 205, affirmed.

[AS TO CHARITABLE PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 111-
127, paras. 147-168; and FOR CASES, see DIGEST, Vol. 8, pp. 241-265; Nos. 1-272.]

Cases referred to :

(1) *Re Foveaux, Cross v. London Anti-Vivisection Society*, [1895] 2 Ch. 501; 64
L.J.Ch. 856; 73 L.T. 202; 8 Digest 259, 206.

(2) *Morice v. Durham (Bp.)*, (1805), 10 Ves. 522; 8 Digest 293, 705.

(3) *Income Tax Special Purposes Comrs. v. Pensel*, [1891] A.C. 531; 61 L.J.Q.B.
265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest 241, 1.

- (4) *A.-G. v. National Provincial and Union Bank of England*, [1924] A.C. 262; *sub nom. Re Tetley, A.-G. v. National Provincial and Union Bank of England*, 93 L.J. Ch. 231; 131 L.T. 34; Digest Supp.; *affg. S.C. sub nom. Re Tetley, National Provincial and Union Bank of England, Ltd. v. Tetley*, [1923] 1 Ch. 258.
- (5) *Re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451; 65 L.J. Ch. 700; 74 L.T. 706; 8 Digest 296, 731.
- (6) *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; [1944] A.C. 341; 113 L.J. Ch. 225; 171 L.T. 141; Digest Supp. A
- (7) *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J. Ch. 568; 117 L.T. 161; 8 Digest 265, 270.
- (8) *Re Hummeltenberg, Beatty v. London Spiritualistic Alliance*, [1923] 1 Ch. 237; 92 L.J. Ch. 326; 129 L.T. 124; Digest Supp.
- (9) *Re Cranston, Webb v. Oldfield*, [1898] 1 I.R. 431; 8 Digest 259, 214i.
- (10) *Re Grove-Grady, Plowden v. Lawrence*, [1929] 1 Ch. 557; 98 L.J. Ch. 261; 140 L.T. 659; Digest Supp.; C.A.; *varied on appeal, sub nom. A.-G. v. Plowden*, [1931] W.N. 89, H.L. B
- (11) *Re Wedgewood, Allen v. Wedgewood*, [1915] 1 Ch. 113; 84 L.J. Ch. 107; 112 L.T. 66; 8 Digest 259, 208.
- (12) *London University v. Yarrow*, (1857), 1 De. G. & J. 72; 26 L.J. Ch. 430; 29 L.T.O.S. 172; 21 J.P. 596; 8 Digest 258, 200.
- (13) *Bourne v. Keane*, [1919] A.C. 815; 89 L.J. Ch. 17; 121 L.T. 426; 8 Digest 250, 106. C
- (14) *Inland Revenue Comrs. v. Temperance Council of Christian Churches of England and Wales*, (1926), 136 L.T. 27; 10 Tax Cas. 748; Digest Supp.
- (15) *Re Hood, Public Trustee v. Hood*, [1931] 1 Ch. 240; 100 L.J. Ch. 115; 143 L.T. 691; Digest Supp.
- (16) *De Themmines v. De Bonneval*, (1828), 5 Russ. 288; 7 L.J.O.S. Ch. 35; 8 Digest 265, 268.
- (17) *Re Douglas, Obert v. Barrow*, (1887), 35 Ch. D. 472; 56 L.J. Ch. 913; 56 L.T. 786; 8 Digest 258, 205. D
- (18) *A.-G. v. Marchant*, (1866), L.R. 3 Eq. 424; 36 L.J. Ch. 47; 8 Digest 330, 1128.
- (19) *Re Campden Charities*, (1881), 18 Ch.D. 310; 50 L.J. Ch. 646; 45 L.T. 152; 8 Digest 343, 1359.
- (20) *Thornton v. Howe*, (1862), 31 Beav. 14; 31 L.J. Ch. 767; 6 L.T. 525; 26 J.P. 774; 8 Digest 250, 96.
- (21) *Re Villiers-Wilkes, Bower v. Goodman*, (1895), 72 L.T. 323; 8 Digest 351, 1458.
- (22) *Da Costa v. De Pas*, (1754), Amb. 228; Dick. 258; *sub nom. De Costa v. De Pas*, 2 Swan 487, n; 8 Digest 253, 141. E
- (23) *Cary v. Abbot*, (1802), 7 Ves. 490; 8 Digest 252, 133.
- (24) *Marsh v. Means*, (1857), 30 L.T.O.S. 89; 21 J.P. 725; 8 Digest 312, 933.
- (25) *A.-G. v. Windsor (Dean and Canons)*, (1860), 8 H.L. Cas. 369; 30 L.J. Ch. 529; 2 L.T. 578; 24 J.P. 467.
- (26) *Williams (Sir H. J.) Trusts, Trustees v. Inland Revenue Comrs.*, [1947] 1 All E.R. 513.
- (27) *Inland Revenue Comrs. v. Falkirk Temperance Cafe Trust*, 1927 S.C. 261; 11 Tax Cas. 353; Digest Supp. F

APPEAL by the society from a decision of the Court of Appeal (MACKINNON and TUCKER, L.J.J., LORD GREENE, M.R., dissenting), dated Dec. 20, 1945, and reported [1946] 1 All E.R. 205.

The Special Commissioners, regarding themselves as bound by authority, in particular *Re Foveaux* (1), held that the society was "a body of persons established for charitable purposes only" within the meaning of s. 37 of the Income Tax Act, 1918, and, therefore, entitled to exemption from income tax on the income of its investments. On appeal by the Commissioners of Inland Revenue, MACNAGHTEN, J., reversed that decision, [1945] 2 All E.R. 529, and his judgment was upheld by the majority of the Court of Appeal. G

The society appealed to the House of Lords who, also by a majority, dismissed their appeal. H

Frederick Grant, K.C., Sir Valentine Holmes, K.C., and Senter for the society.

The Attorney-General (Sir Hartley Shawcross, K.C.), David Jenkins, K.C., J. H. Stamp and Reginald P. Hills for the Crown.

The House took time for consideration.

VISCOUNT SIMON: My Lords, in this very important and most difficult case, going as it does to the foundations of the conception of one kind of charit-

able trust, I have read and re-read the opinion which has been prepared by LORD SIMONDS. Notwithstanding views to a different effect which are to be found in the minority judgment of LORD GREENE, M.R., in the Court of Appeal, and in another opinion about to be pronounced in this House, I cannot escape from the course of argument contained in LORD SIMONDS' opinion, or from the conclusion at which he arrives. I, therefore, move that this appeal be dismissed with costs.

A **LORD WRIGHT:** My Lords, the issue in this case is whether the appellant society is entitled to exemption from income tax under s. 37 of the Income Tax Act, 1918, on the ground that it is a body established for charitable purposes only. The year of charge is the year ending Apr. 5, 1943, and the subject is the society's invested income aggregating £2,876 15s. 7d. The Special Commissioners before whom the matter came felt bound to allow the claim on the authority of *Re Foveaux* (1), in which CHITTY, J., had held that the society was a charity, though they would, apart from authority, have held that on balance the object of the society, so far from being for the public benefit, was gravely injurious thereto, and, therefore, that the society could not be regarded as a charity. They also, on the ground of the same authority, rejected the argument that the society could not claim to be a charity because the alteration of the law by means of legislation was a main object of the society. That decision was reversed by MACNAGHTEN, J., and his decision was affirmed on appeal by the Court of Appeal, by a majority, LORD GREENE, M.R., dissenting.

B The commissioners heard a great deal of evidence and their material conclusions in the Case they stated were :

C We are satisfied that the main object of the society is the total abolition of vivisection, including, in that term, all experiments on living animals, whether calculated to inflict pain or not, and (for that purpose) the repeal of the Cruelty to Animals Act, 1876, and the substitution of a new enactment prohibiting vivisection altogether . . . We think it has been conclusively proved that :—(a) a large amount of present day medical and scientific knowledge is due to experiments on living animals ; (b) many valuable cures for, and preventatives of, disease have been perfected by means of experiments on living animals, and much suffering both to human beings and to animals has been either prevented or alleviated thereby. We are satisfied if experiments on living animals were to be forbidden (i.e., if vivisection were abolished) a very serious obstacle would be placed in the way of obtaining further medical and scientific knowledge calculated to be of benefit to the public.

D They were also prepared, if it was to be assumed that any public benefit in the direction of the advancement of morals and education amongst men would or might result from the society's efforts to abolish vivisection, of which they had no express evidence, and if their function was to determine the case on the footing of weighing an assumed public benefit in the direction of the advancement of morals amongst men, which could, or might, result from the society's efforts to abolish vivisection, to hold, on the evidence, that any such assumed public benefit was far outweighed by the detriment to medical science and research, and, consequently, to the public health, that would result if the society succeeded in its object, and that on balance the object of the society, so far from being for the public benefit, was gravely injurious thereto, with the result that the society could not be regarded as a charity.

E I think the first thing to examine is whether *Re Foveaux* (1) was rightly decided and whether the commissioners were justified in regarding themselves as bound by the authority. Before examining *Re Foveaux* (1) it will be convenient to bear in mind, what is now generally accepted, that the decision that a gift or fund is charitable is a matter for the decision of the court on all the materials before it. "Charitable" in this context has reference to charitable in the legal sense. Charity indeed is here a word of art of precise and technical meaning. From very early times the decision was the function of the court. Thus, rules grew around the very sketchy list in the Statute of Elizabeth (43 Eliz., c. 4). Judicial precedents were established. An early attempt to simplify the problem by a classification under main heads was the summary under four heads submitted by SIR SAMUEL ROMILLY (then MR. ROMILLY) arguing in *Morice v. Bishop of Durham* (2) (10 Ves. 532). These heads were, first, relief of the indigent, second, advancement of learning, third, the advancement of religion, fourth, which is the most difficult, the advancement of objects of

general public utility. This classification substantially was adopted by LORD MACNAGHTEN about 85 years later in his famous list of charitable purposes in *Pemsel's case* (3) ([1891] A.C. 583), which is too familiar to call for quotation here. LORD MACNAGHTEN had emphasised that he was discussing the legal meaning of charity; like SIR SAMUEL ROMILLY he remarked on the distinction between the popular and the legal meaning of the word. It is not necessary at this time of day, to observe that not every object which is beneficial to the community can be regarded as charitable. The legal significance is narrower than the popular. This was fully and explicitly held by this House in *A.-G. v. National Provincial Bank* (4), which followed *Re Macduff* (5), and was discussed more recently, but more in relation to the construction of general words than to specific instances, in *Chichester Diocesan Fund v. Simpson* (6). Even if the object were in some sense beneficial to the community, it would still be necessary to discover that it fell within the spirit and intendment of the instances given in the Statute of Elizabeth. Healthy and manly sports are certainly in fact beneficial to the public, but apart from special concomitants are not generally entitled to qualify as charitable objects. On the other hand, societies or institutes for scientific research would generally be charities, as being for the benefit of mankind under the fourth head, or, alternatively, as falling within the extended significance given to education or the advancement of learning which includes, in modern times, science. Even societies coming within the first three heads of LORD MACNAGHTEN'S classification would not be entitled to rank as legal charities if it was seen that their objects were not for the public benefit. Where a society has a religious object it may fail to satisfy the test if it is unlawful, and the test may vary from generation to generation as the law successively grows more tolerant. LORD PARKER in *Bowman v. Secular Society* (7) ([1917] A.C. 448, *seq.*), gives a long list illustrating this principle. It cannot be for the public benefit to favour trusts for objects contrary to the law. Again eleemosynary trusts may, as economic ideas and conditions and ideas of social service change, cease to be regarded as being for the benefit of the community, and trusts for the advancement of learning or education may fail to secure a place as charities, if it is seen that the learning or education is not of public value. The test of benefit to the community goes through the whole of LORD MACNAGHTEN'S classification, though, as regards the first three heads, it may be *prima facie* assumed unless the contrary appears.

Re Foveaux (1) was decided in 1895 by CHITTY, J. The headnote ([1895] 2 Ch. 501), is simply:

Societies for the suppression and abolition of vivisection are charities within the legal definition of the term "charity."

The particular societies in question were either the predecessors of the present society or were substantially identical for all relevant purposes. The object as stated by CHITTY, J. (*ibid.*, 503) was the total suppression of the practice of vivisection. At the time when the decision was given an Act entitled the Cruelty to Animals Act, 1876, was in force. That Act made it unlawful and an offence to perform on a living animal any experiment calculated to give pain except subject to the restrictions imposed by the Act. One provision was that the particular experiment was to be performed with a view to the advancement by new discovery of physiological knowledge or of knowledge which will be useful for saving or prolonging life or alleviating suffering. It was generally required by the Act that the animal should be under a sufficient anaesthetic save in special circumstances in which case a certificate was necessary under stringent conditions and experimenters were to hold a licence. This Act has remained in force since then. Its repeal is the main object of the present society. CHITTY, J., (*ibid.*, 504) refers to the Act as being the subject of controversy between the supporters and opponents of the practice of vivisection. The former, he said, argue that the practice under carefully guarded provisions is justifiable because it tends to promote the welfare of the human race and even animals. The latter argue that the practice is really unjustifiable. The judge seemed disposed to regard the issue as depending on how the element of the improvement of morality was to be considered, but he had already accepted the position that the court does not enter into or pronounce any opinion on the merits of the controversy between the two sides. Though he knew of the report of the

Royal Commission on Vivisection, the court, he said, "stands neutral" (*ibid.*, 503). Later in his judgment he said that the intention is to benefit the community: whether, if they achieved their object, the community would, in fact, be benefited is a question on which the court is not required to express an opinion (*ibid.*, 507). Whatever else is clear, it is, I think, clear that the question he is proposing involves the balancing of utilities. I cannot understand how the judge could avoid deciding the very question necessary for his decision, *viz.*, whether the society satisfies the fourth head, as being beneficial to the community. That I think is the test he proposes. He questions if the infliction of pain is necessarily cruelty. It may be justifiable, he concedes, but that, he thinks, is a question of morals on which men's minds may differ (*ibid.*). But he seems to conclude the matter by holding that the intention of the creator of the trust is to benefit the community. That he treats as decisive: he declines to determine whether the community would in fact be benefited.

This judgment has stood since it was delivered. Though it has not been reversed it has been severely criticised by a great authority, LORD RUSSELL OF KILLOWEN, though by way of *dictum* and not decision. There have also been other judicial pronouncements which may have to be considered. The earlier of the cases in which RUSSELL, J., as he then was, adverted to this question was *Re Hummeltenberg* (8); the matter in that judgment most material to the discussion of CHITTY, J.'s judgment is shortly expressed in the headnote ([1923] 1 Ch. 237):

The opinion of the donor of a gift or the creator of a trust that the gift or trust is for the public benefit does not make it so, the matter is one to be determined by the court on the evidence before it.

RUSSELL, J., at p. 242, rejected the contention on the lines of the views expressed in *Re Cranston* (9), and by CHITTY, J., in *Re Foveaux* (1). RUSSELL, J., clearly defined his opinion at p. 242:

If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects, of which the training of poodles to dance might be a mild example. In my opinion, the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it.

I accept these observations as correctly stating the law. They were, in fact, adopted by the majority of the Court of Appeal in the next case I shall cite which is an "animal" case. It is *Re Grove-Grady* (10). It is sufficient here to record that the purpose of the society contemplated by the trust was the acquisition of land for the provision of refuges for the preservation of "all animals birds or other creatures not human." The principle of the decision

was that there could not be a legal charitable trust unless its execution involved a benefit to the community. Hence, a trust for the benefit of animals would not merely on that ground be charitable. There must be a further element, in particular, that the discouragement of cruelty promotes humane sentiments in man towards the lower animals which involves moral benefit to the human community. RUSSELL, L.J., as he then was, reiterated ([1929] 1 Ch. 588) the proposition that:

... the court must determine in each case whether the trusts are such that benefit to the community must necessarily result from their execution.

He added significant words:

The authorities have, in my opinion, reached the furthest admissible point of benevolence in construing, as charitable, gifts in favour of animals, and for myself, I am not prepared to go any further.

The same warning had been uttered by LORD STERNDALE, M.R., in *Re Tetley* (4). He said ([1923] 1 Ch. 266):

I confess I find considerable difficulty in understanding the exact reason why a gift for the benefit of animals, and for the prevention of cruelty to animals generally, should be a good charitable gift, while a gift for philanthropic purposes, which, I take it, is for the benefit of mankind generally, should be bad as a charitable gift.

LORD STERNDALE, M.R., (*ibid.*, 269) agreed with the principles stated by RUSSELL, J., (*ibid.*, 261) which formed the basis of the decision of the Court of Appeal.

It is clear that *Re Grove-Grady* (10) was not inconsistent with the general

view in favour of preventing cruelty to animals. The trust in that case did not protect the weaker animals from the cruelty of the stronger and more savage, because the idea of the testatrix was to provide a sanctuary in which animals might be free from the danger of being shot or trapped or otherwise maltreated by human beings, though left at liberty to indulge their natural instincts of inherent cruelty against each other. *Re Wedgewood* (11) was discussed in that case. The trust there was to apply the fund for the protection and benefit of animals. It was held to be valid on the ground that it was calculated to promote public morality by checking the innate tendency to cruelty. Much that was said in that case clearly went too far. The emphasis of the actual decision, however, was that the moral benefit to mankind consisted in promoting feelings of kindness towards animals and thus promoting feelings of humanity and morality generally; the limitation of the doctrine to animals useful to man which was prominent in the earlier of the animal cases, *University of London v. Yarrow* (12), was lost sight of or at least had fallen into the background in view of the wider and less specific doctrine of moral improvement, which was held to satisfy the requirement of benefit to the community under the fourth head of LORD MACNAGHTEN'S classification. It was held to be present in *Re Wedgewood* (11), but absent in *Re Grove-Grady* (10), but in neither case was it ignored.

I do not intend to make a complete anthology of the "animal" cases, but I must refer shortly to the most important of the Irish cases on gifts for the benefit of animals, *viz.*, *Re Cranston* (9), a decision of the Irish Court of Appeal. There the bequest was in favour of a vegetarian society, whose purpose was to stop the killing of animals for food which was condemned as being inconsistent with the rights of animals and calculated to produce demoralising effects on men. The validity of the gift was upheld by the majority of the Irish Court of Appeal, largely for reasons taken to be derived from *Re Foveaux* (1), but a powerful dissenting judgment was delivered by HOLMES, L.J. ([1898] 1 I.R. 452). He was content, indeed, to distinguish *Re Foveaux* (1), but he demanded to know (*ibid.*, 457) if a belief by the promoters in the utility of their project to eliminate the use of animal food could make it a charity in any sense which the law attaches to that term. "If so," he said, "every object not actually immoral or illegal must be held a charity." He enforced his opinion by giving instances of matters which might be conceived to be beneficent agencies by a few idealists or cranks.

The result so far has been that it is necessary for your Lordships to decide whether *Re Foveaux* (1) was rightly decided, or, perhaps more accurately, whether the commissioners were right in thinking that it governed the case before them. No doubt, CHITTY, J., had, in the report of the Royal Commission on Vivisection, which was before him, amply sufficient evidence of the utility of vivisection and hence of the mischief of any project aimed at making it unlawful, but it is not clear how far he had appreciated the full force of the evidence. The evidence now produced of the enormous advances in science and research which has been accepted by the commissioners in their findings of fact on the utility of vivisection is indeed such as no fair-minded man could refuse full credence. It is conclusive to my mind; besides the findings are binding on your Lordships. *Re Foveaux* (1) has been the subject of much discursive comment, but it has not been the subject of decision in this House until the present case. The fact that it has stood so long cannot bar this House from reversing it if your Lordships are satisfied that it is wrong. *Bourne v. Keane* (13) ([1919] A.C. 815), is sufficient authority as to the general powers of the House, or, as I should say, its duty. One of the most important aspects of the judicial functions of this House is to harmonise or correct the decisions of the lower courts, even though, as LORD BIRKENHEAD, L.C., said at p. 830, it would be "overruling decisions which have been treated as binding for generations."

In my opinion, *Re Foveaux* (1) was wrongly decided and should now be reversed. CHITTY, J., was wrong in taking the intention of the donor as a sufficient test that the gift was charitable. That is vital. He was wrong in holding that he could stand neutral and not decide, on the facts before him, the question whether the gift was for the public benefit. If he stood neutral, he could not decide in favour of one side and against the other side. He was inconsistent in holding that the gift was charitable while at the same time

refusing to decide whether it was for the public benefit : unless he so decided in favour of the gift he could not decide that it was charitable. If he was not satisfied that the propaganda and expenditure for the suppression of vivisection were beneficial to the community, he could not hold that the activities of the society were charitable or that the society was entitled to exemption from income tax under s. 37 of the Income Tax Act, 1918, or to the benefit of a perpetuity. He was also wrong in deciding that he could not weigh against each other the detriment inseparable from suppressing vivisection, on the one hand, and, on the other hand, the benefit to the community of higher moral standards said to be due to enhanced regard for the well-being of animals. There is not, so far as I can see, any difficulty in weighing the relative value of what it called the material benefits of vivisection against the moral benefit which is alleged or assumed as possibly following from the success of the society's project. In any case the position must be judged as a whole. It is arbitrary and unreal to attempt to dissect the problem into what is said to be direct and what is said to be merely consequential. The whole complex of resulting circumstances of whatever kind must be foreseen or imagined in order to estimate whether the change advocated would, or would not be, beneficial to the community. The commissioners have abstained from any but the vaguest finding on the possibility of moral benefit. They had no evidence, they said, on the point, but, at the highest, the assumed or alleged benefit is indirect and problematical. There is clearly no general consensus of opinion or understanding against the practice of vivisection which has been permitted by Parliament as regulated under the Act of 1876. That Act has stood all these years substantially without any serious attack. It seems that people's moral feelings are not weakened nor their objections to cruelty to animals reduced by the existence of the Act. If they think about it at all they think of the immense and incalculable benefits which have resulted from vivisection. If that involves some measure of pain at times to some animals, notwithstanding the Act, they feel that it is due to a regrettable necessity. Similarly, a man who has a beefsteak for dinner, if he thinks at all about the slaughter of the beast, reflects that that is inevitable in the present constitution of society. I do not question that a high degree of regard for animals is a good thing, but it must be a regulated regard. Cruelty, that is purposeless cruelty, whether through brutality or through a purpose to satisfy our pleasure or our pride, cannot be forgiven. It is, indeed, also a penal offence at law, but it is impossible to apply the word cruelty to the efforts of high-minded scientists who have devoted themselves to vivisection experiments for the purpose of alleviating human suffering. HARVEY was only able to publish in 1628 his great work, *De motu cordis*, because he had been given deer from the Royal park for purposes of vivisection. Countless millions have benefited from that discovery. I do not minimise the sufferings of the unfortunate deer. The subject of vivisection is not a consenting party nor does it benefit, but I put against that the benefit to humanity. It has been argued that a court cannot weigh moral and material benefits against each other. This is not the place to accept or reject BENTHAM'S pronouncement that "measure for measure pushpin is as good as poetry," or debate whether utilitarian or intuitionist ethics is the truer theory, but in ordinary life people often have to decide between a moral and a material benefit. However, I do not think that is a fair statement of the issue. The scientist who inflicts pain in the course of vivisection is fulfilling a moral duty to mankind which is higher in degree than the moralist or sentimentalist who thinks only of the animals. Nor do I agree that animals ought not to be sacrificed to man when necessary. A strictly regulated amount of pain to some hundreds of animals may save and avert incalculable suffering to innumerable millions of mankind. I cannot doubt what the moral choice should be. There is only one single issue. I have great sympathy with much that LORD GREENE, M.R., has said in his powerful dissenting judgment. I have a great love for animals and some familiarity with certain classes. I am sorry that rabbits, a weak and an innocent but monstrously destructive race, should have to be destroyed in great numbers as they were and are being, to save our people from qualified starvation. I agree with the MASTER OF THE ROLLS that rats, beetles and other pests, if they have to be destroyed, should be destroyed with as little cruelty as possible, but destroyed they must be. The lives of animals at the best are precarious.

Millions have perished in the last frost. That is a regrettable necessity, but, however it is looked at, the life and happiness of human beings must be preferred to that of animals. Mankind, of whatever race or breed, is on a higher plane and a different level from even the highest of the animals who are our friends, helpers and companions. No one faced with the decision to choose between saving a man or an animal could hesitate to save the man.

I have turned for a while to considerations of fact because that is inevitable in balancing conflicting value. To my mind, the scale of the anti-vivisectionist mounts up and kicks the beam. A statesman is constantly weighing conflicting moral and material utilities. I must add that I have great doubt, even apart from the final argument which I shall advert to in a moment, that the object of abolishing vivisection can on any view be regarded as being in law a public charitable object. It is not analogous to any of the objects enumerated in the preamble to the Statute of Elizabeth. Its only claim to be admitted must rest on the fourth head. To get into that class it must be established that it is beneficial to the community. What it seems to do, however, is to destroy a source of enormous blessings to mankind. That is a positive and calamitous detriment of appalling magnitude. Nothing is offered by way of counterweight but a vague and problematical moral elevation. The law may well say that, quite apart from any question of balancing values, an assumed prospect, or possibility of gain so vague, intangible and remote cannot justly be treated as a benefit to humanity, and that the society cannot get into the class of charities at all unless it can establish that benefit. If it fails, it can still continue to carry on such lawful purposes as the members desire and its funds, exiguous as they are, permit. Apart from the "animal" cases I cannot find any precedent for such an object being held charitable. On the other hand, the vivisectionists, who are attacked, can fairly claim that their purpose is charitable and would generally be so recognised either under the fourth head of the accepted classification or under the head of advancement of learning. I think that the whole tendency of the concept of charity in a legal sense under the fourth head is towards tangible and objective benefits, and at least that approval by the common understanding of, enlightened opinion for the time being is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community to justify admission of the object into the fourth class. By this test the claim of the society would fail.

But there is another and essentially different ground on which, in my opinion, it must fail. That is because its object is to secure legislation to give legal effect to it. It is, in my opinion, a political purpose within the meaning of LORD PARKER's pronouncement in *Bowman v. Secular Society, Ltd.* (7) ([1917] A.C. 442). LORD PARKER was discussing in a different connection the same question of the true criterion for deciding if charitable gifts are for the benefit of the public in the legal sense. He was there referring to the objects enumerated in the memorandum of association of the Secular Society, Ltd. He said:

Now if your Lordships will refer for a moment to the society's memorandum of association you will find that none of its objects, except possibly the first, are charitable. The abolition of religious tests, the disestablishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognise such objects as charitable. It is true that a gift to an association formed for their attainment may, if the association be unincorporated, be upheld as an absolute gift to its members, or, if the association be incorporated, as an absolute gift to the corporate body; but a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

While I was preparing this part of my opinion LORD SIMONDS was kind enough to draw to my attention the passage which in due course your Lordships will hear quoted by him from a work of authority, TYSSON ON CHARITABLE BEQUESTS.* It is, I think, a very important contribution to this question. It appears to me to go to explain and justify LORD PARKER's opinion. I refer especially to TYSSON's words: "the law could not stultify itself by holding

**vide* p. 232, 233 post.

that it was for the public benefit that the law itself should be changed " and again : " Each court . . . must decide on the principle that the law is right as it stands." I am reminded of the words of a great common law judge who warned the courts against usurping the functions of the legislature. I regard the statements of LORD PARKER and TYSEN not as inconsistent, but as complementary.

In my opinion, the Crown's objection under this head is well founded. The commissioners held that :

. . . the alteration of the law by means of legislation is a main purpose of the society, but the repeal of the Act of Parliament [*i.e.*, the Cruelty to Animals Act, 1876], was undoubtedly part of the society's object in 1895.

They, accordingly, felt bound to follow CHITTY, J., on this point as they had done on the first point. Your Lordships are not bound by the judgment of CHITTY, J., and I prefer the reasoning on the point of ROWLATT, J., in *Inland Revenue Comrs. v. Temperance Council of Christian Churches of England and Wales* (14). ROWLATT, J., held in respect of the respondent in that appeal that the purpose was, not charitable, but political within the meaning of the principle stated by LORD PARKER. He held that legislation occupied the greater part of the field in the description of the objects of the respondent. He held that any purpose of influencing legislation is a political purpose in this connection on the clear authorities, that the respondent's direct purpose was to effect changes in the law, and that was not a charitable purpose. He distinguished what he called the anti-vivisection cases (*i.e.*, the cases which I have been discussing) on the ground that in them the alteration of the law was subsidiary and not a main purpose. While I agree with the decision of ROWLATT, J., I venture to think that he fell into error in distinguishing, as he did, the anti-vivisection cases, or, at least, that his assumed ground of distinction could not be applied in the present case.

The commissioners here held categorically, as already stated, that the repeal of the Cruelty to Animals Act, 1876, and the substitution of a new enactment prohibiting vivisection altogether was the main object of the society. I, accordingly, treat the judgment of ROWLATT, J., which I have just cited, as a precise authority from that very eminent judge to support my conclusion that, on this special ground, in addition to the others I have mentioned, the objects of the society were not charitable. ROWLATT, J.'s judgment was distinguished, but not disapproved, by LAWRENCE, L.J., in *Re Hood* (15). He said ([1931] 1 Ch. 252) :

. . . in that case the gift was not for the promotion of temperance generally, but was for the promotion of temperance mainly by political means . . .

These words, *mutatis mutandis*, can be applied aptly to the present case. The illustrations given by LORD PARKER in the passage quoted above show clearly what meaning he attached to the word "political." It was not limited to party political measures, but would cover activities directed to influence the legislature to change the law in order to promote or effect the views advocated by the society. Such a change would be in the same category as the instances given by LORD PARKER of what he regarded as political objects and would exclude the society from the category of charities. Its proposed object is of a public and very controversial character. The present capacity of the society is not great, but the possibilities of political agitation would be immensely increased if a few millionaires were to endow it with great financial resources. This conclusion does not in any way extend or affect the freedom of the society to promote their cause, which is lawful enough, by any legitimate or proper means, but it does prevent them from claiming the benefit of being immune from income tax, which would amount to receiving a subsidy from the State to that extent. LORD PARKER was, I think, merely enunciating a specific limitation on the extent of the legal definition of charitable trusts. There are in this case stronger grounds than LORD PARKER contemplated in his broader statement of principle for the court declining to say that a gift to secure the change is a charitable gift. I should dismiss the appeal.

LORD PORTER : My Lords, the question what is or is not a charity is always a difficult problem partly, I think, owing to the fact that the meaning now attributed to the word is derived from the preamble to the Act of Elizabeth,

which, though the Act itself has been repealed, has been re-enacted and gives a kind of example of the class of matters then held to be charitable. From this beginning legal decisions have extended the meaning of the word to many matters which would not originally have been included. But the difficulty does not lie in the origin of the doctrine alone. It is, I think, inherent in the subject-matter under consideration. Whether any two persons would agree in all cases as to what "charity" should include is at least doubtful. It is not the law but the diversity of subjects which creates the difficulty. A step towards a closer definition was, however, reached in *Pemsel's* case (3) in LORD MACNAGHTEN's well-known speech dividing charitable objects into four classes, with the result that, at the present day, all claims to embrace an object under the head of a charity must assert that it comes within one of the four classes. In the present case the society claims to come under the fourth head. LORD MACNAGHTEN says ([1891] A.C. 583):

Charity in its legal sense comprises four principal divisions—trusts for the relief of poverty: trusts for the advancement of education: trusts for the advancement of religion: and trusts for other purposes beneficial to the community not falling under any of the preceding heads.

In this language it might well have been argued that trusts for any of the first three objects were charitable whether they were beneficial to the community or not, but that inclusion in the fourth class is only permissible if such benefit can be shown. I cannot, however, find that such a contention has been put forward. It was expressly repudiated by both sides in the present case and rejected by RUSSELL, J., in *Hummeltenberg's* case (8) ([1923] 1 Ch. 240). One must take it, therefore, that in whichever of the four classes the matter may fall, it cannot be a charity unless it is beneficial to the community or to some sufficiently defined portion of it.

The difficulties of the present case arise firstly in determining what is of benefit to the public and who is to determine that question, but a not less difficult, though perhaps less subtle, question is whether the objects of the society are political within the meaning of that word as used by LORD PARKER in *Bowman's* case (7) ([1917] A.C. 442). The facts are fully stated by LORD SIMONDS, and he quotes the material passages from the findings of the commissioners. In so far as those findings are for them and are determinative of the matter in issue, your Lordships are of course bound by their decision. The only questions, therefore, are (1) whether the finding of the commissioners that "the main object of the society is the total abolition of vivisection . . . and (for that purpose) the repeal of the Cruelty to Animals Act, 1876, and the substitution of a new enactment prohibiting vivisection altogether" amounts to a finding that the society's object is political in the sense in which that word is used when it is said that political objects are not charitable, and (2) whether the finding that "any assumed public benefit in the direction of morals and education is far outweighed by the detriment to medical science and research, and, consequently, to the public health, which would result if the society succeeded in achieving its object and that, on balance, the object of the society, so far from being for the public benefit, is gravely injurious thereto" is a finding of fact as a result of which your Lordships ought to hold that the objects of the society are not charitable.

My Lords, before dealing with the first question, I would desire to point out that, read strictly, the second finding would appear to contrast moral and educational advancement with the public health and so to contrast an ethical with a material benefit. It was, however, strenuously and, I think, successfully urged by the Crown that this was not an accurate summing up of the position. The object of curing human or even animal illness and suffering itself aims at a moral end and the question is not fairly stated as a conflict between material and moral benefits, but, as counsel for the society was prepared to accept, as a conflict between one ethical outlook and another. His point was not that the material must give place to the moral but that the commissioners or the court are not empowered to decide such a question. In the words of CHITTY, J., in *Foveaux's* case (1) ([1895] 2 Ch. 503) the court "stands neutral." The commissioners, against their own judgment, felt themselves bound to follow the opinion of CHITTY, J., in that case. MACNAGHTEN, J., however, and the majority of the Court of Appeal (the MASTER OF THE ROLLS dissenting) took a

contrary view. In both cases the decision turned on the second point. Neither tribunal decided the first though it is obviously important and, as I understand, in the view of the majority of your Lordships, is determinative of the present case in favour of the Crown.

A 1. As LORD SIMONDS points out, it is curious how scanty the authority is for the proposition that political objects are not charitable, and the only case quoted by LORD PARKER in *Bowman's* case (7), viz., *Re Themmines v. De Bonneval* (16), turned upon public policy and not upon what, apart from that question, is or is not a charity. Moreover, the illustrations given by LORD PARKER ([1917] A.C. 442), of the political matters which he had in mind, "The abolition of religious tests, the disestablishment of the Church, the secularization of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath," are, I think, primarily matters which could not be effected without an alteration of the law. The object in each case is to do away with a positive B injunction to which an end can only be put by repealing the law; an Act of Parliament is required in order to do so. An example may be taken from the first illustration given by LORD PARKER. No agreement come to by individuals or groups could dispense with the obligation of complying with the provisions of the Test Acts, whereas slavery or vivisection could be put an end to without disobedience to the law if all members of the community could be induced to desist from these practices. It is in the narrower sense in which I think the C phrase "purely political objects" is rightly used, i.e., as applicable to objects whose only means of attainment is a change in the law. I cannot accept the view that the anti-slavery campaign or the enactment of the Factory Acts or the abolition of the use of boy labour to sweep chimneys, would be charitable so long as the supporters of these objects had not in mind, or, at any rate, did not advocate, a change in the laws, but became political and, therefore, non-charitable, if they did so. To take such a view would to me be to neglect D substance for form. The object was to stop slavery or the use of boy chimney sweeps, and to ensure that certain minimum requirements were carried out in factories. All this could be done by common consent, though no doubt the only effective method would be to alter the law. But persuasion, not force, was a possible means of effecting the desired purpose. So, in the case of members of the society, a conceivable, though a very unlikely, way of effecting its purpose E would be to persuade mankind to cease from experiments on animals, and it is possible that its members would prefer success by that means, though I have no doubt they would frankly admit that they saw no possibility of such an event. They would not, however, be asking anyone to break the law by refraining from vivisection. Their primary object, as I see it, is to prevent animal suffering caused by vivisection, though a main method of effecting that end is to repeal the present Act and such repeal is in that sense a main object of the F society. As the commissioners say:

We are satisfied that the main object of the society is the total abolition of vivisection and (for that purpose) the repeal of the cruelty to Animals Act, 1876, and the substitution of a new enactment prohibiting vivisection altogether.

And again:

G We agree that the alteration of the law by means of legislation is a main purpose of the society.

In so far as the decision of ROWLATT, J., in *Inland Revenue Comrs. v. Temperance Council* (14) is inconsistent with this view, I do not agree with it, though a distinction might be made between that case and this inasmuch as there legislation is put in the forefront of the object of the council, and some support for this view may perhaps be gained from the decision in *Re Hood* (15). Moreover, as the commissioners point out, this point was as open and as valid in *Re Foveaux* (1) as in this case and yet it was never taken. For these reasons, which H perhaps differ a little from those presented by the MASTER OF THE ROLLS, I agree with his view upon this point and inasmuch as none of the other members of the court below dealt with it do not find myself at difference with any of their expressed views.

2. On the second point the Crown says that the object, if it is to be charitable, must, like any other charitable object, be for the benefit of the public; the commissioners have held that "on balance the object of the society, so far from being for the public benefit, is gravely injurious thereto": that that finding

was one of fact and conclusive of the case as against the society. The society, on their part, maintain that trusts inculcating humanity towards animals are (as has frequently been held) for the public benefit and that it is not for the commissioners or a court to enter into what may be fine distinctions as to the question of the *quantum* of benefit as opposed to the disadvantages. The conflict, as I see it, is between the view held by CHITTY, J., in *Re Foveaux* (1) and the criticisms or suggested criticisms of that view to be found in the judgment of RUSSELL, J., as he then was, in *Re Hummeltenberg* (8), and the Court of Appeal of whom RUSSELL, L.J., formed one in *Re Grove-Grady* (10). Any observations of that learned judge, whether in the court of first instance or the Court of Appeal or in your Lordships' House, even though not strictly an essential part of his decision, could only be differed from with great diffidence and it is therefore necessary to consider their exact bearing in the cases in which they are found. One thing is certain and was not contested by counsel for the society—the intention of the donor in making the gift cannot affect the result. The question must be judged independently of his idea of what is or is not charitable, but, undoubtedly, as has been pointed out more than once, a gift for the protection of animals is *prima facie* at any rate a good charitable gift. It is enough in this connection to refer to the observations of SWINFEN-EADY, L.J., in *Re Wedgewood* (11) ([1915] 1 Ch. 122). Such a gift then being *prima facie* charitable must remain charitable unless its charitable nature is taken away because on the whole it does more harm than good in the eyes of some tribunal authorised to determine that question. CHITTY, J., as I understand him, said in *Re Foveaux* (1) ([1895] 2 Ch. 503) that that question was not one which the tribunal of fact was entitled to decide. The court or the commissioners, as the case may be, were authorised to determine whether the object was one of a class which was or had been held to be charitable, *i.e.*, whether it was one of a class which *prima facie* benefited the public. After that the tribunal remained neutral. It was not for it, in a conflict of opposed opinions, to analyse further the beneficial or injurious results of the gift.

Foveaux's case (1) has more than once been quoted since its decision and apparently accepted without criticism, except in so far as LORD RUSSELL can be said to disapprove of it, and save for such qualifications of the acceptance of its doctrine as may have been implied in the earlier case of *Re Douglas* (17). In *Re Wedgewood* (11) it appears to have been accepted without comment by KENNEDY and SWINFEN-EADY, L.JJ., and LORD HANWORTH, M.R., cites it without criticism in *Re Grove-Grady* (10). Moreover, its principle does, I think, receive support from such a case as *A.-G. v. Marchant* (18). It is quite true that in that case KINDERSLEY, V.-C., refused to increase a gift of doles proportionately with the increase which he granted to a number of other charitable objects on the ground that doles, though for the relief of poverty, were harmful rather than beneficial, but he acted in this way only with regard to accretions to the original gifts on the ground that the court had a discretion, where the original gift has been unexpectedly augmented, to add or not to add to the sum originally given to any one of the different objects. The original gift itself presumably was just as harmful as the accretion would have been, but that portion of the dole he did not, and indeed it was not suggested that he could, touch. *Re Campden Charities* (19) also turned upon the discretion which the court was given of varying the objects of a charity, where, but only where, a scheme was settled *cy-pres* by the Charity Commissioners as a result of a complete change in the character of the neighbourhood and in the value of the gift. The judgment deprecated the giving and denied the benefit to be obtained from doles but nowhere said or attempted to say that to give them would not be a good charity. All it decided was that where the court was bound to administer the funds *cy-pres* it had a discretion as to the object to be included in the scheme and was under no obligation to perpetuate doles.

There remains for consideration LORD RUSSELL's two warnings. In *Hummeltenberg's* case (8) he was discussing the question whether the intention of the giver plays any part in making the object charitable or not, decides that it has no effect, and adds ([1923] 1 Ch. 242):

In my opinion the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it.

It will be observed that the opinion which the court has to form is as to whether the gift is or may be for the benefit of the public, not as to whether on the balance of evidence the scale inclines one way or the other. If the latter were the true meaning I do not know why the words "or may be" were added. The phraseology is at least capable of the interpretation that the court has to determine whether the gift comes within the category of things beneficial to the public, not whether, on balance, the tribunal holds that the disadvantages attached to

- A it outweigh its benefits. *Re Grove-Grady* (10) was concerned with this very point, viz.: was the gift in question within that class which could be held to be a charity? The Court of Appeal differing from ROMER, J., held by a majority that it could not, because there was no benefit to the community in a devise to form a reserve for animals of all kinds, wild or tame, free from the interference of man and with no provision even for his observation of the result: see [1929] 1 Ch. 572. LORD HANWORTH, M.R. ([1929] 1 Ch. 572), after citing the language of RUSSELL, J., in *Re Hummeltenberg* (8) follows *Re Wedgewood* (11) in quoting the words of FITZGIBBON, L.J., in *Re Cranston* (9) ([1898] 1 I.R. 448):

Any gift which proceeds from a philanthropic or benevolent motive, and which is intended to benefit an appreciably important class of our fellow creatures (including, under decided cases, animals) and which will confer the supposed benefit without contravening law or morals will be "charitable."

- C He adopts the views of KENNEDY and SWINFEN-EADY, L.JJ., in the former case. The statement of FITZGIBBON, L.J., undoubtedly requires qualification in that it appears to make the intention of the donor the deciding factor and fails to point out that it is the stimulation of humane and generous sentiments in man and not the protection of animals *per se* which is important but this fact does not affect the view adopted by LORD HANWORTH, M.R. RUSSELL, L.J., however ([1929] 1 Ch. 582), contemplates the possibility of anti-vivisection societies being removed from the class of charities in the light, as he says, of later knowledge in regard to the benefits accruing to mankind from vivisection. In answer to this suggestion it is immaterial to consider the evidence which CHITTY, J., had before him in *Re Foveaux* (1), since the principle which he adopts is not that he is constrained by the evidence to hold the society charitable when he came to weigh the advantages of vivisection against the benefits to be obtained by a crusade against it. RUSSELL, L.J., on the contrary, appears
- E to take the view that the case for and against the benefits to be conferred is to be decided by some tribunal which shall determine whether the humane and generous sentiments exhibited in a desire to save animals from suffering may not be outweighed by the benefits conferred by inflicting it.

I find it difficult to accept the view that, once an object has been held to be included in the class of charities, it is then for the court to hear the evidence of witnesses on the one side and on the other as to whether it is in fact beneficial.

- F I can imagine the severest contest between two sets of witnesses in the case of a gift for a religious purpose, the one saying that it is most beneficial and the other that it is very harmful. Is the tribunal to make up its mind between these two views whether on balance the gift is beneficial to the community or not? Yet if the argument be that the tribunal is to make up its mind on the evidence called before it, I cannot see where it can stop short of determining the matter
- G on the ordinary principle upon which courts act in deciding upon a conflict of evidence, nor can I see any method of determining what preponderance of weight is to incline the scale sufficiently to one side or the other. This view is, I think, in accordance with the opinion of SIR JOHN ROMILLY, M.R., in *Thornton v. Howe* (20) (the Joanna Southcote case) when he says (*inter alia*) (31 Beav. 20):

- H . . . if the tendency were not immoral and although this court might consider the opinions sought to be propagated, foolish or even devoid of foundation, it would not, on that account . . . take it out of the class of legacies which are included in the general terms charitable bequests.

Undoubtedly the object must not be a mere fad or contrary to public policy, but no argument against the claim of the society was presented to your Lordships on either of these points, and fads can be dealt with by the method suggested by KENNEDY, L.J., in *Re Wedgewood* (11).

In my view, the object of this society is the protection of animals from the sufferings believed to be involved in vivisection; that object is, in accordance

with the decisions in what may be called the animal cases, charitable and does not cease to be charitable, in spite of the finding of the commissioners that its success would be gravely injurious to the public benefit. For these reasons, which are substantially those expressed by LORD GREENE, M.R., as well as because I do not think the objects of the society are political in the sense which would prevent them being charitable, I should allow the appeal.

LORD SIMONDS: My Lords, the question raised in this appeal is whether the National Anti-Vivisection Society, which I will call "the society," is a body of persons established for charitable purposes only within the meaning of s. 37 of the Income Tax Act, 1918, and accordingly entitled to exemption from income tax upon the income of its investments. The Commissioners for the Special Purposes of the Income Tax Acts, thinking that they were bound by authority so to do, answered this question in the affirmative. From their decision the Commissioners of Inland Revenue appealed to MACNAGHTEN, J., who reversed it, holding that the society is not a body of persons established for charitable purposes only. His judgment was upheld by the Court of Appeal (MACKINNON and TUCKER, L.JJ., LORD GREENE, M.R. dissenting). Hence the appeal of the society to this House. I think that it is important to set out the decision contained in the Case stated by the commissioners. It is amply supported by the findings of fact which therein appear. The material parts of the decision are as follows :

The object of the society, as set out in its book of rules, is stated to be "to awaken the conscience of mankind to the iniquity of torturing animals for any purpose whatever ; to draw public attention to the impossibility of any adequate protection from torture being afforded to animals under the present law ; and so to lead the people of this country to call upon Parliament totally to suppress the practice of vivisection." An explanatory resolution was passed by the council of the society on Feb. 9, 1898, in the following terms :—"The council affirm that, while the demand for the total abolition of vivisection will ever remain the object of the National Anti-Vivisection Society, the society is not thereby precluded from making efforts in Parliament for lesser measures having for their object the saving of animals from scientific torture." The quotations set out above are taken from the book of rules of the society as reprinted in 1938. We are satisfied that the main object of the society is the total abolition of vivisection, including in that term all experiments on living animals, whether calculated to inflict pain or not, and (for that purpose) the repeal of the Cruelty to Animals Act, 1876, and the substitution of a new enactment prohibiting vivisection altogether. Dr. Fielding-Ould, in his evidence before us, suggested that there were some experiments on living animals to which the society did not object, and that the society was only opposed to such experiments as caused pain and suffering to the animals, but we find it difficult to reconcile this evidence with the statements contained in the literature produced by the society, or indeed with the speeches of Dr. Fielding-Ould, as reported in *THE ANIMALS' DEFENDER*, a paper of which he is the editor. We are satisfied that the members of the society are actuated by an intense love of animals, and that the work of the society is to a large extent directed towards the prevention of cruelty to animals. Part of its propaganda literature is directed towards inculcating a love of animals in the young. A number of very distinguished men were called as witnesses by the Crown with the object of proving the great benefits which had accrued to the public by reason of the medical and scientific knowledge which had been obtained through experiments on living animals. We think it has been proved conclusively that :—(a) a large amount of present day medical and scientific knowledge is due to experiments on living animals ; (b) many valuable cures for and preventatives of disease have been discovered and perfected by means of experiments on living animals, and much suffering both to human beings and to animals has been either prevented or alleviated thereby. We are satisfied that if experiments on living animals were to be forbidden (*i.e.*, if vivisection were abolished) a very serious obstacle would be placed in the way of obtaining further medical and scientific knowledge calculated to be of benefit to the public. We were very impressed by the evidence of Major General Poole, Director of Pathology at the War Office, as to the great value of experiments on living animals in connection with the successful carrying on of the present war by the maintenance of the health of the troops and the avoidance or minimizing of many diseases to which soldiers in the field are particularly liable. There was no express evidence before us that any public benefit in the direction of the advancement of morals and education amongst men (or in any other direction) would or might result from the society's efforts to abolish vivisection, but if it must be assumed that some such benefit would or might so result, and if we conceived it to be our function to determine the case on the footing of weighing against that assumed benefit the evidence given before us, and of forming a conclusion whether, on balance,

the object of the society was for the public benefit, we should hold, on that evidence, that any assumed public benefit in the direction of the advancement of morals and education was far outweighed by the detriment to medical science and research, and, consequently, to the public health, which would result if the society succeeded in achieving its object, and that, on balance, the object of the society, so far from being for the public benefit, was gravely injurious thereto, with the result that the society could not be regarded as a charity. But, upon the authorities, we regard ourselves as precluded from so holding.

- A The commissioners then referred to the authorities which it will be my task to examine and came to the conclusion which I have already stated. Before I refer to the cases and to the judgments in the courts below I will state the two questions which appear to me to be raised in this appeal. The first and shorter point is whether a main purpose of the society is of such a political character that the court cannot regard it as charitable. To this point little attention was directed in the courts below. It is mentioned only in the judgment of LORD GREENE, M.R. As will appear in the course of this opinion, it is worthy of more serious debate. The second point is fundamental. It is at the very root of the law of charity as administered by the Court of Chancery and its successor, the Chancery Division of the High Court of Justice. It is whether the court, for the purpose of determining whether the object of the society is charitable may disregard the finding of fact that "any assumed public benefit in the direction of the advancement of morals and education was far outweighed by the detriment to medical science and research, and, consequently, to the public health, which would result if the society succeeded in achieving its object, and that, on balance, the object of the society, so far from being for the public benefit, was gravely injurious thereto." The society says that the court must disregard this fact, arguing that "evidence of disadvantages or evils which would or might result from the stopping of vivisection is irrelevant and inadmissible."

My Lords, on the first point LORD GREENE, M.R., cites in his judgment ([1946] 1 All E.R. 214), a passage from the speech of LORD PARKER in *Bowman v. Secular Society, Ltd.* (7) ([1917] A.C. 442):

... a trust for the attainment of political objects has always been held invalid, not because it is illegal ... but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit ...

- E LORD PARKER is here considering the possibility of a valid charitable trust, and nothing else, and when he says "has always been held invalid" he means "has always been held not to be a valid charitable trust." The learned MASTER OF THE ROLLS found this authoritative statement upon a branch of the law, with which no one was more familiar than LORD PARKER, to be inapplicable to the present case for two reasons, first, because he felt difficulty in applying the words to "a change in the law which is in common parlance a 'non-political' question," and, secondly, because he thought they could not in any case apply when the desired legislation is "merely ancillary to the attainment of what is *ex hypothesi* a good charitable object." My Lords, if I may deal with this second reason first, I cannot agree that in this case an alteration in the law is merely ancillary to the attainment of a good charitable object. In a sense, no doubt, since legislation is not an end in itself, every law may be regarded as ancillary to the object which its provisions are intended to achieve. But that is not the sense in which it is said that a society has a political object. Here the finding of the commissioners is itself conclusive. "We are satisfied," they say, "that the main object of the society is the total abolition of vivisection . . . and (for that purpose) the repeal of the Cruelty to Animals Act, 1876, and the substitution of a new enactment prohibiting vivisection altogether." This is a finding that the main purpose of the society is the compulsory abolition of vivisection by Act of Parliament. What else can it mean? And how else can it be supposed that vivisection is to be abolished? Abolition and suppression are words that connote some form of compulsion. It can only be by Act of Parliament that that element can be supplied. Upon this point I must with respect differ both from LORD GREENE, M.R., and from CHITTY, J., whose decision in *Re Foveaux* (1), I shall later consider. Coming to the conclusion that it is a main object, if not the main object, of the society, to obtain an alteration of the law, I ask whether that

can be a charitable object, even if its purposes might otherwise be regarded as charitable. My Lords, I see no reason for supposing that LORD PARKER, in the cited passage, used the expression "political objects" in any narrow sense or was confining it to objects of acute political controversy. On the contrary, he was, I think, propounding familiar doctrine, nowhere better stated than in a text book, which has long been regarded as of high authority, but appears not to have been cited for this purpose to the courts below (as it certainly was not to your Lordships), TYSSON ON CHARITABLE BEQUESTS. The passage which is at p. 176 [in the original 1898 ed.] is worth repeating at length:

It is a common practice for a number of individuals amongst us to form an association for promoting some change in the law, and it is worth our while to consider the effect of a gift to such an association. It is clear that such an association is not of a charitable nature. However desirable the change may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed. Each court in deciding on the validity of a gift must decide on the principle that the law is right as it stands. On the other hand, such a gift could not be held void for illegality.

LORD PARKER uses slightly different language, but means the same thing, when he says that the court has no means of judging whether a proposed change in the law will or will not be for the public benefit. It is not for the court to judge and the court has no means of judging. The same question may be looked at from a slightly different angle. One of the tests, and a crucial test, whether a trust is charitable, lies in the competence of the court to control and reform it. I would remind your Lordships that it is the King as *parens patriae* who is the guardian of charity, and that it is the right and duty of his Attorney-General to intervene and inform the court, if the trustees of a charitable trust falls short of their duty. So too it is his duty to assist the court, if need be, in the formulation of a scheme for the execution of a charitable trust. But, my Lords, is it for a moment to be supposed that it is the function of the Attorney-General, on behalf of the Crown, to intervene and demand that a trust shall be established and administered by the court, the object of which is to alter the law in a manner highly prejudicial, as he and His Majesty's Government may think, to the welfare of the State? This very case would serve as an example, if upon the footing that it was a charitable trust it became the duty of the Attorney-General on account of its maladministration to intervene. There is, undoubtedly, a paucity of judicial authority on this point. It may fairly be said that *De Themmines v. De Bonneval* (16), to which LORD PARKER referred in *Bowman's* case (7), turned on the fact that the trust there in question was held to be against public policy. In *Comrs. of Inland Revenue v. Temperance Council* (14), the principle was clearly recognised by ROWLATT, J., as it was in *Re Hood* (15), ([1931] 1 Ch. 250, 252). But in truth the reason of the thing appears to me so clear that I neither expect nor require much authority. I conclude upon this part of the case that a main object of the society is political and for that reason the society is not established for charitable purposes only. I would only add that I would reserve my opinion upon the hypothetical example of a private enabling Act, which was suggested in the course of the argument. I do not regard *Re Villers-Wilkes* (21), as a decision that a legacy which had for its main purpose the passing of such an Act is charitable.

The second question raised in this appeal, which I have already tried to formulate, is of wider importance, and I must say at once that, I cannot reconcile it with my conception of a court of equity, that it should take under its care and administer a trust, however well-intentioned its creator, of which the consequence would be calamitous to the community.

I would not weary your Lordships with a historical excursion into the origin of the equitable jurisdiction in matters of charity, one of the "heads of equity" as LORD MACNAGHTEN called it in *Pemsel's* case (3), ([1891] A.C. 580). Undoubtedly the favour shown by the civil law to gifts in *pious usus* had some part in it. So too had the conception, to which I have already referred, that the King as *parens patriae* took under his special care charitable gifts as he took also infants and lunatics. But, whatever its origin, from the fact of its existence arose the necessity of definition, and so both before and after the

Statute of 43 Elizabeth it became the duty of the Court of Chancery to determine what objects were and what were not charitable. I will refer to TYSEN again. He says at p. 5 :

One by one the question of the validity of such trusts was brought before the Court of Chancery . . . It considered only this : Having regard to all legislative enactments and general legal principles, is it or is it not for the public benefit that property should be devoted for ever to fulfilling the purpose named ? If the court considered that it was not for the public benefit, it held the trust altogether void . . .

The learned author proceeds to illustrate his statement by reference to various trusts which the court held to be invalid, as trusts to say masses for the donor's soul, to keep in repair a tomb outside a church, or to teach religious opinions for which penalties were inflicted by statute. The task of the court was in some degree simplified by the Statute of Elizabeth, which made it clear that

at least the purposes enumerated in the preamble were charitable, but from the beginning it appears to have been assumed that the enumeration was not exhaustive, and that those purposes also were charitable which could be fairly regarded as within its spirit and intendment. This view enabled the court to extend its protection to a vast number of objects which appeared both to the charitable donor and to it to be for the benefit of the community. Nowhere,

perhaps, did the favour shown by the law to charities exhibit itself more clearly than in the development of the doctrine of general charitable intention, under which the court, finding in a bequest (often, as I humbly think, on a flimsy pretext) a general charitable intention, disregarded the fact that the named object was against the policy of the law and applied the bequest to some other charitable purpose. Thus in *Da Costa v. De Pas* (22), LORD HARDWICKE

applied a bequest for instructing the people in the Jewish religion (then regarded as an illegal purpose) for the benefit of the Foundling Hospital, and in *Cary v. Abbot* (23), SIR W. GRANT, M.R., directed that the residue of an estate, which had been bequeathed for the instruction of children in the Roman Catholic faith, should be applied as the King by sign manual should direct. I refer to this doctrine in a brief review of the equitable jurisdiction only because, as I think, it has been the cause of some confusion in the argument which has been presented to the House. It would be very relevant if the society,

conceding that the campaign against vivisection was not a charitable purpose, argued that there was yet a general charitable intention and that its funds were applicable to some other charitable purpose. That is not the argument. If it were, I should not entertain it, though it might in an earlier age have succeeded.

My Lords, this then being the position, that the court determined "one by one" whether particular named purposes were charitable, applying always the overriding test whether the purpose was for the public benefit, and that

the King as *parens patriae* intervened *pro bono publico* for the protection of charities, what room is there for the doctrine, which has found favour with LORD GREENE, M.R., and has been so vigorously supported at the Bar of the House, that the court may disregard the evils that will ensue from the achievement by the society of its ends ? It is to me a strange and bewildering idea

that the court must look so far and no farther, must see a charitable purpose in the intention of the society to benefit animals, and thus elevate the moral character of men, but must shut its eyes to the injurious results to the whole human and animal creation. I will readily concede, that, if the purpose is within one of the heads of charity forming the first three classes in the classification which LORD MACNAGHTEN borrowed from SIR SAMUEL ROMILLY's argument in *Morice v. Bishop of Durham* (2), the court will easily conclude that it is a charitable purpose. But even here to give the purpose the name of "religious" or "educational" is not to conclude the matter. It may yet

not be charitable, if the religious purpose is illegal or the educational purpose is contrary to public policy. Still there remains the overriding question : Is it *pro bono publico* ? It would be another strange misreading of LORD MACNAGHTEN's speech in *Pemsel's* case (3) (one was pointed out in *Re Macdruff* (5)), to suggest that he intended anything to the contrary. I would rather say that, when a purpose appears broadly to fall within one of the familiar categories of charity, the court will assume it to be for the benefit of the community and therefore charitable unless the contrary is shown, and further that the court

will not be astute in such a case to defeat upon doubtful evidence the avowed

benevolent intention of a donor. But, my Lords, the next step is one that I cannot take. Where upon the evidence before it the court concludes that, however well-intentioned the donor, the achievement of his object will be greatly to the public disadvantage, there can be no justification for saying that it is a charitable object. If and so far as there is any judicial decision to the contrary, it must, in my opinion, be regarded as inconsistent with principle and be overruled. This proposition is clearly stated by RUSSELL, J., in *Re Hummeltenberg* (8), (1923 1 Ch. 242). He said :

In my opinion the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it.

This statement of that very learned judge follows immediately upon some observations on the cases of *Re Foveaux* (1), and *Re Cranston* (9) which were the mainstay of the appellant's argument. In *Re Foveaux* (1), a testatrix had bequeathed legacies to two societies, described briefly by CHITTY, J., as the two defendant anti-vivisection societies, one of them being the appellant society under the name which it then bore. The question as stated by the learned judge was whether they were charities in the technical sense in which the term "charity" is used in law. That is the same question as that which your Lordships have to decide here. CHITTY, J., decided that they were charities. His judgment concludes with these words ([1895] 2 Ch. 507) :

The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community ; whether, if they achieved their object, the community would, in fact, be benefited is a question on which I think the court is not required to express an opinion. The defendant societies may be near the border line, but I think they are charities.

These words, which appear to be in direct opposition to the passage that I have cited from the judgment of RUSSELL, J., in effect repeat what CHITTY, J., said earlier in his judgment (*ibid.* 503) :

In determining this question of charity the court does not enter into or pronounce any opinion on the merits of the controversy which subsists between the supporters and opponents of the practice of vivisection. It stands neutral.

My Lords, in the passages that I have cited from the judgments of CHITTY, J. and RUSSELL, J. the issue is clear cut. Which of them is right ? Your Lordships will now see why I have thought it proper, however briefly, to consider the origin of this equitable jurisdiction. For at once this question arises. If indeed CHITTY, J., is right, if it is not the duty of the court to express an opinion whether the community will in fact be benefited, should the object of those, who intend to benefit it, be achieved, at what point in its long history did it cease to be its duty ? One by one the purposes enumerated in the preamble to the Statute of Elizabeth were held to be charitable by a court which performed just this duty and applied this overriding test. And since the statute the court has performed the same duty in determining whether objects alleged to be charitable are within the spirit and intendment of the preamble. May I not cite CHITTY, J. himself in this very case ? He said ([1895] 2 Ch. 504) :

After all, the best that can be done is to consider each case as it arises, upon its own special circumstances.

Is there a more special circumstance than this, that the fact is proved that "on balance the object of the society, so far from being for the public benefit, was gravely injurious thereto ?" Nor do I understand why, in his concluding words, CHITTY, J., said that the defendant societies might be near the border line, if he looked only at their intention and formed no opinion upon the result of their efforts if they were successful. For there could be no doubt upon the authority of such cases as *University of London v. Yarrow* (12), and *Marsh v. Means* (24), that a gift for the protection of animals is *prima facie* a charitable gift for the reason later stated by SWINFEN-EADY, L.J., in *Re Wedgewood* (11) ([1915] 1 Ch. 122). Upon this line of authority CHITTY, J., founded his judgment and, if intention only was looked at, the defendant societies could fairly claim to be in the heart of the province of charity. If the learned judge had a doubt, it could only have been due to the passing thought that perhaps result as well as intention was material. It is worthy of notice that the same

doubt, so strong indeed that final opinion was reserved, was entertained by COTTON, LINDLEY and BOWEN, L.JJ. in *Re Douglas* (17). In that case it was unnecessary to determine whether the same anti-vivisection society in its then form was a charity, but the learned Lords Justices expressly reserved their opinion upon the point. I see no reason why they should have done so, unless they held, as I invite your Lordships to hold, that injury to the community must be weighed with the ostensible charitable purposes of the society.

- A LORD GREENE, M.R., from whose opinion on a broad question of principle such as this I differ with great reluctance, supports his decision by reference to such cases as *A.-G. v. Marchant* (18), and *Re Campden Charities* (19). In the former case a testator had, in the year 1640, left real estate upon trust to pay £50 per annum to four charitable objects, *viz.*, £20 for the salary of a schoolmaster, £20 to a college for the purchase of books and £5 each to the poor of two parishes, with a direction that any deficiency should be borne rateably. It appears to have been assumed that any excess of the rents and profits of the real estate over £50 was applicable for charitable purposes. There was in fact a substantial surplus and the question submitted to the court was whether it should be divided rateably between the charities named in the will, or should be appropriated for the benefit of one or more of them to the exclusion of the others. KINDERSLEY, V.C., after referring to the rule of law laid down by LORD KINGSDOWN in *A.-G. v. Dean & Canons of Windsor* (25) (8 H.L. Cas. 452) that the accretion was *prima facie* to be applied and apportioned *pro rata* among the objects of the testator's bounty, but subject to the discretion of the court to be exercised in certain cases and within certain limits, thus expressed himself (L.R. 3 Eq. 430):

- D So, I apprehend, if it should appear that the directions of the testator with respect to a particular object, if carried out in these days, so far from being beneficial, would be detrimental to the objects he meant to benefit: in that case, a good reason would exist for exercising the discretion.

Then he applies this principle to the gifts to the poor of the two parishes and says (*ibid.* 431):

- E I think, by common consent, it is established at the present day that there is nothing more detrimental to a parish, and especially to the poor inhabitants of it, than having stated sums periodically payable to the poor of that parish by way of charity. The poorest class of all is not allowed to participate in such charities, because the court, in such cases, always excludes those who are in receipt of parochial relief, inasmuch as that would be a relief to the poor rates, and so a charity to the ratepayers and not to the poor. The only effect of such gifts is to pauperise the parish . . .

Accordingly the Vice Chancellor declined to increase *pro rata* the gifts to the poor and directed that the whole of the surplus revenue should be divided between the other two objects of the testator's bounty. My Lords, I find in this decision nothing contradictory to the principles that I have asserted. A purpose deemed charitable in 1640 was no longer deemed charitable in 1866; therefore the court declined to give effect to it in regard to surplus revenues. It does not follow from this that, if, in 1640, the court had thought that nothing could be more detrimental to a parish than such doles, it would nevertheless have supported the gift as a good charitable gift.

- G *Re Campden Charities* (19) is an authority of some importance in a difficult branch of the law of charity relating to the *cy-pres* application of charitable funds and the jurisdiction of the Charity Commissioners, and it is often cited in that connection. Substantially the same question had arisen as in *Attorney-General v. Marchant* (18). There, too, a bequest had been made for the purchase of lands of the annual value of £10, half of which was to be applied towards the better relief of the most poor and needy people of good life and conversation in the parish of Kensington. The value of the lands so purchased had greatly increased; so had the parish of Kensington. It became necessary to establish a scheme for the administration of the charity, and the Charity Commissioners did so. Taking the view expressed by KINDERSLEY, V.C., that doles to the poor were detrimental to the parish they in substance diverted to educational purposes a gift which was in part eleemosynary. The Court of Appeal held that they were entitled to do so. JESSEL, M.R., said (18 Ch.D. 324):

The habits of society have changed . . . and in consequence of the change of ideas there has been a change of legislation; laws have become obsolete or have been

absolutely repealed, and habits have become obsolete and have fallen into disuse which were prevalent at the times when these wills were made.

and, later (*ibid.*, 327) :

With our present ideas on the subject, and our present experience, which has been gathered as the result of very careful enquiries by various committees and commissions on the state of the poor in England, we know that the extension of doles is simply an extension of mischief.

Again, my Lords, I find nothing in this reasoning which is opposed to what I have said. If, to-day, a testator made a bequest for the relief of the poor, and required that it should be carried out in one way only, and the court was satisfied by evidence that that way was injurious to the community, I should say that it was not a charitable gift, though three hundred years ago the court might, upon different evidence, or in the absence of any evidence, have come to a different conclusion. I have been careful to add the condition that the testator required the gift to be carried out in one way only. For I would again remind your Lordships how much confusion has been introduced by the doctrine of general charitable intention, which is itself the substantial justification of the *cy-pres* doctrine.

The two cases to which I have last referred both fall within one of the three determinate categories in LORD MACNAGHTEN'S classifications, the relief of poverty. In a case, which it is sought to bring within the indeterminate fourth category, it is, I think, even more difficult to pause at a certain stage in the enquiry to say, *e.g.*, that the purpose is to protect animals, that kindness to animals is conducive to the moral advancement of man, and to conclude that the purpose is charitable without looking to the end of the matter. Thus in *Re Grove-Grady* (10) a testatrix left her residuary estate to trustees to found an institution which should have as one of its objects the acquisition of land for the provision of refuges for the preservation of "all animals birds or other creatures not human." The Court of Appeal by a majority held that the trust, not having been shown to be for purposes beneficial to the community, was not a good and valid charitable trust. It is instructive to see why not. LORD HANWORTH, M.R., thus states the law. Having formulated the test in the two familiar questions (1) Is the trust for a purpose beneficial to the community ? (2) If it satisfies that first test, is it charitable ? he then asks ([1929] 1 Ch. 572) :

Who is to decide these questions ? I agree with HOLMES, L.J., that the answer does not depend on the view entertained by any individual—"either by the judge who is to decide the question, or by the person who makes the gift" : *Re Cranston* (9). The test is to be applied from evidence of the benefit to be derived by the public or a considerable section of it ; though a wide divergence of opinion may exist as to the expediency, or utility, of what is accepted generally as beneficial. The court must decide whether benefit to the community is established.

The learned MASTER OF THE ROLLS then expressly approved the passage that I have cited from the judgment of RUSSELL, J., in *Re Hummeltenberg* (8). The same view is reiterated by that learned judge (RUSSELL, L.J., as he then was), at p. 588 :

In my opinion, the court must determine in each case whether the trusts are such that benefit to the community must necessarily result from their execution.

Counsel for the society sought to distinguish this case on the ground that the initial step was not there taken, there was not found to be any benefit to the community, so that no question arose of weighing advantage against disadvantage. In this view, presumably, however slight the benefit, the court must disregard injury however great. Such a view is repellant alike to common sense and to the principles upon which the equitable jurisdiction has been founded.

I ought not to let *Re Cranston* (9) ([1898] 1 I.R. 431) pass unnoticed. In that case the court had to consider whether a bequest to two vegetarian societies was a good charitable bequest, and, though there was no such evidence of injury to the community arising from the activities of the societies as was adduced in this case, yet there were observations in the judgments of the very learned judges who took part in the decision upon which counsel for the society properly relied. But they must not be pressed too far. Thus when PORTER, M.R. (who first heard the case) felt bound "to give effect to the intention unless there is coercive reason to

the contrary" (*ibid.*, 433), it is at least open to doubt whether he would not have been coerced to a contrary view if he had found upon the evidence that injury to the community was the necessary result of the societies' work. It may indeed be said that even, the possibility of a coercive reason to the contrary is fatal to the contention that the court may not look to the end of the chapter. LORD ASHBOURNE, L.C., perhaps went further. For he observed (*ibid.*, 445) that, though the vast majority be opposed to it and it might be disapproved by medical men, yet he did not feel at liberty to sit in judgment upon objects and purposes or to measure the success which they might then have or might thereafter attain to. If by this the learned Lord Chancellor meant that it was not a matter for his individual opinion, I should not dissent, but I cannot accept it if he meant that the court could abrogate its duty of deciding upon evidence whether the test of charitable purpose was satisfied. FITZGIBBON, L.J., uses words which I think it worth citing at length. He says (*ibid.*, 446):

What is the tribunal which is to decide whether the object is a beneficent one? It cannot be the individual mind of a judge, for he may disagree, *toto coelo*, from the testator as to what is or is not beneficial. On the other hand, it cannot be *vox populi*, for charities have been upheld for the benefit of insignificant sects, and of peculiar people. It occurs to me that the answer must be—that the benefit must be one which the founder believes to be of public advantage, and his belief must be at least rational and not contrary either to the general law of the land, or to the principles of morality.

Your Lordships see how inevitably some qualification slips in. Here we have the test of rationality, of conformity with the general law, of the principles of morality. These are tests which the court must examine and, so far as they depend on facts, come to a conclusion upon relevant evidence. I do not understand FITZGIBBON, L.J., to support the view of the society that, given a measure of public advantage, the public disadvantage can be ignored. WALKER, L.J., appears more strongly to favour the society. He says (*ibid.*, 451):

The idea may be erroneous and may be visionary, but it was entertained honestly by the giver, and her gift was designed for the benefit of mankind, and I think it was charitable . . .

I can hardly think that the learned Lord Justice intended to say that the honest opinion of a donor is conclusive. At least an exception must be made in the case of an illegal purpose or a purpose contrary to public policy. The question here, with which he did not purport to deal, is whether it is as fatal to the charitable nature of a gift that it is shown specifically to be to the public detriment as that it is regarded generally as contrary to public policy. From the dissenting judgment of HOLMES, L.J., your Lordships may get some assistance. That learned Lord Justice is careful to say that there is nothing illegal or contrary to public policy in the propagation of the doctrines of vegetarianism. The question remained whether the object of the societies was charitable and after stating that the object must be one by which the public, or a section of the public, benefits, the Lord Justice proceeds (*ibid.*, 454, 455):

. . . but what is the test or standard by which a particular gift is to be tried with a view of ascertaining whether it is beneficial in this sense? I am of opinion that it does not depend upon the view entertained by any individual—either by the judge who is to decide the question or by the person who makes the gift.

And he answers the question by saying:

There is probably no purpose that all men would agree is beneficial to the community: but there are surely many purposes which everyone would admit are generally so regarded, although individuals differ as to their expediency or utility. The test or stand is, I believe, to be found in this common understanding.

He then applies this standard to the gift there in question, and, applying it, finds that the object does not benefit mankind and therefore is not charitable. It is, I think, instructive to see how he contrasts the vegetarian and the anti-vivisection claims. Of anti-vivisection he says (*ibid.*, 458):

. . . there is a great body of well-informed opinion, holding that it would be for the true interests of mankind to put an end to it [*i.e.*, vivisection] altogether. I think that there is no analogy between a practice such as this pursued by only a few individuals, attended with the severest suffering and productive of very doubtful benefit, and the universal habit of killing animals for human food in a manner that causes at the most but momentary pain.

It may well be that if the finding of the Special Commissioners in this case had been in similar terms, I should accede to the society's claim. But the value of the observations of the Lord Justice is that he looks first and last to the true interests of mankind. That is the test. Be the intention of the donor what it will, let him label his gift by what name he likes, he cannot draw a line and say to the court that it shall go thus far and no farther. I have dealt at some length with *Re Cranston* (9), partly because it was relied on by the society, partly because it is, I think, one of the most important cases in this branch of the law of charity. I do not express any opinion whether it was rightly decided. Still less do I express an opinion whether upon such evidence as might to-day be available a similar conclusion would be reached. I use it for the purpose of emphasising a view, too often, I fear, reiterated, that the court must still in every case determine by reference to its special circumstances whether or not a gift is charitable.

My Lords, what I have said is enough to conclude this case. But there is an important passage in the judgment of LORD GREENE, M.R., which I ought not to ignore. He says ([1946] 1 All E.R. 212) :

I do not see how at this time of day it can be asserted that a particular exemplification of those objects is not beneficial merely because in that particular case the achievement of those objects would deprive mankind of certain consequential benefits, however important those benefits may be. If this were not so, it would always be possible, by adducing evidence which was not before the court on the original occasion, to attack the status of an established charitable object to the great confusion of trustees and all others concerned. Many existing charities would no doubt fall if such a criterion were to be adopted.

I venture with great respect to think that this confuses two things. A purpose regarded in one age as charitable may in another be regarded differently. I need not repeat what was said by JESSEL, M.R., in *Re Campden Charities* (19) (18 Ch.D. 324). A bequest in the will of a testator dying in 1700 might be held valid upon the evidence then before the court, but, upon different evidence, held invalid if he died in 1900. So, too, I conceive that an anti-vivisection society might at different times be differently regarded. But this is not to say that a charitable trust, when it has once been established, can ever fail. If, by a change in social habits and needs, or, it may be, by a change in the law, the purpose of an established charity becomes superfluous or even illegal, or if, with increasing knowledge, it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply to the court, or, in suitable cases, to the Charity Commissioners, or, in educational charities, to the Minister of Education, and ask that a *cy-pres* scheme may be established. And I can well conceive that there might be cases in which the Attorney-General would think it his duty to intervene to that end. A charity once established does not die, though its nature may be changed. But it is wholly consistent with this that in a later age the court should decline to regard as charitable a purpose, to which in an earlier age that quality would have been ascribed, with the result that (unless a general charitable intention could be found) a gift for that purpose would fail. I cannot share the apprehension of LORD GREENE, M.R., that great confusion will be caused if the court declines to be bound by the beliefs and knowledge of a past age in considering whether a particular purpose is to-day for the benefit of the community, but, if it is so, then I say that it is the lesser of two evils.

My Lords, in a speech which I recently delivered in this House [in *Williams (Sir H. J.) Trust, Trustees v. Inland Revenue Comrs.* (26) ([1947] 1 All E.R. 519)] I had occasion to say that the cases decided on this branch of the law were legion in number and were not easy to reconcile. This is the first time, so far as I am aware, that the issue in the form in which I have endeavoured to state it has reached this House. If your Lordships are satisfied that the law as laid down by RUSSELL, J. (as he then was) in *Re Hummeltenberg* (8) is correct, and the decision of this House confirms it, I believe that it will be a useful landmark in the history of the law of charity.

LORD NORMAND : My Lords, the society claims exemption from income tax on its investment income on the ground that it is a body of persons established

for charitable purposes only within the meaning of s. 37 of the Income Tax Act, 1918. The trust purposes are to be found in resolutions passed by a general meeting of the society held on July 31, 1897, and by the council on Feb. 9, 1898. Of these resolutions the first declares that the object of the society is to awaken the conscience of mankind to the iniquity of torturing animals for any purpose whatever; to draw public attention to the impossibility of any adequate protection from torture being afforded to animals under the present law; and so to lead the people of this country to call upon Parliament totally to suppress the practice of vivisection. By the second resolution, which is described as an explanatory resolution, the council affirmed that, while the demand for the total abolition of vivisection would ever remain the object of the society, the society was not thereby precluded from making efforts in Parliament for lesser measures, having for their object the saving of animals from scientific torture.

The first question in the appeal is whether these purposes do not demonstrate that the society is an association for political purposes and not an association or trust for charitable purposes. The distinction between a political association and a charitable trust has not been defined and I doubt whether it admits of precise definition. The Attorney-General, however, submitted that any association which included among its objects the passing by Parliament of any legislation, unless it were an uncontroversial enabling Act, was to be considered a political association, and must be refused the privileges which the law allows to charities. But no authority was cited which would warrant so extreme a proposition. The formation of voluntary associations for the furtherance of the improvement of morals is familiar, and such associations are a well recognised sub-division of the fourth of LORD MACNAGHTEN'S divisions of charities in *Pemsel's case* (3). It is also familiar that trusts for preventing cruelty to animals or for improving the conditions of their lives have found a recognised place in that sub-division. Trusts for the benefit of animals are allowed to be charitable because, to quote the language of SWINFEN-EADY, L.J., in *Re Wedgewood* (11) ([1915] 1 Ch.D. 122), they tend :

... to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race.

Societies for the amelioration of the condition of animals like other societies for the improvement of human morals do not as a rule limit their activities to one particular method of advancing their cause. Commonly they hope to make voluntary converts, and they also hope to educate public opinion and so to bring its influence to bear on those who offend against a humane code of conduct towards animals. But they seldom disclaim and frequently avow an intention of inducing Parliament to pass new legislation if a favourable opportunity should arise of furthering their purpose by that means. A society for the prevention of cruelty to animals, e.g., may include, among its professed purposes, amendments of the law dealing with field sports or with the taking of eggs or the like. Yet it would not, in my view, necessarily lose its right to be considered a charity, and if that right were questioned, it would become the duty of the court to decide whether the general purpose of the society was the improvement of morals by various lawful means including new legislation, all such means being subsidiary to the general charitable purpose. If the court answered this question in favour of the society, it would retain its privileges as a charity. But, if the decision was that the leading purpose of the society was to promote legislation in order to bring about a change of policy towards field sports, or the protection of wild birds, it would follow that the society should be classified as an association with political objects and that it would lose its privileges as a charity. The problem is, therefore, to discover the general purposes of the society and whether they are in the main political or in the main charitable. It is a question of degree of a sort well known to the courts. The appellant society is a society for the prevention of cruelty to animals, and it is not disputed that by the vigilance of its members it does much to prevent the infliction of cruelty on animals undergoing experiments. But it has chosen to restrict its attack upon cruelty to a narrow and peculiar field,

and it has adopted as its leading purpose the suppression of vivisection by legislation. This is apparent from the resolutions which I have quoted. In the first of them the society condemns the existing legislation as an insufficient protection against the torture of animals, and sets forth as its object the total suppression of vivisection by new legislation passed by Parliament under pressure from an enlightened people. By the second resolution the council affirms that the total abolition of vivisection remains the object of the society but intimates that lesser Parliamentary measures for the protection of animals from scientific torture will also be pursued by the society. The society seems to me to proclaim that its purpose is a legislative change of policy towards scientific experiments on animals, the consummation of which will be an Act prohibiting all such experiments. I regard it as clear that a society professing these purposes is a political association and not a charity. If for legislative changes a change by means of government administration was substituted the result would be the same. In *Bowman v. Secular Society* (7) ([1917] A.C. 442) LORD PARKER said :

... a trust for the attainment of political objects has always been held invalid, not because it is illegal . . . but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit.

That was said in a case in which the society was advocating a very important change in the relations of the State and the community towards religion. I respectfully agree with the comment of LORD GREENE, M.R. ([1946] 1 All E.R. 214) that LORD PARKER's words do not apply when the legislation is merely ancillary to the attainment of what is *ex hypothesi* a good charitable object. For the charitable purpose, being dominant, would prevail as it did in *Inland Revenue Comrs. v. Falkirk Temperance Cafe Trust* (27) and in *Public Trustee v. Hood* (15), where it was held that, the main object of the gift being charitable, the gift was none the less valid because the testator had pointed out one of the means by which, in his opinion, the main object could best be attained and which in itself might not have been charitable if it had stood alone. But I regret that I cannot agree with LORD GREENE, M.R., in limiting the scope of LORD PARKER's words to matters of acute political controversy. Whether a project for new legislation excites acute political controversy may depend on the prudence and good management of the promoters. If they have patiently prepared the way by a gradual education of the public they may succeed in eliminating much of the opposition. But I cannot imagine that it is probable that a measure for the suppression of the kind of research which is impugned by this society would pass without acute controversy. It excites little or no controversy at present because the immediate prospects of its success are negligible, but, if the efforts of the society were to bring success near, acute and bitter controversy would, it is almost certain, become inevitable. But in my opinion it is not relevant to inquire whether the change of policy, for such it would be, represented by the prohibition of experiments on animals, might be accompanied by controversy or not. The relevant consideration is that it would be a change of policy, and that this society makes the achievement of that change by legislation its leading purpose. That in my opinion settles the issue in this case. I think that the same reason explains the decision of *Inland Revenue Comrs. v. Temperance Council of Christian Churches of England and Wales* (14), and I adopt the words used of that case by LAWRENCE, L.J., in *Public Trustee v. Hood* (15) ([1931] 1 Ch. 252) :

... in that case the gift was not for the promotion of temperance generally, but was for the promotion of temperance mainly by political means . . .

The appellant society is similarly not a society for the prevention of cruelty to animals generally, but a society for the prevention of cruelty to animals by political means.

It would not, however, be right to pass by in silence the other question which occupied so much of the debate. This question, which in my opinion only arises on the assumption that the society is held not to be a political body, is in brief whether it is sufficient for it to prove that its purpose is to alleviate or prevent the suffering of animals or whether it must prove that on balance its purpose is beneficial to mankind. I confess that my opinion has wavered and that I was for long inclined to agree with the judgment of LORD GREENE,

M.R. But after careful consideration of the speech of LORD SIMONDS, which I have had the advantage of reading in print, I have come to agree with it. I do not propose to attempt to add anything to what LORD SIMONDS has said on this part of the case.

Appeal dismissed with costs.

Solicitors: *Shield & Son* (for the society); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

STENOR, LTD. v. WHITESIDES (CLITHEROE), LTD.

[HOUSE OF LORDS (Viscount Simon, Lord Macmillan, Lord Porter, Lord Simonds and Lord Uthwatt), April 17, 18, 21, 22, 24, July 2, 1947.]

Designs—Registration—“New or original design” —“Mere mechanical device” —Design for fuse for use in vulcanising machine—Novelty claimed only for shape of fuse—Shape already anticipated in other articles in same class—Fuse only for use in a particular type of machine—Shape dictated solely by functional considerations—Patents and Designs Act, 1907 (c. 29), (as amended up to May 26, 1938), ss. 49 (1), 93.

The design for a metal cut-out or fuse for use in a vulcanising apparatus was registered by S., Ltd., in Jan., 1939, under the Patents and Designs Acts, 1907-1938, in class I of sched. III to the Designs Rules, 1932-1938, which consists of “Articles composed wholly of metal or in which metal predominates, and jewellery.” In an action brought by S., Ltd., against W. (C.), Ltd., for infringement of their copyright in the design, W. (C.), Ltd., challenged the validity of the design and counterclaimed for rectification of the register of designs by its removal therefrom on the grounds (i) that it was not a “new or original design,” as required by s. 49 (1) of the Act of 1907, because other articles in class I, though used for quite a different purpose, were already known to be made according to a design with substantially the same features of shape; (ii) that it was not a “design” within the definition in s. 93 of the Act (as amended), because it was “in substance a mere mechanical device,” since the shape shown on the registered design was dictated solely by functional considerations and the fuses to which it was applied were intended solely to operate a vulcanising machine which could be operated only by fuses of this shape. In regard to (i) S., Ltd., contended that “design” meant, not the features of shape appearing in an article, but a particular kind of article having a particular shape, and that registration of a design was not invalidated by the prior existence of articles of a different kind which were included in the same class merely because they were made of the same substance:—

HELD: (i) in determining whether or not a design had been anticipated, it must be compared with previous designs applied to all other articles in the same class, and a difference of purpose or use in articles of the same class was immaterial, and, accordingly, the design was not a “new or original design” as required by s. 49 (1) of the Act of 1907.

Re Clarke’s Design ([1896] 2 Ch. 38) considered.

(ii) since the shape of the article had no significance other than that, by reason of the features indicated, it would function in a certain machine, the design was “in substance a mere mechanical device” and was, therefore, not a “design” within the definition in s. 93 of the Act of 1907 (as amended), and was not a proper subject for registration under the Acts.

Kestos, Ltd. v. Kempat, Ltd., and Vivian Fitch Kemp, Re Kestos, Ltd. Registered Design (No. 725,716) (53 R.P.C. 139) approved.

Decision of the Court of Appeal ([1946] 1 All E.R. 176) affirmed.

[AS TO REGISTRABLE DESIGNS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 682-688, paras. 994-999; and FOR CASES, see DIGEST, Vol. 43, pp. 245-251, Nos. 881-914, and Supplement.]

Cases referred to:

- (1) *Re Clarke’s Design*, [1896] 2 Ch. 38; 65 L.J.Ch. 629; *sub nom. Re Clarke’s Registered Design, Clarke v. Sax & Co., Ltd.*, 74 L.T. 631; 13 R.P.C. 351; 43 Digest 248, 896.

- (2) *Re Bach's Design*, (1889), 42 Ch.D. 661; 61 L.T. 765; 6 R.P.C. 376; 43 Digest 250, 912.
- (3) *Re Read & Greswell's Design*, (1889), 6 R.P.C. 471; 42 Ch.D. 260; 58 L.J.Ch. 624; 61 L.T. 450; 43 Digest 250, 911.
- (4) *Kestos, Ltd. v. Kempat, Ltd., and Vivian Fitch Kemp, Re Kestos, Ltd. Registered Design (No. 725,716)*, (1935), 53 R.P.C. 139; Digest Supp.
- (5) *Tecalemit, Ltd. v. Ewarts, Ltd. (No. 2)*, (1927), 44 R.P.C. 503; 43 Digest 247, 892.
- (6) *Walker, Hunter & Co. v. Falkirk Iron Co.*, (1887), 4 R.P.C. 390; 14 R. (Ct. of Sess.) 1072; 43 Digest 245, g.
- (7) *Saunders v. Wiel*, [1893] 1 Q.B. 470; 62 L.J.Q.B. 341; 68 L.T. 183; 10 R.P.C. 29; 43 Digest 250, 910.
- (8) *Hecla Foundry Co. v. Walker, Hunter & Co.*, (1889), 14 App. Cas. 550; 59 L.J.P.C. 46; 61 L.T. 738; 6 R.P.C. 554; 43 Digest 258, 970.
- (9) *Re Gutta Percha and Rubber (London), Ltd. (No. 789,574) Application*, (1935), 52 R.P.C. 383; Digest Supp.

APPEAL by the plaintiffs from a decision of the Court of Appeal (LORD GREENE, M.R., DU PARCQ and MORTON, L.JJ.), dated Dec. 11, 1945, and reported [1946] 1 All E.R. 176, affirming an order of ROMER, J., dated May 18, 1945, whereby he ordered the removal from the Register of Designs of the plaintiffs' design No. 833,097. The House of Lords affirmed these decisions. The facts appear in the opinions of their Lordships.

Shelley, K.C., and *James Mould* for the appellants.

Lloyd-Jacob, K.C., and *Stuart Bevan* for the respondents.

The House took time for consideration.

July 2. The following opinions were delivered.

VISCOUNT SIMON: My Lords, this is an appeal from an order of the Court of Appeal (LORD GREENE, M.R., DU PARCQ and MORTON, L.JJ.), which confirmed (though for different reasons) the judgment of ROMER, J., whereby he ordered the removal from the Register of Designs of the appellants' design No. 833,097. The action was brought in the Chancery Division of the High Court by the present appellants against the respondents, claiming relief in respect of alleged infringement by the respondents of the appellants' copyright in this registered design. By their defence, the respondents denied the infringement, and further relied on the provisions of the Patents and Designs Act, 1907, s. 54 (1). They also alleged that the registration of the said design was invalid and counter-claimed for the rectification of the register accordingly. On the issues of infringement and on the defence raised under s. 54 (1), the judge found as a fact that the sale by the respondents of articles alleged to infringe the appellants' copyright occurred in circumstances which would, in any case, disentitle the appellants to recover any penalty or damages, and he further held (a) that at the time of its registration the design was not a "new or original design not previously published in the United Kingdom" within s. 49 (1) of the Act, and (b) that it was not a "design" at all within the meaning of the Act because it was so minute that its shape could not be adequately apprehended by ordinary human vision, unassisted by a magnifier. As to this second reason, it is enough to say that the drawings annexed to the certificate of registration 833,097 do not include any indication of dimensions, nor do existing regulations so require, but that the drawings themselves measure several inches in length, while the actual object produced by the appellants as embodying the design, though very small, being about the length of an ordinary thumb-nail, was not found by the Court of Appeal to be so tiny that its shape could not be apprehended by the eye. The Court of Appeal, therefore, did not agree with the view of the trial judge that the alleged design was not registrable because it was intended to be applied to an article of so small a size. This topic has not been the subject of argument before us. The question how far, if at all, minuteness in the object to which a design is applied affects the registrability of the design must be regarded as reserved for decision if and when a future case raises the point. Before the Court of Appeal the appellants did not seek to challenge the decision of ROMER, J., that their action should be dismissed, but confined themselves to appealing against the order on the counterclaim directing that the Register of Designs should be rectified by removing from it design No. 833,097. The judge's view that this order should be made because the design was not "new

or original" was, of course, discussed on the appeal, but the ground on which the Court of Appeal decided to uphold the cancellation was a different one, raised in the pleadings but not dealt with by ROMER, J., *viz.*, that the alleged design was not registrable because, as applied to the article specified in the certificate, it was something "which is in substance a mere mechanical device," and thus was not included in the definition of "design" in s. 93 of the Act.

A Before this House both the ground taken by ROMER, J., and the ground taken by the Court of Appeal have been fully examined, and, though a decision adverse to the appellants on one of these grounds would render it unnecessary to deal with the other, I think, in the circumstances, it would be of value if the House were to deal with both.

First, as to the contention that the design is not "new or original." The definition in s. 93 states that "design" means only:

B "... features of shape, configuration, pattern or ornament applied to any article by any industrial process or means ... which in the finished article appeal to and are judged solely by the eye. ...

C In the present case it is the "features of shape" which are relevant. The drawing attached to the certificate shows a cylindrical rod carrying at each of two places along its length a bevelled collar, which increases the diameter of the rod where it occurs by about a third. The two collars are similar to one another and are placed symmetrically from one or other end of the rod at a distance which is somewhat less than a third of the rod's length. The middle section of the rod is slightly thicker between the two collars than it is where it protrudes beyond either of them. The certificate of registration describes the design as "in class I" and as being:

D "... in respect of the application of such design to a metal cut-out or fuse for use in a vulcanising apparatus.

E The statement that the design is applied to a metal cut-out or fuse satisfies the requirement of the statutory definition that "design" means the "features of shape ... applied to any article." The additional statement that the article is "for use in a vulcanising apparatus" is no part of the statutory requirements, but r. 17 of the Designs Rules, 1932, made under s. 86 (1) (a) of the Act, purports to authorise the Comptroller to require the applicants to state for what purpose the article to which the design is to be applied is used. In the present case, they did so voluntarily.

Class I in the classification of goods contained in sched. III to the Designs Rules, 1932, consists of:

Articles composed wholly of metal or in which metal predominates, and jewellery.

F There is thus a vast variety of objects included in the class, and, inasmuch as the features of shape in the registered design are substantially the same as the features of shape in rollers in rolling mills or in a bicycle crank axle, both made of steel and thus in the same class, which were well known at an earlier date, the respondents contended at the trial that this was enough to prove that the appellants' design was not "new or original." If it be enough to disprove novelty or originality to show that any other article in class I, though used for quite a different purpose, was already known to be made according to a design with the same or substantially the same features of shape, then this is clearly proved in the present case and the appellants' claim to retain their design on the register fails on this ground. The appellants contend, however, that identity of shape previously applied to articles of quite a different type, though falling within the same class, is not enough to destroy the validity of their claim that the design they have registered is "new or original." Counsel H for the appellants seeks to limit the field within which it is relevant to ask whether a design as defined in the Act has been anticipated to an area which is not so wide as that of the class, though I have found it difficult to grasp with precision what are, according to him, the metes and bounds of the relevant field within the class. His contention, as I understand, is that no previous application of the design to another article in class I should be regarded as an anticipation unless this previous article is "analogous" to the article mentioned in the certificate, and by analogous is meant made for a similar use or purpose. Similarly, the contention is that there is no infringement of the

appellants' monopoly unless another person subsequently makes an article of readily fusible metal in the same shape adapted for the same use, *viz.*, for use in a vulcanising apparatus. In other words, the shape may have been already applied to other articles in the same class, but that is (according to the argument of counsel for the appellants) no reason why registration should not be granted in respect of the novel application of the same shape to another and different article in that class.

In deciding whether this contention is correct, our first duty is to examine the language of the statute itself. By s. 53 the registration of a design gives copyright in it to the proprietor during five years from the date of registration. By s. 93, copyright means the exclusive right to apply a design to any article in any class in which the design is registered—in the present case in class I. Indeed, it is not obvious what is the purpose of providing for a classification of goods unless it be to indicate the area within which the monopoly would exist. I cannot construe the words "any article in any class" otherwise than as embracing all the articles in that class whatever may be the differences of use or purpose among them. If this is so, the bicycle crank axle must be an example of "any article" in class I and the copyright which would be given to the appellants by registering the design 833,097 would include the exclusive right to apply their design to a bicycle crank axle. But this shape as applied to a bicycle crank axle has been used and published long before 1939, and it follows that the appellants' design is not "new or original." I am fully alive to the fact that this construction greatly cuts down the instances in which, on another view, a design may be validly registered, but the truth is that this particular design is of the most ordinary character. Its general features of shape are to be found in numerous and well-known products of engineering. It has no significance whatever except in connection with the use to which the object to which it is to be applied is to be put. The shaping of collars on metal bars and rods has long been practised for various purposes and is a matter of common knowledge. The only ground on which, as it seems to me, such a design could be regarded as "new or original" would be if it is legitimate to regard designs applied to articles in the same class as different from one another according to the use to which the article is put, or is intended to be put, but there is nothing in the definition of design in s. 93 (save in the final words of exclusion, which are not relevant on the issue of novelty, but have to be considered on the second aspect of the case) which suggests that one design is to be distinguished from another by the feature of the use to which the article to which the design is applied is to be put. On the contrary, the definition states that the word means "only" the features of shape, etc. It seems to me, therefore, that on the words of the statute a design, in order to be entitled to copyright, must run the gauntlet of comparison with previous designs applied to all other articles in the same class.

Counsel for the appellants contends that the construction which I feel compelled to adopt runs counter to previous decisions, and, in particular, to the well-known judgment of LINDLEY, L.J., ([1896] 2 Ch. 43), in deciding *Re Clarke's Design* (1). Even if it were so, the House would still be obliged to give a construction to the statute which it believes to be correct, but, in fact, the judgment of LINDLEY, L.J., when carefully examined, will be found not necessarily to be in conflict with the construction I have suggested. The question in that case arose under the Act of 1883, and LINDLEY, L.J., expressly mentioned that among the sections to be considered was s. 50 of that Act, which contained a definition of copyright in terms which do not materially differ from the present definition. It is impossible to suppose that he did not keep in mind the statement that copyright was the exclusive right to apply the design to any article "in the class or classes in which the design is registered," but he chose to decide the case on the wider ground that, even if the articles to be compared were in different classes (which they apparently were not), a design applied to an article in one class cannot be said to be "new or original" if it is already being applied to articles of an analogous character even though they are in another class. His references ([1896] 2 Ch. 44, 45) to *Re Bach's Design* (2) and to *Re Read and Greswell's Design* (3), make this perfectly plain. In the latter case CHITTY, J., said (6 R.P.C. 474, 475):

No doubt the copyright that is conferred by the Act of Parliament . . . is a copyright

only in respect to the goods comprised in the class in which the registration takes place . . .

But he then went on to explain that a want of novelty or originality may exist if a design applied to an article in one class is merely imitated in the application of it to a similar article made in a different material in another class. The result of the decisions is, in effect, to establish that the claim of a design to novelty or originality may fail in either of two ways, (i) because there is another article in the same class to which the shape has been already applied, or, (ii) because the shape has already been applied to another article of an analogous character even though it is included in a different class. In both cases, of course, the earlier application must have been "published in the United Kingdom." When the two articles to be compared as embodying the same design are in the same class, a difference of purpose or use appears to me to be immaterial. If monopoly exists, it is monopoly in respect of features of shape and the like which appeal to and are judged solely by the eye, and this excludes the idea that monopoly is established by considering, within the same class, how far the use of one article differs from the use of another article with the same features of shape.

Secondly, as to the respondents' contention that the excluding words at the end of the definition of "design" in s. 93 of the Act apply, and that the appellants cannot have a monopoly because what they are claiming is a thing "which is in substance a mere mechanical device," this is the ground on which the Court of Appeal ordered the removal from the register of design No. 833,097. The definition in s. 93 concludes by stating that "design":

. . . does not include any mode or principle of construction, or anything which is in substance a mere mechanical device.

These words of exclusion first appeared in the Patents and Designs Act, 1919, though it may be that they only express what was previously implied in the true conception of a design in the statute law relating to the subject. The meaning of the exclusion is fairly clear, though it is not altogether easy to define with accuracy. LUXMOORE, J., in *Kestos, Ltd. v. Kempat, Ltd. and Vivian Fitch Kemp* (4) explained the relevant phrase thus (53 R.P.C. 151):

A mere mechanical device is a shape in which all the features are dictated solely by the function or functions which the article has to perform . . .

He cited in support of this view the decision of ROMER, J., in *Tecalemit, Ltd. v. Ewarts, Ltd.* (No. 2) (5). I think that the words of LUXMOORE, J., may be accepted as a useful and accurate test. The configuration of a key, for example, is what it is solely because it has to operate a lock with appropriate wards, and (apart altogether from want of novelty) would be a "mere mechanical device" within this definition. It is to be noted that in the provisional specification 522,543 of 1938, respecting the patent for a vulcanising machine using a fusible member of another pattern, the statement is made that:

. . . the correct fuse will therefore constitute a kind of key for operating the switch mechanism, which cannot be operated by an incorrect key.

The first meaning of "mechanical" in THE OXFORD DICTIONARY is: "Concerned with the contrivance and construction of machines or mechanism," and a device which is in substance a mere mechanical device in this sense seems to me to be what is excluded by the words of the Act. MORTON, L.J., in the Court of Appeal in the present case reached the conclusion ([1946] 1 All E.R. 180):

. . . that the plaintiffs' design is a shape in which all the features are dictated solely by the function which is to be performed by the article to which the shape is applied and that that shape possesses no features beyond those necessary to enable the article to fulfil its function.

I have come to the same conclusion. If one looks at the drawing annexed to the patent specification 533,816 of 1939, which relates to improvements in vulcanising machines for repairing motor vehicle tyres, one sees depicted in figure 5 exactly the same two-collared rod as is shown in registered design 833,097, and the reason for so shaping it is plainly due to the function which it is to perform, namely to fit into the correspondingly shaped orifice of the machine, and so to find its way into the position where it will constitute a fusible

element. Indeed, the specification itself describes one advantage of the mechanism which it is sought to cover by the patent as lying in the fact "that the circuit can only be closed with the aid of the fusible element and only fusible elements of the pre-determined correct shape." It further describes the insertion slot as one which "corresponds in profile with the shape of the fuse member." In fact, the shape of the article has no significance other than that, if it has the features indicated, it will function in the machine. Counsel for the appellants addressed to us an ingenious and detailed argument designed to show that the features of shape applied to the article in question were decided on first and the machine in connection with which it was to be used came into existence afterwards, but it is plain that one was conceived of in connection with the other and I cannot think that this case should be determined by inquiring whether the particular vulcanising machine which would take through its orifice an article of this shape was already made at the date of the registration of the design, or existed only in Mr. Steiner's mind, or was already in at least an experimental condition. In any case, I agree with MORTON, L.J., that, on a close examination of Mr. Steiner's evidence, there is nothing in his replies to negative the existence, at the time when the application to register the design was made, of an experimental machine which was intended to be worked by fuses made according to the registered design. For both the above reasons, therefore, I am of opinion that the appeal fails and should be dismissed with costs.

My Lords, I am authorised by my noble and learned friend, LORD C
MACMILLAN, to say that he concurs in this opinion.

LORD PORTER : My Lords, the only issue left for your Lordships' decision in this case is to be found in the counterclaim in which the respondents claimed rectification of the Register of Designs by the removal therefrom of the appellants' design. They attack the validity of the registration for two reasons, (i) that it has been anticipated, and (ii) that it is a mere mechanical device and as such not the subject of registration. On the first question the respondents say that, by the terms of the Act, the Board of Trade are given power to divide all types of articles into classes, that they have done so, and that any design which has been anticipated in any article, whatever its type, in one of the classes is an anticipation of any design in any other article in that class, however much the two articles may differ in type or object. The appellants, on their part, say that there is a cross division. One division is into the classes which the Board of Trade have prescribed, and the other is that between articles of different types, *e.g.*, a coalscuttle and a bicycle frame may both be made of metal, and, therefore, within class I, but a design registered, or to be registered, in respect of one is not necessarily anticipated by a similar design in respect of the other, because the types of the two articles differ one from the other.

The determination of the question which of these two views is right depends, and must depend, on the provisions of the Act itself and of any rules made thereunder. Those provisions are to be found in the Patents and Designs Act, 1907 (as amended), pt. II, "Designs," beginning at s. 49. The more important of those provisions are contained in ss. 49 (1) and (2), 53 (1), 60 (1) (a), 86 (1) (b) and (2), and finally the definition section—s. 93—under the headings "Design," "Article" and "Copyright" :

Registration of Designs.

49 (1) The Comptroller may, on the application made in the prescribed form and manner of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom, register the design under this part of this Act. (2) The same design may be registered in more than one class, and, in case of doubt as to the class in which a design ought to be registered, the Comptroller may decide the question.

Copyright in registered Designs.

53 (1) When a design is registered, the registered proprietor of the design shall, subject to the provisions of this Act, have copyright in the design during 5 years from the date of registration.

Legal Proceedings.

60. (1) During the existence of copyright in any design it shall not be lawful for any person (a) for the purposes of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof, except with the licence or written consent of the registered proprietor or to do anything with a view to enable the design to be so applied . . .

Powers, etc., of Board of Trade.

86 (1) The Board of Trade may make such general rules and do such things as they think expedient, subject to the provisions of this Act . . . (b) for classifying goods for the purposes of designs . . . (2) General rules shall, whilst in force be of the same effect as if they were contained in this Act.

Definitions.

93 In this Act, unless the context otherwise requires . . .

A "Design" means only the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device:

"Article" means (as respects designs) any article of manufacture and any substance artificial or natural, or partly artificial and partly natural:

B "Copyright" means the exclusive right to apply a design to any article in any class in which the design is registered.

C The Designs Rules, 1932-1938, on their part, contain a classification of goods drawn in the widest terms by the Board of Trade. In these sections of the Act, and, indeed, in the Act and the rules generally, it is notable that, throughout, the differentiation of class from class is insisted on, but, in terms at any rate, no distinction is drawn between different types of article. In particular, this is manifest in the definition of "copyright" in s. 93 as "the exclusive right to apply a design to any article in any class in which the design is registered," by which the proprietor of the design appears to be protected against any user of his design in respect of any article in the same class, however widely that type of article may differ from others in that class. This reading of the definition is, I think, borne out by the provisions of s. 60 (1) making it unlawful to apply the design to any article in any class of goods in which the design is registered.

D I should myself have thought that this language in clear terms protected the copyright in the registered design against the use of that design in respect of any article in the same class, however varied the type of the different articles in that class might be, but it was said, in answer, that no such view has ever been taken, that it is inconceivable that, because two articles were made of metal, a design which was quite unknown in one should be prohibited in any other, however divergent they might be, and, finally, that what was prohibited
E was the use of a design, i.e., a shape applied to any article, that use of the shape itself was not forbidden except when applied to an article, and that must mean applied to an article of the same type.

F My Lords, I find great difficulty in apprehending exactly why "features of shape applied to any article" should be confined to articles of the same type, even if one is to break off the definition of design at the word "article" and not continue to the end of the definition. That definition seems to me to be
G drawn without reference to type of article or even to distinction of class. It seems merely to insist on two things: (i) that the design must be used for an industrial process, and (ii) that it must not include any mode or principle of construction or be a mere mechanical device. This reading, moreover, is borne out if one reads the definition in full and appreciates why the words "applied to any article by any industrial process," etc., are inserted. Their object, as I see it, is solely to ensure that registration is confined to an industrial article and not used to protect (say) reproductions of pictures or artistic designs to which no industrial reproduction is to be applied.

Roughly, I think that for this purpose one might read the definition of copyright as meaning the exclusive right to apply an industrial design (i.e., a design devised for reproduction by an industrial process) to any article in any class in which the design is registered. I recognise at once that such a construction
H of the Act prevents the acquisition of copyright in a design by any person ingenious enough to adapt a design used with or without his knowledge in one type of article to another type of article in the same class, though they may be widely different in origin, use and appearance. One answer, in my view, is that the wording of the Act, combined with the power given to the Board of Trade to classify goods for the purposes of designs, brings about this result, but, I think, there is also another answer. Primarily, the object of the Act is to protect what one may call artistic decoration, though the artistry may be bad and the decoration common-place or worse, and I should agree with Mr.

RUSSELL-CLARKE when he says in the preface to his book on COPYRIGHT IN INDUSTRIAL DESIGNS :

Though a design need not be artistic, this form of protection is meant to cover cases where the object is to please the eye.

Design in the other sense is ruled out by the exclusion of any mode or principle of construction, *i.e.*, it must be adapted to the shape, pattern or ornament of the article and not to its use, and, from this point of view, features of shape in one article do not differ so much one from another as they would if they were devised to some constructional end. This consideration, however, is only a minor matter, since an adaptation of the same design from one class to another may still be protected, as it was in *Walker, Hunter & Co. v. Falkirk Iron Co.* (6), and in *Saunders v. Wiel* (7), and, indeed, this approach to the subject is more germane to the question of what is, or is not, a mechanical device. I am content to say that the wording of the Act is unambiguous and, therefore, any argument based on an alleged inconvenience of adopting the construction it plainly bears is ruled out.

It is asserted, however, that such a view is inconsistent with the decision of, and reasons given by, LINDLEY, L.J., in *Re Clarke's Design* (1). The decision itself does not appear to give rise to any difficulty. It determines no more than that a design in a particular class may be anticipated by a similar design adapted for use in an article of the same type even though it be in a different class, but the expressions used do, I think, give rise to some difficulty. It is true that the wording of the Patents, Designs and Trade Marks Act, 1883, under which that decision was given, differs somewhat from the phraseology used in the Act of 1907 which it falls to your Lordships to construe, but, in substance, I think their meaning is the same, and, therefore, it is necessary to consider the reasoning of LINDLEY, L.J. ([1896] 2 Ch. 45). After saying: "In . . . *Hecla Foundry Co. v. Walker, Hunter & Co.* (8), a design for the shape of an iron furnace-door was protected, although wooden doors of the same shape for sideboards and other articles were old. The things shaped were for such different purposes and their uses were so dissimilar that the design for one of such things was held to be new or original, although it was old for the other," he asked the question: "What then is the test to be applied to a case such as that before us?" and answered:

The design must be new or original with reference to the kind of article not the class of article for which it is registered, meaning by kind of article, not the class of article mentioned in the schedule to the rules, but the kind of article having regard to its general character and use. A design may be new for a coal-scuttle, but not for a bonnet.

In terms, this language in no way affects the construction of the Act which has been suggested above. It merely decides that a design, though registered or used in one class of articles, may still be an anticipation if applied to a similar type of article in another class. It does not say that a design registered in a particular class does not protect its application to any article in that class, but, as was pointed out, the articles in question were almost certainly both in class I and, therefore, it would have been an answer to the claim that the design had been anticipated in that class, yet no such argument was presented. The answer is, I think, that what was being argued was that the design was new, whether in class I or in any other class, and LINDLEY, L.J., was considering this aspect of the case and this only. He was not deciding that a design protected a type of article only. He was deciding that an anticipation of the design in a similar article in another class might yet be a ground for refusing or expunging registration.

This view would of itself determine the case, but the question what is the meaning of "a mere mechanical device" has been fully argued before your Lordships and it is proper that a decision on it should be given. For the appellants it was argued that nothing, whatever functional part it might play as part of an article, was a mere mechanical device if its shape was not required for working all articles of the type in which it was embodied. A yale key, it was said, might be cut in all sorts of shapes, each of which would open a different yale lock, and each different shape would be a registrable design though it was devised for use with a particular type of lock only—at any rate,

if the shape of the key was first devised and the lock, on which it was to operate, was thought out and constructed later. The only non-registrable design would be a key of a shape which must be adopted in order to open any yale lock. The respondents, on the other hand, maintained that any article the shape of which was required to perform a functional purpose was a mere mechanical device: it did not matter that different shapes and different devices could be adopted to perform a similar purpose—in each case the shape is required for

A operational purposes: its ward shape is determined by its function. I do not know that the question is capable of much argument. In the present case the fuse is constructed in the shape shown that it may be used in connection with a particular type of vulcanising machine, and for this purpose I do not think it matters whether the machine was devised to fit the fuse or the fuse to fit the machine. No doubt, another shape of fuse and another type of machine could be invented to perform the same task. However that may be, the only

B object of using the registered shape now under discussion is to perform the functional purpose of making the machine work. Such a design is, to my mind, a mechanical device because it has in view the object of successfully performing a mechanical act. It is “a more mechanical device” because, substantially, that is its only object. No doubt, it is easily recognisable, must be capable of acting as a fuse, and, if that view of the facts be accepted, was conceived before

C the machine into which it was to be fitted was invented. A device, as it appears to me, is none the less mechanical whether the mechanism with which it is to be used is devised before or after the device. As to the two earlier reasons, they appear not to make the design less mechanical, but only to make its mechanism more ingenious and more successful. Primarily, the object of the Act is to protect shape, not function, and not to protect functional shape. I agree that the appeal should be dismissed.

D **LORD SIMONDS:** My Lords, the question raised in this appeal is whether a design which was numbered 833,097 and registered as of Jan. 25, 1939, under the Patents and Designs Acts, 1907-1938 is valid. By ROMER, J., and the Court of Appeal it has for different reasons been held to be invalid.

The design was registered in the name of Leonard Steiner, the predecessor in title of the appellants, in class I in the classification contained in sched. III

E to the Designs Rules, 1932, made by the Board of Trade under s. 86 of the Patents and Designs Acts then in force. This class consists of:

Articles composed wholly of metal or in which metal predominates, and jewellery.

The certificate issued in respect of the design certified that it had been registered “in respect of the application of such design to a metal cut-out or fuse in a vulcanising apparatus.” A copy of the design is annexed to the certificate,

F and the drawings therein contained are accurately thus described by ROMER, J.:

The drawings annexed to the design show in perspective view, profile view and end view a circular bar or rod. The centre part of the rod is somewhat thicker than the two end parts and is divided or separated therefrom by bevelled collars. The central portion of the rod is slightly longer than the two end parts. The design as shown in the drawings possesses a definite appearance, but, as no scale is shown, no idea is afforded of the size of the object drawn other than what can be gathered from the verbal

G description of the application of the design which is contained in the certificate. In fact the fuse to which the design is applied is a minute object, its length being little more than half of that of the average thumb nail.

The respondents challenged and challenge the validity of the registration on three grounds: (a) that the design does not contain any feature applied to an article by any industrial process or means which in the finished article appeals to or is judged solely by the eye: (b) that, if it does contain any such feature,

H that feature is a mode or principle of construction, or, alternatively, is in substance a mere mechanical device: (c) that the design was neither new nor original at the date thereof. ROMER, J., held the registration invalid on the first and third grounds, the Court of Appeal on the second ground. Before looking further at the facts of this case, I think it convenient to call attention to the statutory provisions which now prescribe the limits within which a monopoly of design can be claimed.

The main Act is the Patents and Designs Act, 1907, which repealed previous enactments on this subject, but this Act has itself been from time to time

amended, and, when in this opinion I refer to "the Act," I mean that Act as amended up to Feb. 26, 1942. I must first refer to certain definitions which are of paramount importance. Section 93 of the Act enacts (*inter alia*) as follows :

"Design" means only the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye ; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device ; "Article" means (as respects designs) any article of manufacture and any substance artificial or natural, or partly artificial and partly natural : "Copyright" means the exclusive right to apply a design to any article in any class in which the design is registered.

I turn back to the substantive enactment of the Act, bearing in mind that its purpose is to create and define monopoly in design and that *prima facie* the ambit of the monopoly is, by the definition of copyright, to be found in the class in which the design is registered.

Section 49 of the Act enacts by sub-s. (1) that the Comptroller may, on the application of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom, register the design under that part of the Act. The key words in this sub-section are "new or original." I do not venture an opinion what is the distinction between those alternatives. Section 49 (2) provides that the same design may be registered in more than one class, and, in case of doubt as to the class in which a design ought to be registered, the Comptroller may decide the question.

I pause to observe that it is the "class" which is of importance, and this is emphasised by s. 50 which provides for the registration in certain cases of old designs in new classes. Thus, by s. 50 (1), it is provided that, where a design has been registered in one or more classes, the application of the proprietors of the design (but of no other person) to register it in another class is not to be refused nor the registration invalidated (a) on the ground of the design not being a new or original design, by reason only that it was so previously registered ; or (b) on the ground of the design having been previously published in the United Kingdom, by reason only that it has been applied to goods of any class in which it was so previously registered. And by s. 50 (2) it is provided that where the proprietor of a registered design applies for the registration in the same class of goods of a design consisting of the registered design with modifications or variations not sufficient to alter the character or substantially to affect the identity thereof, the application shall not be refused, nor shall the registration of that other design be invalidated for reasons comparable to those referred to in sub-s. (1).

Sections 51 and 52 provide for the grant of a certificate of registration and for the keeping of a register of designs. Section 53 provides for the term of copyright. I can pass over ss. 54, 55 and 56, but note that in s. 57 provision is made for information being given by the Comptroller whether registration still exists in respect of a design and, if so, in respect of what classes of goods. I come to a very important section, s. 60, which is headed "Legal Proceedings." It is important because, if there is any ambiguity as to the nature and extent of the monopoly conferred by the Act, *i.e.*, as to what is intended by saying that the registered proprietor of a design shall have copyright in the design, it cannot fail to be useful to see in respect of what acts he may take proceedings to protect his monopoly.

Section 60 (1) enacts that during the existence of copyright in any design it shall not be lawful for any person (I put it shortly) (a) for the purposes of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof except as therein mentioned, or (b) knowing that the design or any such imitation thereof has been so applied, to publish or expose for sale that article. Sub-s. (2) of the same section prescribes the relief recoverable by the proprietor of the design. Once more the reference to "class" is significant. The proprietor of a design registered in any class has the right to prevent its application to any article in that class.

It will be observed that, while the reference to classes is frequent, the Act does not itself define that expression or provide what the classes shall be. This is left to be dealt with by rules, for s. 86 (1) provides :

The Board of Trade may make such general rules and do such things as they think expedient, subject to the provisions of this Act, (a) for regulating the practice of registration under this Act : (b) for classifying goods for the purposes of designs . . .

In exercise of this power, the Board of Trade have from time to time made rules, those now in force being the Designs Rules, 1932 (as amended in 1934 and 1938) to which I have already referred. I need refer only to r. 2 (1) which defines "set" as meaning a number of articles of the same general character ordinarily on sale together or intended to be used together all bearing the same design with or without modifications or variations not sufficient to alter the character or substantially to affect the identity thereof ; to r. 6 which provides that, for the purposes of the registration of designs and of those rules, goods are classified in the manner set out in sched. III thereto, and that, if any doubt arises as to the class to which any particular description of goods belongs, it shall be determined by the Comptroller ; to r. 16, which provides that an application shall state the class in which the design is to be registered, and that, where it is desired to register the same design in more than one class, a separate application shall be made in respect of each class ; and to r. 17, which provides that every application shall state the article or articles to which the design is to be applied and that, where the Comptroller so requires, the applicant shall further state for what purpose the article to which the design is to be applied is used and the material or the predominating material of which the article is made. The classification of goods in sched. III contains 15 classes and is largely based on differences of material. Thus class I, with which this case is concerned, is :

Articles composed wholly of metal or in which metal predominates, and jewellery.

Class II is :

Books and bookbinding of all materials.

Classes III, IV, V and VI all commence with the words "Articles composed wholly of" and then different materials are stated.

I can now state in a few words what is the problem raised by the third ground of challenge by the respondents, which I find it convenient to take first, *i.e.*, that the design was neither new nor original. While it was not contended that the design in question had previously been applied to a fuse, as I will without prejudice call the appellants' article, it was alleged, and, as I think, clearly established by the evidence, that it was common in mechanical engineering practice to provide collars on bars or rods of metal, such as rollers used in rolling mills, or shafts for gear boxes, or bicycle cranks, all of them metal articles falling within class I. In particular, a bicycle crank was exhibited at the trial, and your Lordships have had the advantage of seeing a full scale drawing of it, which left it beyond doubt that the features of shape and configuration which distinguish the design applied to the appellants' fuse had been anticipated in other metal articles. This being so, it would appear to me to follow that the appellants' design was not new or original and that the registration of it was invalid. The appellants seek to avoid this conclusion by a contention which I state as nearly as I can in the language of their formal Case. Design, they say, is defined to mean "features of shape, etc., applied to" an article, and, therefore, the word "design" when used in the Act does not mean "features of shape, etc.," but "a particular kind of article having a particular shape, etc.," and that, accordingly, the words of s. 60 (1) (a), "apply . . . to any article . . . the design" mean "make an article of that particular kind (as specified in the certificate of registration) and having that particular shape, etc." Accordingly, the argument proceeds, registration gives a monopoly only in respect of articles of the particular kind specified in the certificate of registration and such registration neither covers, nor is invalidated by the prior existence of, articles of a different kind which may be fortuitously included in the same class, *e.g.*, because they are also made of metal. It was sought to justify this interpretation of the Act by reference to judicial authority. That I will presently examine, but, since the monopoly is purely a statutory creation, I must first ask what support the appellants' contention finds in the language of the statute. The question that at once occurs to me to ask is : Why, if the monopoly is defined by reference to classes of goods, a matter on which the definition of "copyright" and the provisions of s. 60 are conclusive, some other area of monopoly, which

is nowhere to be found in the Act, is to be substituted? It will be observed that, in the language of their formal Case which I have cited, the monopoly is alleged to be limited to articles "of the particular kind," presumably in whatever class they may fall. In the argument before the House other language was used: the monopoly was limited to "similar" articles, or to articles "in the same field," or "of the same type," or "of a similar type." All these expressions have two things in common, the first that they are not to be found in the Act of Parliament, and the second that they are of a vagueness which I should be unwilling to ascribe to the legislature in the creation of a monopolistic right. A

But, my Lords, the further question arises why, if the area of monopoly is not defined by class but by something else, it is necessary to have any classification at all. To this question no satisfactory answer was given. It must, I think, be difficult in this field to reconcile the reward to be given to an inventor of design with industrial freedom. The solution found by the legislature was to give to the Board of Trade the power to make a classification of goods and to control the monopoly by reference to that classification. The Board might have exercised their power by defining classes in the language used by the appellants. Fortunately, as I think, they did not. The classification, which they have in fact adopted, may be considered somewhat arbitrary, e.g., by including all articles composed of metal and jewellery in one class. But so, I think, any classification was bound to be. If from the point of view of industry and manufacture it is unsatisfactory and is capable of improvement, new rules can be made and a new classification substituted. However this may be, I think that, on the plain, unambiguous language of the Act, a design applied to any article in class I, if validly registered, gives a monopoly for that design in respect of any other article in that class, and, as a necessary corollary of that, a design is not new or original and cannot be validly registered in respect of any article in class I if it has already been applied, whether registered or not, to any article in that class. I have, as I have already said, been unable to find any ambiguity in the language of the Act. In particular, the definition of "copyright" leaves no room for doubt. It was suggested that assistance might be got from the fact that articles, to which a design has been applied, are sometimes to be found in sets. For that reason I referred to the definition of "set" in the rules. I have not been able to follow this argument, which does not appear to have been considered in the courts below and there I must leave it. C D E

But, my Lords, counsel for the appellants relied on authority, and particular reliance was placed on what was said by LINDLEY, L.J., in *Re Clarke's Design* (1). I think that this case has been misread and that ROMER, J., himself fell into error in thinking that he was precluded by it, or by any other case, from holding that:

... any metal object (whatever its purpose) designed to a particular shape is necessarily an anticipation of any other metal object (whatever its purpose) created subsequently in the same shape so as to deprive the latter object of any claim to novelty. F

Your Lordships' attention has not been called to any case (except a case before the Patents Appeal Tribunal) in which it has been expressly decided that a design was registrable within a certain class, notwithstanding that it had already been published in respect of another article within the same class, or to any case in which the contrary had been expressly decided. The respondents urged that every decision proceeded on the basis that the Act and its predecessors were absolutely clear in the sense which I have already put before your Lordships: the appellants countered by saying that the opposite view was implicit in the decisions of the court in such cases as *Re Clarke's Design* (1). My Lords, I find nothing in the decision of *Re Clarke's Design* (1) which in any way justifies the appellants' contention. The question there was whether a design which had been registered in class I for a "Lamp for electric lighting, applicable for its shape" was valid. It was challenged on the ground that the design was not new or original in that it was substantially in the old form of lampshade which had been commonly used for gas lights, and this challenge was upheld. From beginning to end of the case I find no reference to what I assume to have been the fact, that the registered design had been previously published in respect of an article falling within the same class I. The single question was whether there were such differences between the registered and the earlier designs that G H

novelty or originality could be claimed for the registered design. In the view of the Court of Appeal they could not, but in the course of his judgment LINDLEY, L.J., made certain observations on which the appellants rely. After an examination of the Act then in force, *viz.*, the Act of 1883 as amended by the Act of 1888, LINDLEY, L.J., made a reference, which I think is instructive, to *Re Bach's Design* (2). In that case, as he pointed out ([1896] 2 Ch. 44), a lampshade in the shape of a rose and made in linen was registered for goods in class XII, and it was held that a lampshade of the same shape, but made in china, which had been registered for goods in class XIV was not entitled to protection. Here was a clear decision approved by LINDLEY, L.J., that, where a design has already been published in respect of goods in one class, novelty cannot be claimed for the same design in respect of the same goods merely because they are made of a different material and fall within another class. To the same effect was *Re Read & Greswell's Design* (3), but though LINDLEY, L.J., thus thought fit to expound the law in relation to novelty—though, indeed, it may be said that, if the construction of the Act which I have suggested to your Lordships is right, he might easily have disposed of the case by saying that the design could not be novel since it had already been registered in the same class—yet I cannot read his words as rejecting that construction and substituting for the monopoly limited by class a monopoly limited by the nature of the article. I cannot doubt that, if that had been his intention, he would have explained by what process of reasoning he arrived at an interpretation which appears to find no support in the plain language of the statute. I would not throw any doubt on his decision that a design may not be novel though it has not been published in the same class, but I would hold—and I do not think he meant to decide the contrary—that it cannot be novel if it has been published in the same class. Any observations to the contrary cannot, in my opinion, be regarded as good law and the decision of LUXMOORE, J., sitting as judge of the Patents Appeal Tribunal, in *Re Gutta Percha and Rubber (London), Ltd. (No. 789,574) Application* (9), cannot be supported. Thus, my Lords, I agree with the conclusion reached by ROMER, J., on this part of the case, though I reach it by a somewhat different road.

On the first ground of challenge, which I understand to be based on the contention that the design as applied to the article in question is on so small a scale as to make no appeal to the naked eye (a contention which also found favour with ROMER, J.), I do not think it necessary to express any views. I am not satisfied that on the facts such an issue arises. For the shape or configuration of the appellants' fuse appeared at least to my eye to have very definite characteristics which I recognised as having been anticipated by the earlier published designs. In the circumstances I will reserve my opinion on what may be a difficult question of law, whether the eye, to which alone appeal must be made, is the natural eye unaided by a magnifier.

On the second ground, with which your Lordships have dealt, I will content myself with saying that I fully concur in the reasoning and conclusion of MORTON, L.J.

LORD UTHWATT : My Lords, three objections were taken to the appellants' design—(i) that it is not new or original, (ii) that it is in substance a mere mechanical device, and (iii) that the article in respect of which the design was registered was too minute that the design applied to it did not make an appeal to the eye.

The first objection, on the facts proved, raises the question whether the existence of a design, old as applied to some one article falling within a particular statutory class, necessarily precludes the attribution, for the purposes of the Act, of novelty or originality to that design when newly applied to any other article in the same statutory class, however different the two articles may be in nature and purpose. The matter in issue is not novelty or originality as a general conception, but novelty or originality for the purposes of the Act. A consideration of the relevant provisions of the Act may impose on the words "new or original" occurring in the phrase "a new or original design," as used in the Act, a limitation not suggested by the words themselves. The scheme of the Act is that goods are to be classified for the purposes of design in accordance with rules made by the Board of Trade (s. 86) and that a new or original design submitted by an applicant and accepted for registration is to be registered

in some one class and may be registered in more classes than one, the appropriate class or classes being determined by the nature of the article in respect of which the design is submitted by the applicant. No registration other than registration in a class is permissible. The effect of registration is that the registered proprietor obtains for a period of years copyright in the design. Copyright is defined in s. 93 as :

... the exclusive right to apply a design to any article in any class in which the design is registered.

Section 60 (dealing with piracy of a registered design) provides [by sub-s.(1) (a)] that during the existence of copyright in any design it shall not be lawful to apply or cause to be applied to :

... any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof, except with the licence or written consent of the registered proprietor ...

Unauthorised application of a registered design may be restrained by injunction.

Those are the relevant provisions. It is obvious that the Act cannot be construed so as to permit of there being two or more competing designs registrable in the same class if each such design carried a monopoly as respects the application of the design to all articles falling within that class. That is an impossible position. The fact that only a new or original design may be registered, the circumstance that a design must be registered in a class, and the terms of the definition of copyright and of the provision as to piracy leave but two ways of escape from it. Either (i) novelty and originality for the purposes of the Act must be denied to a design proposed to be registered in a particular statutory class when it is old in its application to any article falling within that class, or (ii) the monopoly conferred by a registered design must be limited by reference to the particular article to which on registration the design is applied. The point at issue, therefore, may be approached by considering whether the definition of copyright and the provision as to piracy, when fairly read, enable the monopoly to be so limited. In my opinion, they do not.

The appellants sought to secure that limitation by putting a particular construction on the definition of design contained in the Act. Design is defined in s. 93 as meaning :

... only the features of shape, configuration, pattern or ornament applied to any article by any industrial ... means ... which in the finished article appeal to and are judged solely by the eye ...

In the appellants' submission, design means, not the features of shape appearing in an article, but a particular kind of article having a particular shape. The article referred to in a design when registered accordingly entered into and formed part of the registered design. In my view, that is not the true construction of the definition. Its whole point is the isolation of the specified features. The use of the word "applied" in the definition is dictated by the reference to the means of application and is not directed to the inclusion in the design of the article featuring the design, but, even if one accepts the appellants' construction of the word "design," the phrase "any article in any class in which the design is registered" appearing in the definition of "copyright" and the provision as to piracy is not susceptible of a meaning which excludes any article that is in the class. All, indeed, that results from considering the appellants' construction of the word "design" in connection with the definition of "copyright" and the provision as to piracy is that an additional argument is furnished for rejecting that construction. The monopoly conferred by a registered design, therefore, in my view, extends to all articles in the class in which the design is registered, and, in my opinion, it follows that a design is not new or original for the purposes of registration in any class if it is old in its application to any article in that class. Judged by that test, the design of the appellants was not "new or original" for the purposes of class I in which it was registered.

The appellants placed much reliance on the judgment of LINDLEY, L.J., in *Re Clarke's Design* (1). That judgment, when read as a whole, does not afford any solid basis for their contention. LINDLEY, L.J., dealt only with the question which arises when a design, old as regards an article falling within one of the statutory classes, was sought to be registered as respects an article falling

within some other statutory class. Some novelty or originality had to be shown in the new application. That novelty might be found if the old design was applied to a different kind of article. Registration of the design in some other class or, without registration, use of the design as regards any article in that other class, would not, therefore, of itself deny novelty or originality to the design in its new application. LINDLEY, L.J., did not at any stage concern himself with discussing the question whether prior use of a design as regards any article falling within a particular statutory class permitted novelty or originality being attributed to that design when applied to any other article in the same statutory class, but it would appear that he thought the answer obvious. I quote the relevant passage ([1896] 2 Ch. 44) :

From the wording of ss. 47, 58 and 60 [which correspond in substance with the relevant sections here, ss. 49, 60 and 93 of the Act of 1907, as amended], it might be thought that if a design had never been applied to articles comprised in one of the classes of goods into which manufactured articles are divided for the purposes of the Act, such design might be protected for that class even if it had been previously applied to goods of a different class.

The suggestion is that novelty in the application of the design to any article falling within the particular statutory class, at any rate, was necessary.

On the second objection I respectfully agree with the observations of the noble and learned Lord on the Woolsack and my noble and learned friend LORD PORTER. With them and the Court of Appeal, I see no reason for excluding from the facts proper to be taken into account the knowledge of the designer of the objects which the design is fitted to serve. His own intentions as to the use to which the design is to be put—and here I differ from some expressions appearing in the judgments of the Court of Appeal—are, taken alone, irrelevant, but those intentions may throw considerable light on the substantive nature of the features appearing in the device represented in the design. The design may give working effect to them. In the present case the designer's intentions throw a flood of light on those features. Every feature in the design was apt to serve a mechanical object and no feature had any other substantial quality. In the sum of the qualities of the design there was a mechanical device and nothing else.

As regards the third objection—which was not argued before this House—I observe only that the design, as registered, depicts merely the relative sizes of its various features and not the actual size of any one of them, and that in the design as used the characteristic features are readily discernible to the naked eye. This objection did not arise on the facts and it is unnecessary to express any opinion on the question of construction raised by it. I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors : Warren & Warren (for the appellants) ; Stocken, May, Sykes & Dearman, agents for Baldwin, Weeks & Baldwin, Clitheroe (for the respondents).
[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

GREENHALGH v. MALLARD.

[COURT OF APPEAL (Somervell and Evershed, L.JJ.), June 16, 17, 1947.]

Conspiracy—Res judicata—Allegation that purpose unlawful—Subsequent action alleging means unlawful.

Practice—Striking out pleading—Statement of claim—Action frivolous and vexatious—Conspiracy—Allegation that purpose unlawful—Subsequent action alleging that means unlawful.

Any series of concerted acts damaging to a plaintiff can give rise to only one cause of action for conspiracy. The unlawfulness resides in the fact of combination. A plaintiff who believes he has a cause of action in conspiracy must, therefore, decide whether he is going to say either (i) that the purpose was unlawful but not that the means were unlawful, or (ii) that the means were unlawful but not that the purpose was unlawful, or, that both purpose and means were unlawful. If he has chosen to put his case in one of the first two ways, he cannot, thereafter,

bring the same transactions before the court, put his case in the other way, and say he is relying on a new cause of action. In such circumstances he can be met with a plea of *res judicata*, or the statement of claim may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the court.

[AS TO STRIKING OUT PLEADINGS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 253-256, paras. 419, 420; and FOR CASES, see DIGEST, Pleading, pp. 71-92, Nos. 623-777].

Cases referred to :

- (1) *Henderson v. Henderson*, (1843) 3 Hare 100; 1 L.T.O.S. 410; 21 Digest 174, 276.
- (2) *Macdougall v. Knight*, (1890) 25 Q.B.D. 1; 59 L.J.Q.B. 517; 63 L.T. 43; 54 J.P. 788; 21 Digest 205, 473.
- (3) *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*, [1942] 1 All E.R. 142; [1942] A.C. 435; 111 L.J.P.C. 17; 166 L.T. 172; Digest Supp.
- (4) *Green v. Weatherill*, [1929] 2 Ch. 213; 98 L.J.Ch. 369; 142 L.T. 216; Digest Supp.
- (5) *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155; 94 L.J.P.C. 79; 134 L.T. 354; Digest Supp.
- (6) *Brunsdon v. Humphrey*, (1884) 14 Q.B.D. 141; 53 L.J.Q.B. 476; 51 L.T. 529; 49 J.P. 4; 21 Digest 207, 480.
- (7) *Mulcahy v. R.*, (1868), L.R. 3 H.L. 306; 42 Digest 983, 137.

INTERLOCUTORY APPEAL by the defendants from an order of CASSELS, J., dated May 22, 1947, reversing an order of the master that the statement of claim in the action be struck out on the ground that the causes of action alleged therein were *res judicata* and that the action was frivolous and vexatious and an abuse of the process of the court. The Court of Appeal allowed the appeal. The facts appear in the judgment of SOMERVELL, L.J.

Russell Vick, K.C., and *Milmo* for the defendants.

R. F. Levy, K.C., and *A. S. Diamond* for the plaintiff.

SOMERVELL, L.J. : This is an appeal from CASSELS, J., who reversed an order made by a master, that the statement of claim in these proceedings be struck out on the ground that "the causes of action therein alleged are *res judicata* and that the same are frivolous and vexatious and an abuse of the process of the court." The master based his decision on what was said in *Henderson v. Henderson* (1) to which I will refer later. The learned judge reversed the decision of the master on the ground that there was a triable issue, and he referred to certain observations made by LORD GREENE, M.R., in earlier proceedings between the parties. The application with which we are concerned is made under R.S.C. Ord. 25, r. 4, and I have borne fully in mind what has so often been said—that, in dismissing an action under that order, the court must be satisfied that there is no chance of the statement of claim succeeding. In *Macdougall v. Knight* (2), FRY, L.J., said (25 Q.B.D. 10), that in dismissing an action under this procedure on the ground of a plea of *res judicata*, the court must be satisfied "that a plea of *res judicata*, if put on the record, must succeed."

As part of an agreement under which the present plaintiff advanced money to assist a company called the Arderne Cinemas, Ltd., in which the defendants had at that time substantial interests as shareholders, the defendants agreed, by what was called a collateral agreement, to vote with and support the plaintiff who became a substantial shareholder. The effect was that, with his own shares and with the shares held by those whom he was entitled to call on to support him, he had control of the company. Troubles arose between the parties in connection with the company, and on July 1, 1941, the plaintiff started proceedings for a declaration that the so-called collateral agreement was valid and enforceable. He succeeded in those proceedings, and judgment was delivered to that effect by MORTON, J., on Oct. 3, 1941. After that judgment the plaintiff sought to take certain steps to which the defendants objected, and the defendants then did that of which the plaintiff complains and with which we are concerned. In Jan., 1942, the plaintiff started proceedings in the Chancery Division against the present defendants and others. In those proceedings the plaintiff alleged that the present defendants "wrongfully and fraudulently conspired together to defeat the said judgment"—i.e., the judgment of MORTON, J., to which I have referred—"and to deprive the plaintiff of the benefits thereof

and of his rights under the collateral agreement mentioned in para. 3 hereof." The substance of the alleged conspiracy was that the defendants had transferred most of their shares to others, and thereby reduced the shares which the plaintiff, for voting purposes, could control under the collateral agreement to an extent which deprived him of control of the company. It was also alleged in those proceedings that the defendants, "or some or one of them . . . caused a meeting of directors of the defendant company to be called for Nov. 12, 1941."

A The notice convening the meeting is set out, and it is said that "Prior to the date of such meeting each of them the plaintiff and the said Harold Brooks endeavoured to obtain from the defendant, Harold Titterton"—who is a defendant in the present proceedings—"some information concerning the purpose for which such meeting had been convened and the business proposed to be transacted thereat, but the said defendant in reply wrongfully refused to give such information and untruthfully represented to them that he had no knowledge of such purpose of business." It is, therefore, plain that an untruthful statement in that matter by the defendant, Titterton, was alleged as a relevant allegation in the proceedings which were then taken.

B That case came on before UTHWATE, J., who decided against the plaintiff, and I need only read one sentence from his judgment. The case was put on the basis that this was an unlawful conspiracy to injure the plaintiff, and the learned judge, referring to *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (3) said he had "no hesitation in finding that the predominant purpose was not to damage the plaintiff or his property." That disposed of the case as it had been presented to him. The plaintiff appealed from that judgment, and the appeal was dismissed.

C The present statement of claim admittedly deals with the same transactions. It is not suggested that there is any further fact that is relied on. The paragraph setting out the conspiracy is as follows: "Thereupon between Oct. 3 and Nov. 12, 1941, the defendants conspired to deprive the plaintiff of the benefit of the said judgment and of his rights under the collateral agreement by means of fraud, namely, causing a meeting of directors of the company to be called, but procuring the absence of the plaintiff therefrom and attempting to procure the absence of the said Harold Brooks therefrom by fraudulently misrepresenting to them and concealing from them the nature of the business to be transacted thereat, and thereby enabling certain transfers to be done. Counsel for the plaintiff says that this is a different cause of action. It is, of course, true that in the authorities dealing with conspiracy it is pointed out that there are cases in which the conspiracy is unlawful in that its purpose is unlawful, viz., to injure the plaintiff, in a way which cannot be justified by any legitimate purpose of the defendants in what they do, and that in other cases the conspiracy may give rise to a cause of action because the means used are unlawful. In other words, a conspiracy may give rise to a claim for damages if either the end or the means, or both, are wrongful, but, in my opinion, a plaintiff who believes he has a cause of action in conspiracy must make up his mind whether he is going to rely on one or other or both of these allegations—whether he is going to say that the purpose was unlawful, but he does not suggest that the means are unlawful, or that the means were unlawful, but he does not suggest that the purpose was unlawful; or that both are unlawful. But if he has chosen to rely on, and put his case in, one of those ways, he cannot, in my view, thereafter bring the same transactions before the court and say that he is relying on a new cause of action."

D That, I think, would be enough to dispose of this case, but counsel for the defendants put his case in two ways, and I will deal with them. He relied, first, on *res judicata*, and then said that, if there was any doubt about that, he was entitled to succeed on the ground that it would be vexatious and an abuse of the process of the court to allow this transaction to be brought before the court again on the basis of the present statement of claim. I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

In *Green v. Weatherill* (4) ([1929] 2 Ch. 221), MAUGHAM, J., quoted some observations by WIGRAM, V.C., in *Henderson v. Henderson* (1) (3 Hare 114):

I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

MAUGHAM, J., goes on to refer to the fact that that passage had been approved by the Privy Council in *Hoystead v. Commissioner of Taxation* (5) ([1926] A.C. 170). Applying that principle here, and, perhaps, having particular regard to the second sentence in it, it seems to me that one could not find an issue or a way of putting a case which more clearly came within the principle as there laid down. Counsel for the plaintiff relied on *Brunsdon v. Humphrey* (6). That was a case in which damage to goods and injury to the person were occasioned by the same act of negligence, and the plaintiff brought an action in the county court for damage to his goods (in that case a cab), and recovered the amount he claimed, and later he brought an action in the High Court of Justice against the defendant claiming damages for personal injury. LORD COLERIDGE, C.J., dissented, so it may be regarded as a somewhat border-line case, but the majority held "that the action in the High Court was maintainable, and was not barred by the previous proceedings in the county court." It is, however, to be observed that in that case there were, so far as I can see, two separate causes of action in the ordinary sense in which that word is used, in that, at any rate, the cases could have been put as trespass to the person and as trespass to goods, and it seems to me that for that reason counsel for the plaintiff cannot successfully put forward that case as covering as a matter of law the circumstances which we have to consider. In the present proceedings, as in the former proceedings, the plaintiff is alleging a conspiracy to injure. In the first proceedings he alleged that the defendants fraudulently conspired. In these proceedings he alleges that they conspired by means of fraud. I will accept fully what was said by LORD GREENE, M.R., in a passage to which I will refer, that that is a different way of putting forward or basing the issue of conspiracy in respect of the transactions which are complained of, but the means of fraud now relied on were expressly pleaded in the first action, *viz.*, the untruthful statement by the secretary, and if there ever was a point which was apparent and open to be raised if it was desired to raise it it is this point which counsel now seeks to make the basis of fresh proceedings. Counsel relied on some observations by LORD GREENE, M.R., at the hearing of the appeal. Mr. BEYFUS, who appeared for the plaintiff in the Court of Appeal, sought to advance an argument that, while accepting the judge's finding as to the purpose of the defendants, the plaintiff ought to succeed on the basis of a conspiracy to effect a legal purpose by unlawful means, and the unlawful means or illegal means suggested were two. It was said there was a breach by the defendants of their statutory duty in failing to call a meeting that the plaintiff had requisitioned. That matter was not pleaded and it is not relied on in the present proceedings. Secondly, it was said that there was the statement which was dishonestly made by the secretary of the company to the plaintiff. That is the statement to which I have already referred and which was referred to in the original statement of claim. LORD GREENE, M.R., said that this way of putting the case—that the conspiracy was based not on the purpose, but on the alleged unlawful means—could and should have been properly pleaded as an alternative conspiracy and clearly put before the court and investigated in the evidence, and that it was too late to raise it in the Court of Appeal. I, of course, agree that that way of putting the case should have been pleaded and clearly put before the court, but reading and reading carefully, as I have, what the MASTER OF THE ROLLS said—and no one suggests that he had the present point in mind—I agree with counsel for the

defendants in that I think the general tenor of his remarks is that this was a way of putting the case which it was clearly open to the plaintiff to put forward on the series of transactions which he was asking the court to investigate, and, if that is the general tenor of what was in the MASTER OF THE ROLLS's mind, it seems to me to support the conclusion to which I have come. For these reasons I think this appeal must be allowed and the order of the master restored.

A **EVERSHED, L.J.:** I agree. CASSELS, J., thought that the observations of the MASTER OF THE ROLLS, to which SOMERVELL, L.J., has referred, were directed to the very point which has been argued before us on this appeal. I do not so interpret the language of the MASTER OF THE ROLLS, and I agree with what has fallen from SOMERVELL, L.J., upon that point. It is, of course, true that in so far as a breach of statutory duty on the part of a director was sought to be relied on by MR. BEYFUS, that was a matter that had not been pleaded at all in the first action. It was a point which was born and lived and flourished and died, so far as I know, in the course of MR. BEYFUS's argument. It was not pleaded in the present case either. It is also clear that at the trial before UTHWATT, J., the use which the plaintiff sought to make of the facts constituting, or alleged to constitute, evidence of conspiracy was that from those facts the court should infer that the conspirators combined to do something unlawful in its purpose or end, and it is now sought, as it was argued by MR. BEYFUS, to make, as it were, a re-deployment of those facts and to put the case thus—that, whatever the justification for the purpose, the means, or some of the means, employed were unlawful. The MASTER OF THE ROLLS pointed out that that was a different case in the sense of a different way of seeking to make use of the facts pleaded. That I think, if I may say so, is plain when one considers the judgment of UTHWATT, J., and the inference one must draw from it as to the way in which the case was fought, but that, in my judgment, has nothing to do with the present question, whether it is right now, according to principle, that the plaintiff should be allowed in another action to rely on the same series of facts, deployed differently, to assert a conspiracy and to recover the same damage which he has sought to recover in the first action. Mr. Levy's argument assumes, I think, that a series of concerted acts may give rise to two quite separate causes of action, each called a conspiracy, *viz.*, one where the end or predominant purpose of the concert lacks justification, and is, therefore, unlawful, and the second where, the predominant object or the end being lawful or justifiable, unlawful means are employed. In my judgment, that is a fallacy. Any series of concerted acts damaging to a plaintiff can, in my view, only give rise to one cause of action for conspiracy. The unlawfulness resides in the fact of combination. Such a combination willfully to do acts injurious to another's interest, and, in fact, damaging to him, may be actionable as a conspiracy. Such a combination may, however, be justified if the predominant purpose of the parties to the combination is legitimate: for example, the promotion of their own business interests. On the other hand, such a justification may not be available to the parties to the combination if the means which they employ to gain their end are unlawful. In his speech in *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (3) ([1942] 1 All E.R. 157), LORD WRIGHT cites the classical definition of "conspiracy"—that is, of criminal conspiracy—by WILLES, J., in *Mulcahy v. R.* (7) (L.R. 3 H.L. 317):

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." This must be supplemented by observing that, though the crime is constituted by the agreement, the civil right of action is not complete unless the conspirators do act, in pursuance of their agreement to the damage of the plaintiff.

H The essence of any claim is the fact of combination. If, therefore, in any case conspiracy is alleged, the subject of the litigation consists, in my view, of the acts done in combination, and whether it is alleged that these acts, lacking justification in their object, have caused damage to the plaintiff, or that, notwithstanding a legitimate purpose, unlawful means have been employed and the plaintiff has been consequently damaged, both the cause of action and the damage flowing therefrom are the same in each case. In my view, therefore, and without the need for further analysis, if in one action for damages for conspiracy acts done in combination are alleged, it is an abuse of the process of the

court, and contrary to the principle that in the public interest there should be an end to litigation which may be regarded as an extension of the strict rule of *res judicata*, to rely in the second action on the same concerted acts, even though in the first action the claim was formulated on the basis of absence of justification in the end only, without regard, or particular regard, to the means, and in the second action the means are impugned as unlawful without challenge to the legitimacy of the end or purpose. For these reasons, in addition to those given by SOMERVELL, L.J., I think this appeal should be allowed.

Appeal allowed.

Solicitors: *S. A. Bailey & Co.* (for the plaintiff); *Pritchard, Englefield & Co.*, agents for *Field, Cunningham & Co.*, Manchester (for the defendants).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

WOOLF v. COLLIS REMOVAL SERVICE.

[COURT OF APPEAL (Cohen and Asquith, L.JJ.), June 3, 4, July 8, 1947.]

Arbitration—Stay of legal proceedings—Deviation from terms of contract—Whether arbitration clause displaced—Application of clause to claim framed in tort—Arbitration Act, 1889 (c. 49), s. 4.

In his statement of claim the plaintiff alleged that the defendants had contracted to remove his furniture and effects from London to their store in M., and there safely to keep and take care of them, and that, in breach of that contract, they had removed the goods to a different destination, a farm in B., where some of them were lost and others damaged. Further, or alternatively, the plaintiff alleged that the goods were lost and damaged owing to the negligence of the defendants in using, when the goods arrived at B., an unsuitable place in which to store them and guarding them inefficiently. The contract was in the form of a written estimate providing for the removal of the goods to M. Indorsed on its back were a number of conditions; "exceptions clauses," mainly limiting the liability of the defendants; and an arbitration clause in the following terms: "If the customer makes any claims upon or counterclaim to any claim by the contractors, the same shall in case of difference be referred to the decision of two arbitrators . . . and the making of an award shall be a condition precedent to any right of action or counterclaim." Before taking any step in the action the defendants applied, under s. 4 of the Arbitration Act, 1889, for a stay, which was granted by the master, and his decision was upheld by the judge in chambers. On appeal:—

HELD: (i) although, if the "deviation" alleged were proved, the "exceptions clauses" would become inapplicable and inoperative (*Lilley v. Doubleday* (1881) (7 Q.B.D. 510) and *Gibaud v. Great Eastern Railway Co.* ([1921] 2 K.B. 426) applied), there were radical distinctions between "exceptions clauses" (inserted for the protection or benefit of one party) and arbitration clauses, (inserted as a method of settling disputes), and the "deviation" did not necessarily displace the whole contract, including the arbitration clause (*Heyman v. Darwins, Ltd.* ([1942] 1 All E.R. 337) and *Hain SS. Co., Ltd. v. Tate & Lyle, Ltd.* ([1936] 2 All E.R. 597) applied).

(ii) the fact that the arbitration clause was one-sided did not divest it of its character as an arbitration clause.

(iii) even if the claim in negligence was a claim in tort and not under the contract, yet there was a sufficiently close connection between that claim and the transaction to bring the claim within the arbitration clause. (*Polemis v. Furness Withey & Co., Ltd.* (5) ([1921] 3 K.B. 426) applied).

[AS TO STAY OF LEGAL PROCEEDINGS, see HALSBURY, Vol. 1, pp. 637-644, paras. 1084-1092; and FOR CASES, see DIGEST, Vol. 2, pp. 361-377, Nos. 311-411.]

Cases referred to:

- (1) *Gibaud v. Great Eastern Ry. Co.*, [1921] 2 K.B. 426; 90 L.J.K.B. 535; 125 L.T. 76; Digest Supp.
- (2) *Lilley v. Doubleday*, (1881) 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814; 46 J.P. 708; 3 Digest 77, 163.

- (3) *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; Digest Supp.
 (4) *Hain SS: Co., Ltd. v. Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597; 155 L.T. 177; 55 Lloyd L.R. 159; Digest Supp.
 (5) *Re Polemis & Furness, Withy & Co., Ltd.*, [1921] 3 K.B. 560; *sub nom. Polemis v. Furness, Withy & Co., Ltd.*, 90 L.J.K.B. 1353; 126 L.T. 154; 41 Digest 419, 2620.

A INTERLOCUTORY APPEAL by the plaintiff from an order of SELLERS, J., dated Apr. 22, 1947, staying further proceedings under s. 4 of the Arbitration Act, 1889. The facts appear in the judgment of the court delivered by ASQUITH, L.J. The appeal was dismissed.

Heathcote-Williams for the plaintiff.

A. W. Roskill for the defendants.

B *Cur. adv. vult.*

C July 8. ASQUITH, L.J., read the following judgment of the court. This is an appeal from an order of SELLERS, J., affirming an order of a master directing that all further proceedings in this action should be stayed, under s. 4 of the Arbitration Act, 1889. In the first two paragraphs of his statement of claim the plaintiff alleges that the defendants contracted to remove certain furniture and other effects from his house in London to the defendant's "Quarry" Store, Marlow, Buckinghamshire, and there safely to keep and take care of the same, and that, in breach of such contract, they removed the goods to a different destination, *i.e.*, Hawes Hill Park, Braywood, Berkshire, where some of them were lost and others were damaged. Further or alternatively, he alleges that the goods were lost and damaged owing to the negligence of the defendants in using, when the goods had arrived at Hawes Hill Farm, Braywood, an unsuitable place (a disused piggery) in which to store them and guarding them inefficiently. He claims damages. Before taking any step in the action, the defendants applied, under s. 4 of the Arbitration Act, for a stay which was granted by the master, his decision being upheld by the judge in chambers. The plaintiff argues that there was in effect no jurisdiction to stay the action and to refer these issues to arbitration, and this, as we understand it, on two broad grounds.

E The contract takes the form of a written "estimate," providing for removal of the goods to the Quarry Store, Marlow. Indorsed on its back are a number of conditions, practically all of them limiting the liability of the removers. No. 20 of the indorsed conditions is, however, an arbitration clause, the precise terms of which we indicate later. The plaintiff's first broad point is that the second paragraph of the statement of claim alleges a "deviation" or fundamental departure from the contract, and that, if such an allegation were proved, the effect would be to deprive the defendants of the benefit of the indorsed conditions, including, as he contends, the arbitration clause. In other words, he argues that the issue raised in these paragraphs is one which, if determined in his favour, would make the arbitration clause inoperative or, put slightly differently, his proposition is that a dispute cannot be referred to arbitration under an arbitration clause the continued existence of which is itself the subject, or necessarily involved in the subject, of the dispute. The plaintiff's case was, indeed, put higher, it being argued that "deviation" displaced the whole contract, *ab initio* and for all purposes.

G In the words of SCRUTTON, L.J., in *Gibaud v. Great Eastern Ry. Co.* (1) ([1921] 2 K.B. 435), it is a familiar principle of law that :

H "... if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it.

The learned judge cites *Lilley v. Doubleday* (2), where GROVE, J., said (7 Q.B.D. 511) :

If a bailee elects to deal with the property entrusted to him in a way not authorised by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself.

In *Lilley v. Doubleday* (2) the facts were that warehousemen contracted, under a contract which limited their liability to loss by specified causes, to keep the plaintiff's goods in store A., but, in fact, kept them in store B. When in store B. they were in part lost and in part damaged by fire, without negligence by the warehousemen. It was held that the latter could not rely on the conditions limiting their liability, since these applied only to goods kept in the store authorised by the contract.

The facts alleged in the statement of claim in this case are very similar. The goods, according to the pleading, were carried to and stored in a place and a store unauthorised by the contract. If so, any "exceptions clauses" (as, for brevity, we will call clauses limiting the carrier's or warehouseman's liability) would, no doubt, become inapplicable and inoperative. It is, however, important to observe that the argument which we are considering makes the vital assumption that arbitration clauses are, or at all events, this arbitration clause is, on the same footing for the relevant purpose as "exceptions clauses" and in the event of a "deviation" share their fate. This, we think, is a fallacy. Leaving aside for the moment the special wording of this particular arbitration clause, we are satisfied that "deviation" or its equivalent in contracts not for carriage—we will, for brevity, call both "deviation"—will not in itself displace an arbitration clause. "Deviation" is a very common phenomenon in contracts of carriage, especially in carriage by sea, and the theme of a vast number of reported cases. In a large proportion at least of these there were (a) an "exceptions clause" or "exceptions clauses" and (b) an arbitration clause. Yet counsel for the plaintiff was unable to cite any case in which the fact or averment of "deviation" was held to displace the arbitration clause and to afford a ground for refusing a stay of the action. This, it may be said, is negative and inconclusive. Affirmatively, however, it appears to us to emerge from two decisions of the House of Lords (a) that "deviation" does not necessarily displace the whole contract, including any arbitration clause, and (b) that there are radical distinctions for this purpose between "exceptions clauses" and arbitration clauses.

This last point appears in the following passages in *Heyman v. Darwins, Ltd.* (3) ([1942] 1 All E. R. 337) from the speeches of LORD MACMILLAN and LORD PORTER. At p. 347 LORD MACMILLAN is speaking of repudiation of a contract, in the sense, not of a denial of the existence of the contract, but of conduct evincing an intention no longer to be bound by it. He is speaking of a repudiation in this sense, and, no doubt, of such a repudiation which has been accepted, for it is well settled that an unaccepted repudiation has no legal consequences whatsoever. So speaking, he says:

The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.

LORD PORTER, at p. 361, accepts LORD MACMILLAN's statement and for himself also emphasises the distinction between "exceptions clauses" (stipulations inserted for the protection or benefit of one party) and arbitration clauses:

As my noble and learned friend LORD MACMILLAN has said, the arbitration clause is inserted as a method of settling disputes, and is not imposed as a term in favour of one party or the other.

Ergo, in the event of a repudiation, the arbitration clause, subject to any exceptional wording, will survive. This is spoken in relation to repudiation. Does it apply to "deviation"? We think that it does. That "deviation" whatever else it may be, is repudiation of the contract, and repudiation in an extreme form, appears to us plain both in principle and from the decision of the House of Lords in *Tate & Lyle, Ltd. v. Hain Steamship Company, Ltd.* (4). LORD ATKIN's opinion (concurring in by LORDS THANKERTON and MACMILLAN and not, we think, materially dissented from by LORD WRIGHT or LORD MAUGHAM) is concerned largely with the question whether, assuming a "deviation" is a kind of repudiation, it needs, like an ordinary repudiation, to be accepted by the party not in fault in order that it may have legal consequences. He holds

that it does and that, if, and only if, it is accepted, do the exceptions clauses become inoperative, but nowhere does any doubt appear that deviation is a species of repudiation. Indeed, it is hardly possible to imagine a clearer way in which a carrier can "evince the intention of not being bound" to perform the transit contracted for than his act in performing a different and inconsistent transit and putting it out of his power to perform the stipulated one.

A If "deviation" equals repudiation, then, under the decision in *Heyman v. Darwins, Ltd.* (3) which is binding on this court, the arbitration clause survives, although exceptions clauses, if the implied repudiation is accepted, may become a dead letter. It is argued, however (and this is the last point under this branch of the case), that this particular arbitration clause is in effect an "exceptions clause," since it is one-sided in its operation and confers advantages or liberties on the defendants which it denies to the plaintiff. The clause reads as follows :

B If the customer makes any claims upon or counterclaim to any claim made by the contractors, the same shall in case of difference be referred to the decision of two arbitrators (one to be appointed by each party). All the provisions of the Arbitration Act, 1889, or any modification in force for the time being, shall apply. The arbitration shall, unless otherwise agreed, be held in the town in which the contractor's office at or from which the contract was made is situate, and the making of an award shall be a condition precedent to any right of action or counterclaim.

C It is argued for the plaintiff that, while the clause purports to compel the customer to refer to arbitration claims against the carrier, it leaves the carrier free, as the customer is not, to pursue claims on his part against the customer by action at law. It is, therefore, so the argument runs, in substance a clause protecting the carrier and so far analogous to an exceptions clause.

D We think that the answer of counsel for the defendants to this contention prevails, viz., that the clause is in essence mere machinery, even if it be one-sided machinery. There is nothing in its unequal operation to divest it, in our view, of the character attributed to arbitration clauses in general in the speeches of LORDS MACMILLAN and PORTER in *Heyman v. Darwins, Ltd.* (3) as distinguishing them from "exceptions clauses."

E The second broad point on which the plaintiff relied was that, although in his statement of claim a claim sounding in contract is given pride of place, yet there is a further or alternative claim for negligence, and that such alternative claim cannot be referred to arbitration under the arbitration clause since it is not made under the contract of which that clause forms part. It is contended that this alternative claim is made either in pure tort or quasi-contract, but, at all events, not under the contract itself. The reasoning which led us to our conclusion on the first point is, in our view, equally fatal to this one. While

F it is true that, without any special contract, the mandatory, when once he had entered on the execution of the task which he has undertaken, is bound, apart from special contract, to exercise reasonable care and diligence, none the less, where there is a special contract, that contract defines the measure of the obligation. In the present case there is an obligation of diligence in the contract itself, pleaded in para. 2 of the statement of claim, and apparently co-extensive with the non-contractual obligation of diligence. The effect of "deviation,"

G as we have seen, is not to put an end to the contract for all purposes, but, when accepted, to deprive the mandatory of the benefit of any exceptions in that contract limiting the liability of the mandatory under it. The deviation in the present case, if it took place as alleged, was accepted as a repudiation by the issue of the writ, but the claim in negligence, like the alternative claim in this action, arose out of acts done before the issue of the writ, i.e., before the acceptance of the repudiation. The arbitration clause remains in force to settle all

H such claims if they fall within its ambit.

The arbitration clause in the present case is, as to the subject-matter of claims within its ambit, in the widest possible terms. That clause is not in terms limited to claims arising "under" the contract. It speaks simply of "claims." This, of course, does not mean that the term applies to claims of every imaginable kind. Claims which are entirely unrelated to the transaction covered by the contract would no doubt be excluded; but we are of opinion that, even if the claim in negligence is not a claim "under the contract," yet there is a sufficiently close connection between that claim and that transaction to bring the claim

within the arbitration clause even though framed technically in tort. A claim so framed was treated in *Polemis v. Furness, Withy & Co., Ltd.* (5) as falling within an arbitration clause in the contract, which provided that, should any dispute arise between the owners and charterers, the matters in dispute should be referred to three persons in London. For these reasons, the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Chamberlain & Co.* (for the plaintiff); *Zabell & Co.* (for the defendants).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

HYETT v. GREAT WESTERN RAILWAY COMPANY.

[COURT OF APPEAL (Tucker, Somervell and Evershed, L.JJ.), July 1, 2, 1947.]

Negligence—Invitee—Duty of owner of premises to secure safety thereof—Novus actus interveniens—Voluntary assumption of risk—Attempting to put out fire on invitor's property.

The plaintiff, who was employed by a firm of repairers of privately owned railway wagons, was issued, by the defendants, with an authority to enter on their premises to carry out his duties. While engaged, at a siding, in repairing a privately owned wagon, which, being subject to requisition and forming part of a "pool" of rolling stock, could have been used by the defendants for their own purposes, the plaintiff and a companion saw smoke arising from one of the defendants' own wagons in the same siding and went to investigate. They found the floor of the wagon, which contained drums of paraffin oil, in flames, and after they had tried without success to extinguish the fire, the companion went for assistance, while the plaintiff tried to get some of the drums out of the wagon by using the skids. While he was doing so, one of the drums exploded, and the plaintiff suffered injury. The defendants, by their servants, had known there was a paraffin leakage in the wagon and had allowed the wagon to remain in the siding for some days in that condition:—

HELD: (i) the plaintiff, being on the premises on business in which both he and the defendants had an interest, was an invitee, and the defendants, knowing of the existence of the leaking paraffin, failed to take reasonable steps to secure the safety of the premises on which the plaintiff was working.

(ii) the act of the plaintiff was not *novus actus interveniens* breaking the chain of causation, but was the kind of act which the defendants might reasonably have anticipated as likely to follow from their act of negligence in leaving the leaking paraffin at the siding.

Haynes v. Harwood ([1935] 1 K.B. 146), and *Steel v. Glasgow Iron and Steel Co., Ltd.* (1944 S.C. 237) applied.

[EDITORIAL NOTE.] It has for long been established that when the plaintiff has, under an exigency caused by the defendant's misconduct, consciously and deliberately faced a risk, even of death, to rescue another person from imminent danger of injury or death, whether the person endangered is one to whom he owes a duty of protection as a member of his family, or is a mere stranger to whom he owes no such special duty, he is not deemed to have voluntarily assumed a risk, nor will he be deemed guilty of contributory negligence. The present case would seem to be the first case in which the principle has been applied to an attempt to save property.

As to EFFECT OF IMMINENT DANGER JUSTIFYING UNUSUAL COURSE, see *HALSBURY*, Halsham Edn., Vol. 23, p. 688, para. 971.]

Cases referred to:

(1) *Haynes v. Harwood*, [1935] 1 K.B. 146; 104 L.J.K.B. 63; 152 L.T. 121; Digest Supp.

(2) *Hadley v. Baxendale*, (1854) 9 Exch. 341; 23 L.J. Ex. 179; 23 L.J.O.S. 69; 17 Digest 93, 101.

(3) *Steel v. Glasgow Iron and Steel Co., Ltd.*, 1944 S.C. 237; Digest Supp.

APPEAL by the plaintiff from a decision of HILBERY, J., given at Monmouth Assizes on Nov. 11, 1946. The facts appear in the judgment of TUCKER, L.J.

Beney, K.C., and *H. Salter Nichols* for the plaintiff.

Melford Stevenson, K.C., and *R. C. Hutton* for the defendants.

TUCKER, L.J. : This is an appeal by the plaintiff from a judgment of HILBERY, J., given at the Monmouth Assizes, on Nov. 11, 1946. The plaintiff claimed damages for negligence in respect of an injury that he had suffered on the defendants' railway sidings, known as "cripple sidings," at Gloucester on Mar. 5, 1945. The plaintiff was employed by a firm of wagon repairers called Wagon Repairs Ltd., who repaired privately owned wagons. On Mar. 5, 1945, the plaintiff, in the course of his duty to his employers, Wagon Repairs, Ltd., went to do some repairs to a privately owned wagon, i.e., a wagon not belonging to the defendant railway company on the cripple sidings. The evidence was that he was directed or requested so to do by one of the defendants' officials, and, having done some of the repairs at midday, he, with another man named Price, knocked off work. As they went off, they saw some smoke coming from a wagon which belonged to the defendants and was situated on the same sidings some 22 or 23 yards away from the wagon on which they had been working. The plaintiff and Price climbed into the wagon which contained drums of paraffin oil, and found that there were flames on the floor. Price endeavoured to put the fire out with his coat, but failed to do so. The plaintiff sent Price to get help, and, as the fire was getting control, tried to get some of the drums out of the truck by opening the side of the truck and using the skids. As he was doing so, owing to heat from the fire, a drum of paraffin which he was handling exploded and he received injuries to his leg.

In the court below the case proceeded very largely on the issue whether the plaintiff was an invitee or a licensee. It appeared that the plaintiff was provided by the defendants with a card, which is in this language :

Subject to the conditions and limitations shown on the back hereof, wagon repairer Herbert Hyett in the employ of Wagon Repairs, Ltd., is authorised to enter and be upon the following property.

Then there is a description of the property, and on the back there are certain conditions. In view of the terms of that document and the nature of the business on which the plaintiff was engaged, the learned judge came to the conclusion that he was a mere licensee. In this court counsel for the defendants brought to our notice the fact that on the date in question the wagon on which the plaintiff was working was subject to requisitions and formed part of a pool of rolling stock, and one of the features of the pool was that the defendants could have used this private wagon and other private wagons for their own purposes. It is unfortunate that that position was not brought to the notice of the learned judge who tried the case, but, in my view, that fact makes it quite clear that the relationship of invitor and invitee existed between the defendants and the plaintiff. Manifestly he was on the defendant company's premises on business in which both he and the defendants had an interest. It was, therefore, the duty of the defendants to take reasonable steps to see that the premises on which he had to work were reasonably safe.

The plaintiff, therefore, has to establish that the defendants have been guilty of negligence in that they failed to take reasonable steps to secure the safety of the premises. It is said, first, that the evidence shows that on Friday, Mar. 2, the defendants, by their servants or servant, were made aware of the fact that there was paraffin leaking from one of their own trucks which they had put on the cripple sidings and that they allowed the truck to remain there over the week-end in that condition, and, furthermore, there were engines shunting in the locality, sparks from which would be potentially dangerous in view of the leaking paraffin. If it is established that the defendants knew, or if the facts are such that the only reasonable inference is that their servants must have known, that during this week-end there was leaking paraffin coming from one of their trucks in the vicinity of the lines on which engines were shunting and in an area where men might be expected to be smoking and discarding their cigarettes and matches, it seems to me that they must be taken to be aware that the premises were not reasonably safe in that there was a real probability of fire resulting from the leaking paraffin. If the evidence is as I have indicated, the defendants were guilty of negligence, and the conclusion I have drawn is that, knowing of the existence of this leaking paraffin, the defendants failed to take reasonable steps to secure the safety of the premises on which the plaintiff was working. Therefore, subject to the question whether the act of the plaintiff in trying to put out the fire was *novus actus interveniens*, which would break

the chain of causation, resulting from the defendants' negligence, I should be disposed to hold that the plaintiff has established his cause of action.

With regard to the *novus actus interveniens*, the position is put very concisely in the judgment of GREER, L.J., in *Haynes v. Harwood* (1) in a passage in which he says ([1935] 1 K.B. 156) :

If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether or not, to use the words of the leading case, *Hadley v. Baxendale* (2), the accident can be said to be "the natural and probable result" of the breach of duty. If it is the very thing which ought to be anticipated by a man leaving his horses, or one of the things likely to arise as a consequence of his wrongful act, it is no defence; it is only a step in the way of proving that the damage is the result of the wrongful act.

In *Steel v. Glasgow Iron & Steel Co.* (3), the Lord Justice-Clerk (Cooper) said (1944 S.C. 251) :

... my conclusion ... is ... that, taking the whole circumstances into consideration, his intervention, looked at as a whole, was reasonable and justifiable and a natural and probable consequence of the defender's negligence which ought reasonably to have been foreseen.

In my opinion, those are the tests which are to be applied to the facts of any particular case. It is, no doubt, material to consider in every case whether or not it is life or property which is in danger. It is material to consider the relationship of the plaintiff who intervenes in the matter to the property or person in peril. It is relevant to consider the degree of danger and risk, and so forth. Those are all matters to be weighed in the balance in applying these tests. The conclusion at which I have arrived is that, if a man, who is working on premises as of right, sees a fire starting on those premises, whether or not the property of his employers is in immediate peril, it is reasonable to anticipate that he will take the necessary steps to put out the fire. Of course, it is always very material to consider how far the fire has advanced, and so forth. In the present case the evidence was that the plaintiff and his companion merely saw smoke coming from the wagon, they climbed up, saw flames on the floor, and tried to put them out, and when one man had gone for help, the plaintiff tried to get the barrels out of the wagon. I do not think that any of those steps were unreasonable or were such as should not have been anticipated as likely to follow in the case of a fire. I have taken into account the facts relied on by the defendants that some 90 or 100 yards away there was assistance which could have been obtained, but, if a man is going to act at all in a case of fire, he must act swiftly, and applying the tests laid down in the two cases to which I have referred, the conclusion I have reached is that the act of the plaintiff was not *novus actus interveniens* breaking the chain of causation, but was the kind of act which the defendants might reasonably have anticipated as likely to follow from their act of negligence in leaving the leaking paraffin on this siding.

For these reasons I have come to a different conclusion from that arrived at by the learned judge, but I would repeat again that the case was fought before him on a totally different issue, *viz.*, whether or not the plaintiff was an invitee or a licensee. In my opinion, the appeal succeeds.

SOMERVELL, L.J. : I agree.

EVERSHED, L.J. : I also agree.

Appeal allowed.

Solicitors : Rowley Ashworth & Co. (for the plaintiff) ; M. H. B. Gilmour (for the defendants).

[Reported by R. L. ZIAR, ESQ., Barrister-at-Law.]

LANCASTER v. LONDON PASSENGER TRANSPORT BOARD.
 [COURT OF APPEAL (Tucker, Somervell and Evershed, L.JJ.), June 30,
 July 1, 1947.]

Master and Servant—Common employment—Linesman and trolley omnibus driver.

While on a tower wagon, engaged in repairing the overhead gear which supplied current to the defendants' trolley omnibuses, the plaintiff, who was employed by the defendants as a linesman, was injured through the negligence of the driver of one of the defendants' trolley omnibuses.

HELD: the plaintiff's safety depended to a special degree on the care and skill of the drivers of all trolley omnibuses proceeding along the route, and the mere fact that there might be other vehicles which would constitute a danger to the plaintiff did not make the danger from a trolley omnibus an "ordinary traffic risk." The plaintiff was, therefore, in common employment with the driver of the trolley omnibus, and the defendants were not liable.

Dictum of LORD SIMON in Miller v. Glasgow Corporation ([1947] 1 All E.R. 1) *applied*.

Decision of HENN COLLINS, J. ([1946] 2 All E.R. 612) *affirmed*.

[AS TO COMMON EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328; and FOR CASES, see DIGEST, Vol. 34, pp. 207-220, Nos. 1697-1824.]

Cases referred to:

- (1) *Miller v. Glasgow Corporation*, [1947] 1 All E.R. 1; 176 L.T. 142; [1947] L.J.R. 239.
- (2) *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] 1 All E.R. 637; [1939] A.C. 215; 108 L.J.K.B. 320; 160 L.T. 420; Digest Supp.
- (3) *Metcalf v. London Passenger Transport Board*, [1939] 2 All E.R. 542; 108 L.J.K.B. 733; 160 L.T. 599; 103 J.P. 246; Digest Supp.
- (4) *Morgan v. Vale of Neath Ry. Co.* (1865), L.R. 1 Q.B. 149; 5 B. & S. 736; 35 L.J.Q.B. 23; 13 L.T. 564; 30 J.P. 36; 34 Digest 212, 1750.

APPEAL by the plaintiff from a judgment of HENN COLLINS, J., without a jury, dated Nov. 6, 1946, and reported [1946] 2 All E.R. 612.

The plaintiff was injured on Sept. 10, 1945, while he was working on the platform of a tower wagon, repairing wires which supported the wires suspended along the highway from which trolley omnibuses derived motive power. The tower wagon was a vehicle having attached to it a tall, ladder-like structure supporting a platform which could be swivelled into the required position. When the accident occurred the platform was projecting from the side of the wagon and it was struck by a trolley omnibus which was too high to pass underneath the platform. There was nothing to prevent the driver from steering to one side and avoiding the platform, and his failure to do so constituted negligence. The plaintiff was working for the Overhead Electrical Department (Maintenance) of the defendants, the London Passenger Transport Board, and the driver was working for the Traffic Department of the Board. These departments were separate. The plaintiff and the driver were members of different trades unions. HENN COLLINS, J., found that the trolley omnibus driver was in common employment with the plaintiff, who, therefore, could not recover against the defendant Board in respect of injuries suffered by him as a result of the driver's negligence. The Court of Appeal affirmed this decision.

Russell Vick, K.C., and *Aarvold* for the plaintiff.

Paull, K.C., and *Armstrong-Jones* for the defendants.

TUCKER, L.J.: [having stated the facts]: The question arises whether or not the defendant Board have established that the plaintiff was in common employment with the negligent driver of the trolley omnibus. Cases of this kind have been before the courts on several occasions recently, and we have been referred to most of them, but I think that for the ascertainment of the principle which is to be applied to the facts of a particular case it is only necessary to refer to *Miller v. Glasgow Corporation* (1), a Scottish appeal to the House of Lords. I quote from a passage in the speech of LORD SIMON ([1947] 1 All E.R. 4), and it is to be observed that that speech received the express concurrence of LORD THANKERTON, LORD SIMONDS and LORD DU PARCQ:

The criterion is often expressed by saying that, to make good the defence of common employment, it is not enough that the plaintiff was a fellow-servant of the person by whose fault he was injured, but it is also necessary that the two should have been engaged at the time of the injury in a "common work." But this last expression also needs definition, or, at any rate, explanation. "Common work" is not limited to the sharing of the same task, like the task of two sawyers in a saw-pit, or of engine-driver and stoker on the footplate of a locomotive. The phrase covers the case where the work of one is so related to the work of the other that the risk of injury to the one, due to the carelessness of the other, is not merely fortuitous, but is a special risk involved in the relationship itself, so that that risk must be deemed to have been in contemplation of the injured servant when he entered into his contract of service. *Radcliffe's* (2) case, therefore, does not support the broad proposition that the defence of common employment is never available when two vehicles driven by fellow-servants of the same employer collide in the high road. If the risk of collision between them is merely the ordinary risk arising from contiguity in traffic, *i.e.*, the risk of being run into by another vehicle, whoever is its driver, then the injured party has no special interest in the skill and caution of a driver who is his fellow-servant. The risk he runs is a mere risk of the road in the sense that he might equally well be run into by anyone else driving in his vicinity, but, if the relation between the work of the two fellow-servants is such that one of them depends for his safety from harm in a special degree on the care and skill of the other, then they are engaged in a "common work" and the term in the contract of employment exonerating the common employer from liability has to be implied.

We have to apply that principle to the facts of the present case, and the conclusion which I have reached is that on those facts, applying this principle, the defendant Board have succeeded in showing that the plaintiff was in common employment with the negligent trolley omnibus driver. I have come to that conclusion for these reasons. The plaintiff was performing an operation which was a hazardous one with regard to all vehicles of a height, at any rate, of 11ft. 8ins. from the ground. He was going to perform his work on a route along which a large number of vehicles of that height would pass on their normal, ordinary, appointed way, and it appears to me that there was a special risk attached to this work, and that it cannot be regarded as merely fortuitous. I further think that there was a special risk involved in the relation between the work of the two men within LORD SIMON's statement (*ibid.*):

... if the relation between the work of the two fellow-servants is such that one of them depends for his safety from harm in a special degree on the care and skill of the other, then they are engaged in a "common work" ...

I think the safety of the plaintiff while working on this platform did depend in a special degree on the care and skill of the drivers of all trolley omnibuses proceeding along that route. It is true that there were other vehicles using the road besides trolley omnibuses—vehicles belonging to other members of the public, pantechicons, vans and so forth, so constructed that they would constitute a danger to men working in the position in which the plaintiff was working, but, none the less, I cannot regard his risk as what has been described as an ordinary traffic risk. I think that there was a special risk attached to the plaintiff of suffering injury from the stream of trolley vehicles which was passing throughout the day along this defined route, and the mere fact that there might occasionally be other vehicles which would constitute some danger to the plaintiff would not make his risk an ordinary traffic risk. For those reasons, I think that this case, which is not without difficulty, does come within the doctrine of common employment, and is to be distinguished from such a case as *Metcalf v. London Passenger Transport Board* (3), and, therefore, this appeal fails.

SOMERVELL, L.J. : I agree and have little to add except to express my complete concurrence, first of all, with what TUCKER, L.J., has said as to the passage which he read from *Miller v. Glasgow Corporation* (1). It seems to me that in that passage LORD SIMON enunciated more fully and more clearly the principles which are to be applied in this branch of the law in this class of case than had been done by previous decisions of their Lordships' House. That being so, the task of this and other courts is to apply the principles as there laid down to particular sets of facts, and for the reasons which TUCKER, L.J., has given I think, applying that principle, the defendants make out the defence of common employment. I agree that the appeal fails.

EVERSHED, L.J. : I also agree. In this case it has been proved or admitted that a trolley omnibus of the defendant Board is supplied with peculiar apparatus for giving it motive power consisting (i) of a pole or trolley normally connected with the overhead gear on which the plaintiff was, under his contract of employment, called upon to work, and (ii) of a platform structure of such a height above the roof of the trolley omnibus that the trolley omnibus when on the road was incapable of passing under the platform on which the plaintiff stood for the purpose of doing his work. Applying, therefore, the principles enunciated by LORD SIMON, to which my Lords have referred, in my judgment, the plaintiff had a special interest in the care and skill of the trolley omnibus drivers of the London Passenger Transport Board who would, to the plaintiff's knowledge, be proceeding in the course of their duties along the roads where he worked, at least to the extent of the care and skill required of them to avoid the risk of contact between any part of the apparatus referred to and the platform on which the plaintiff did his work. It may well be that once a special interest is shown to exist in the care and skill of trolley omnibus drivers, the rule of common employment must apply to all acts of negligent driving on the part of the trolley omnibus drivers though unrelated to the risks peculiar to the apparatus in question, for *prima facie* the plaintiff and the trolley omnibus drivers, when doing their appointed tasks, either were or were not doing common work. It is, however, unnecessary in the present case to express a concluded opinion on the broader question. For present purposes it is sufficient that the plaintiff's injury was due to a collision, caused by the driver's negligence, between the plaintiff's platform and some part of the apparatus of the trolley omnibus, the presence of which gives rise to the plaintiff's special interest in the omnibus driver's skill and care.

Appeal dismissed.

Solicitors: *William Gorringe & Co.* (for the plaintiff); *A. H. Grainger* (for the defendants).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

NOTE.

DAILEY v. DAILEY (otherwise SMITH).

[COURT OF APPEAL (Tucker and Asquith, L.JJ.), May 15, July 8, 1947.]

Divorce—Nullity—Maintenance—Conduct of parties—Matters to be taken into consideration—Refusal of intercourse by wife without contraceptives—Assent of husband—Ignorance of parties of legal position—Age of wife at time of decree—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1).

INTERLOCUTORY APPEAL by the husband from an order of WILLMER, J., in Chambers, dated Apr. 2, 1947, and reported [1947] 1 All E.R. 847.

The parties went through a form of marriage on Dec. 22, 1926, and on Aug. 16, 1946, the husband's decree *nisi* of nullity on the grounds of the wife's refusal to consummate the marriage (granted by BARNARD, J., at Liverpool Assizes in Feb., 1946) was made absolute. The husband, whose petition was based on the wife's refusal to permit sexual intercourse without the use of contraceptives, had reluctantly agreed to this course for the first 2 years, and afterwards had always desired full intercourse, but the wife had persistently refused, and intercourse with the use of contraceptives continued. The husband had an income of about £1,500 a year, mainly derived from his business, and the wife was able to earn £260 a year as a shorthand typist. In his report on an application by the wife for maintenance, the registrar submitted that the husband should secure to the wife, for her life *dum sola*, the nominal sum of £52 less tax, and, in addition, should pay her during their joint lives *dum sola*, or till further order, maintenance at the rate of £75 a year, less tax. On a motion to affirm the registrar's order WILLMER, J., held that, in considering the conduct of the parties, as directed by s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, it was necessary to have regard to the whole history of the case, including the facts that for 19 years the husband had assented to the conditions made by the wife and had taken advantage of such limited intercourse as she would permit; that the wife, at the age of 43, having devoted 19 years of her life to her husband, found herself, after all, still a single woman, having lost, or, at any rate, had gravely impaired, such opportunities as she might otherwise have had of contracting another marriage or of following another career; that until the decision in *Cowen v. Cowen* ([1945] 2 All E.R.

197), the conduct of the wife was not known to either party to be a ground for relief, and this was relevant both to the degree of "guilt" on the part of the wife, which it was material to consider, and to the true appreciation of the husband's conduct for so many years. The learned judge said both parties were unfortunate victims of their ignorance as to their true rights and obligations, and it would be unjust to treat the case as a simple one of a "guilty" wife, who, by her conduct, had forfeited any right to ask for more than a compassionate allowance to save her from utter destitution. In affirming the registrar's report, the learned judge said the husband should make some substantial provision for the wife. The husband appealed, and the case was now remitted for the re-consideration of WILLMER, J.

Ormrod for the husband.

H. S. Law for the wife.

TUCKER, L.J. (with whom **ASQUITH, L.J.**, agreed), having reviewed the facts and the judgment of **WILLMER, J.**, said that it appeared from the transcript of the shorthand notes of the original trial before **BARNARD, J.**, that both parties had throughout used contraceptives; that from quite an early stage in the marriage they had occupied separate rooms; that when intercourse did take place the wife was inclined to get into a hysterical condition whenever the question of having intercourse in a way which was likely to result in the birth of a child was discussed; that the husband took medical advice with regard to that matter; that he felt so acutely the position in which he found himself, and the injustice of the law on the subject as he understood it, that he wrote to various prominent people, including the Archbishop of Canterbury and the Prime Minister; and, finally, that for some years before the separation in Sept., 1945, the parties had not even been having their meals together. These additional matters, which, apparently, were not known to the registrar and the learned judge, gave a somewhat different picture of the married life from that given by the learned judge in his judgment on the material before him. In the opinion of the court, **WILLMER, J.**, took the right view in saying that in these matters there were degrees of guilt and varying degrees of conduct, and that the submission made to him, on behalf of the husband, that the wife should be put into the category of an adulterous wife and only be given a compassionate allowance was erroneous. As, however, the court felt some doubt whether or not those additional matters might have influenced the learned judge's mind to some degree as to the *quantum*, which was entirely a matter for his discretion, they thought that the proper course was to remit the matter to him for re-consideration in the light of the material now disclosed in the shorthand note of the trial.

Order accordingly.

Solicitors: *Layton & Co.* (for the husband); *Whitfield, Byrne & Dean*, agents for *Whitley & Co.*, Liverpool (for the wife).

[Reported by **R. L. ZIAR, ESQ.**, Barrister-at-Law.]

MOORE v. HEWITT.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Macnaghten and Lynskey, JJ.), July 10, 11, 1947.]

Bastardy—Application proceedings—Evidence—Corroboration—Association on terms of close affection—Letters from putative father produced by complainant. Magistrates—Appeal—Case stated—Case stated out of time—Whether fatal objection—No fault of either party—Summary Jurisdiction Rules, 1915 (S.R. & O. 1915, No. 200), r. 52.

(1) Rule 52 of the Summary Jurisdiction Rules, 1915, which provides that a Special Case should be stated within three months of the date of the application to the justices to state a Case, is directory and not mandatory. It is not a fatal objection that the Case was not stated within the stipulated time, and the court has power in its discretion to allow the Case to be heard.

Hughes v. Wavertree Local Board (58 J.P. Jo. 654) followed.

Gregory v. Cattle ([1943] 1 All E.R. 654) explained.

(2) In bastardy proceedings where there is evidence that over a long period, including the time of conception, the alleged father has associated with the mother on terms of close affection, and there is no evidence that the mother was associating with other men, there is material which the justices are entitled to treat as corroboration of the mother's statement.

Dunn v. Chalmers (1875) 3 R. (Ct. of Sess.) 286 approved.

Burbury v. Jackson ([1917] 1 K.B. 16) criticised and distinguished, and *Thomas v. Jones* ([1921] 1 K.B. 22) distinguished.

(3) In bastardy proceedings letters written by the alleged father to the complainant and produced by her cannot be treated as corroboration.

Johnson v. Pritchard (97 J.P. Jo. 754) followed, but doubted.

[AS TO EVIDENCE IN AFFILIATION PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 2, p. 589, para. 812; and FOR CASES, see DIGEST, Vol. 3, pp. 394-398, Nos. 317-330.]

AS TO LIMITATION OF TIME FOR SPECIAL CASE, see HALSBURY, Hailsham Edn., Vol. 21, p. 725, para. 1256; and FOR CASES, see DIGEST, Vol. 33, p. 414, No. 1241 and Supp.]

Cases referred to:

- (1) *Hughes v. Wavertree Local Board*, (1894), 58 J.P. 654; 33 Digest 414; 1241.
- (2) *Lane v. Rendall*, [1899] 2 Q.B. 673; 33 Digest 411, 1214.
- (3) *Gregory v. Cattle*, [1943] 1 All E.R. 654; [1943] 1 K.B. 412; 112 L.J.K.B. 620; 168 L.T. 376; 107 J.P. 122; Digest Supp.
- (4) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] 1 K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; Digest Supp.
- (5) *Johnson v. Pritchard*, (1933), 97 J.P. Jo. 754; 176 L.T. Jo. 389; Digest Supp.
- (6) *Burbury v. Jackson*, [1917] 1 K.B. 16; 86 L.J.K.B. 255; 115 L.T. 713; 80 J.P. 455; 3 Digest 397, 323.
- (7) *Thomas v. Jones*, [1921] 1 K.B. 22; 90 L.J.K.B. 49; 124 L.T. 179; 85 J.P. 38; Digest Supp.
- (8) *Dunn v. Chalmers*, (1875), 3 R. (Ct. of Sess.) 236; 3 Digest 395, 317 xxiv.
- (9) *Richardson v. Standish*, (1933), unreported.

CASE STATED by Hinckley (Leicester) justices.

On a complaint preferred by the respondent against the appellant under the Bastardy Laws Amendment Act, 1872, the justices determined that the appellant was the father of the respondent's child and ordered him to pay 12s. 6d. maintenance and other sums. On the present appeal to the Divisional Court a preliminary objection that the Case was not stated within the time limited by r. 52 of the Summary Jurisdiction Rules, 1915, failed and the finding of the justices was upheld.

Marshall, K.C. for the appellant.

Herrick Collins for the respondent.

LORD GODDARD, C.J.: Counsel for the respondent has taken a preliminary objection to the hearing of this appeal on the ground that the Case was not stated within three months of the application to the justices to state a Case, pursuant to r. 52 of the Summary Jurisdiction Rules, 1915. There is nothing before the court to show why the justices did not state the Case. We only know that they did not state it for five months, and what I am about to say is to be taken to apply where there are no facts before the court to show that the delay in stating the Case was due to the conduct of the appellant. If the appellant, by taking frivolous objections to the Case and continually sending it back to the justices with a request for re-statement, or by some action of that sort, had been responsible for the failure of the justices to state this Case within three months, I am far from saying that he might not have been met with this rule, but where the circumstances are no more than that, an application having been made to justices to state a Case, they fail to do it within three months, as might well happen, for instance, if the chairman of the justices or the clerk to the justices were taken ill, it is clear that the court has power in its discretion to allow the Case to be heard on the ground that the limitation in the rules is directory and not mandatory.

The matter was first considered in 1894, and the exact point was decided by CAVE, J. and WRIGHT, J. in *Hughes v. Wavertree Local Board* (1). They held in terms that the rule was only directory, and, therefore, it was not a fatal objection that the justices had not stated the Case within three months. That decision was followed in *Lane v. Rendall* (2), where counsel of considerable experience in these matters, took the objection that the Case had not been stated in time. It was met at once, without calling on the other side, by *Hughes v. Wavertree Local Board* (1), and counsel did not continue his objection after that somewhat abrupt intimation from the Bench. Confusion has been caused by the fact that in 1943, when *Gregory v. Cattle* (3), came before the court and the same objection was taken, counsel was not prepared with these authorities and so he never cited them to the court. The only question which

the court was considering there was whether, when the Summary Jurisdiction Act, 1857, did not contain any limitation as to time, but the rules made under the Summary Jurisdiction Act, 1879, did, it could be said that the Case was stated under the Act of 1857 and not under the later Act so that no limitation applied. The court held that the two Acts had to be read together and the rules made under the Act of 1879 applied equally to proceedings under the Act of 1857. The attention of the court was never called to *Hughes v. Wavertree Local Board* (1), and the court, therefore, acted *per incuriam*. It was laid down in *Young v. Bristol Aeroplane Co., Ltd.* (4), that the Court of Appeal is bound by its own judgments with certain exceptions, and one of those exceptions is where the court gives a decision *per incuriam* because the provisions of a statute or the authority of a case have not been brought to their attention. I should be sorry to hold that where the delay is due to the action of the justices and not due to that of either party, it was a fatal objection. I am not sure that one could not apply the maxim *actus legis nulli facit injuriam*—the act of the law does wrong to no man. For reasons, whether they be good or bad, the justices here failed to send the Case to the parties within three months, and if that were to prevent the appellant bringing his case before the court, it would be a serious matter. In my opinion, the preliminary objection ought not to prevail. I think we have jurisdiction to hear this case.

MACNAGHTEN, J. : I agree.

LYNSKEY, J. : I agree.

THE COURT then heard the appeal.

LORD GODDARD, C.J. : The question which arises is the familiar one whether the evidence of the respondent was corroborated in some material particular. In my opinion, it was and this appeal fails. The evidence of the respondent was that she and the appellant had been associating for some months before any sexual intercourse which could have resulted in a child. She said she met him in Sept., 1943, and that sexual intercourse took place in Dec., 1943, and June, July, Aug., Sept., and Oct., 1944. The child was born on June 6, 1945, so it was probable that the sexual intercourse in Aug. or Sept., was that which caused the respondent to become pregnant. The justices found :

On the evidence of the respondent, corroborated by other witnesses, the appellant and the respondent visited cinemas, licensed houses and dances together between Sept., 1943, and Oct., 1944, and were in the company of each other at certain hours in the evening on days during the said period of time and that the appellant visited the respondent's home on four or five occasions during the said period of time.

Their conclusion is :

We, being of the opinion that the letters produced could not in law be regarded as corroboration of the respondent's evidence and that the principle in *Johnson v. Pritchard* (5), applied, disregarded the said letters, but, being also of the opinion that the evidence of the respondent was true and that the evidence of the other witnesses called on behalf of the respondent established that the appellant and the respondent were seen together in such circumstances and on such terms of intimacy or affection as would corroborate the respondent's evidence, therefore, determined that the respondent's said complaint was proved to our satisfaction in fact and in law.

For many years it has been the practice—often it is the only way in which corroborative evidence can be given in these cases—to prove that the parties were a courting couple or, at any rate, associating on terms of “intimacy and affection.” I do not use the word “intimacy” as meaning sexual intercourse. The justices were satisfied that the appellant and the respondent had for a long time been on courting terms. There was no suggestion that the respondent had associated with any other man. It is said that this evidence amounts to no more than proof of opportunity. The main argument of counsel for the appellant was based on the authority of *Burbury v. Jackson* (6) ([1917] 1 K.B. 16), the headnote of which, in my opinion, goes too far. It is :

On the hearing of a bastardy summons evidence of mere opportunity is not sufficient corroboration of the evidence of the mother to satisfy s. 4 of the Bastardy Laws Amendment Act, 1872.

The facts in *Burbury v. Jackson* (6), were very different from the facts here. There the mother and the alleged father were both workers on a farm. They were living at the farm, and, in the course of their ordinary duties they were in and out of the cowsheds, barns and other places, and the court held that evidence of their being constantly together in those circumstances could not be taken as corroborating the fact that connection took place. So, too, in *Thomas v. Jones* (7), the alleged putative father was the employer of the woman, who was his housekeeper and so naturally was living in the house. In such circumstances one cannot say that there is evidence of an association from which one can draw any adverse inference against the man, because the parties are associating in the ordinary and natural course of things, but in the present case we have a young man and a young woman who were sweethearts. It seems to me that, it being proved by independent evidence, that these young people were associating at different hours of the day and night, being in each other's company for various periods of time, and so forth, that is evidence which the justices could regard as corroboration. That is amply supported by a case in the Court of Session, *Dunn v. Chalmers* (8). It would, I think, be going far beyond any case which has ever yet been decided to say that justices were not entitled to take the circumstances of the present case into consideration, more especially when there is no suggestion that the girl was associating with anyone else. The parties were associating in circumstances which might naturally lead to them having sexual intercourse. I do not think it would be possible in those circumstances to hold on the facts found by the justices that there was no evidence which would tend to make it probable—that is the test—that the respondent's story was true and that the appellant, therefore, was the father of the child.

The only other thing I want to say is this. Two letters were produced by the respondent which if they were written by the appellant, show, beyond possibility of doubt, that he was the father of the child. The justices rejected those letters as corroboration on the authority of *Johnson v. Pritchard* (5). In that case there was no other evidence of corroboration except some letters produced by the complainant herself and she swore they were in the reputed father's handwriting. It was held "disapproving of the passage in *STONE'S JUSTICES' MANUAL* (65th ed., p. 409),* that a complainant in bastardy proceedings cannot corroborate herself by saying that a letter produced by her was written to her by the alleged father, and the appeal must be allowed."

It seems from a note in *STONE'S JUSTICES' MANUAL*, 78th ed., p. 461, that it has been held that, if there be other corroboration, the complainant may prove the letters, and the authority which is given for that is *Richardson v. Standish* (9), an unreported case heard in this court in Dec., 1933. I have sent for the Special Case therein, but it bears no note except that the appeal was dismissed, and I can find no indication whether this statement in *STONE* did form part of the judgment of the court (I am sure, knowing how carefully *STONE* is edited, there must be some reason for it). If *Johnson v. Pritchard* (5), was rightly decided, I find some difficulty in understanding how the letters in *Richardson's* case (9) could become admissible as corroboration merely because some other fact was corroborated. I hope that *Johnson v. Pritchard* (5), may be considered in a higher court. Sitting in this court, I think I am bound by it, although the court has not got the advantage of any report which shows the reasoning leading to the decision. The difficulty which I feel in accepting the case is that the statute does not require the whole of the complainant's evidence to be corroborated. If the whole of the complainant's evidence had to be corroborated, it would mean that in a great many cases the case could be proved without calling the complainant herself. The complainant's evidence in *Johnson v. Pritchard* (5), seems to have been, first, that the respondent was the father of the child, and, secondly, that two letters which she had received were in the respondent's handwriting. If those letters were

*"While, as a matter of prudence, it is desirable that the handwriting should be proved by other testimony than that of the woman, we are of the opinion that her evidence alone, if credible, is sufficient for the purpose, and that letters, when thus proved may furnish the corroboration required by the statute."

admissible on her evidence, the statements in the letters, being written by the respondent himself, were at once evidence against him. While the production of those letters did not corroborate the evidence of the complainant that he wrote them, they corroborated the complainant's evidence that he was the father of the child. That was a material particular, and, therefore, it seems to me that the production of the letters afforded corroboration of the complainant's story in a material particular. However, as long as that decision stands, in this court, I suppose, we are bound by it and the letters cannot be treated as corroboration. In the present case the appellant might have been put into the box by the respondent, the letters could have been handed to him, and he could have been asked whether they were in his handwriting or not. If he said that they were, the letters could have been admitted, but, as it is, this court must not pay any attention to the letters, any more than the justices did. On the grounds I have endeavoured to express, however, the justices, in my opinion, came to a decision to which they were entitled to come because there was evidence which could, if they believed it, amount to corroboration. This appeal must be dismissed with costs.

MACNAGHTEN, J. : I am of the same opinion.

LYNSKEY, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Callingham, Griffith & Bate*, agents for *Varley, Hibbs & Co.*, Coventry (for the appellant); *Field, Roscoe & Co.*, agents for *Pounall, Teebay & French*, Nuneaton (for the respondent).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

THOMSON AND ANOTHER v. BECKENHAM RATING AUTHORITY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Lewis, JJ.), July 1, 2, 1947.]

Rates and Rating—Distress for rates—Rating period not expired—Poor Relief Act, 1601 (c. 2), s. 2.

A general rate is payable as soon as it is made and published, and, therefore, a distress warrant in respect of it may be issued although the period covered by the rate has not expired.

Davis v. Burrell and Lane (1851) (10 C.B. 821) applied.

[AS TO DISTRESS FOR RATES, see HALSBURY, Hailsham Edn., Vol. 27, pp. 526-528, paras. 976, 977; and FOR CASES, see DIGEST, Vol. 18, pp. 403, 404, Nos. 1434-1444.]

Cases referred to :

- (1) *R. v. Price*, (1880) 5 Q.B.D. 300; 49 L.J.M.C. 49; 42 L.T. 439; 44 J.P. 248; 33 Digest 369, 782.
- (2) *Tracy v. Talbot*, (1704) 6 Mod. Rep. 214; Holt, K.B. 581; 2 Salk. 532; 3 Salk. 260; Sett. and Rem. 237; 38 Digest 452, 191.
- (3) *Davis v. Burrell and Lane*, (1851) 10 C.B. 821; 31 Digest 207, 3475.
- (4) *Gill v. Mellor*, *Gill v. Monday*, [1924] 1 K.B. 97; 93 L.J.K.B. 55; 130 L.T. 211; 87 J.P. 190; 38 Digest 625, 1454.

CASE STATED by Bromley (Kent) justices.

A complaint was preferred before the justices by the rating authority for Beckenham that the appellants, George Wilfred Russell Thomson and Nora Elizabeth Frances Thomson were persons duly rated and assessed to the general rate for the borough in and by a rate made on Sept. 23, 1946, for the half-year ending Mar. 31, 1947, in the sum of £16 15s. 5d., which they had neglected or refused to pay. On Feb. 20, 1947, the justices determined that the appellants were jointly rated and assessed to the general rate in the said sum, that the sum was due, and that, the appellants having neglected or refused to pay for seven days after it had been lawfully demanded of them, a distress warrant against their goods and chattels should be issued. The appellants now appealed to the Divisional Court which dismissed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

Borders for the ratepayers.

Squibb for the rating authority.

LORD GODDARD, C.J.: The appellants, George Wilfred Russell Thomson, who is a solicitor, and his sister, were found by the Bromley justices to be persons duly rated and assessed to the general rate for the borough of Beckenham in and by a rate made on Sept. 23, 1946, for the half year ending Mar. 31, 1947, in the sum of £16 15s. 5d. The appellants did not pay that comparatively small amount, preferring, apparently, to raise points which, no doubt, they considered to be of high juristic principle, but which, if effect were given to them, would upset the whole practice and law in connection with the payment of rates which has been in force since the passing of the Poor Relief Act, 1601.

The point taken is that a distress for rates cannot be levied until the expiration of the period for which the rate was made. A rate is made—until s. 4 (1) of the Rating and Valuation Act, 1925, came into operation it was allowed by justices—and thereupon, as I think has been always understood to be the law, it becomes due. If any authority is required for that proposition, which I thought every ratepayer knew, it can easily be found in *R. v. Price* (1), where **COCKBURN, C.J.**, said (5 Q.B.D. 301): “The rate itself is the order,” *i.e.*, the order to pay. If one turns to the Act of 1601, which is the foundation of the whole law of rating, one finds it is provided by s. 2 that

... it shall be lawfull aswell for the present as subsequent churchwardens and overseers, or any of them, by warrant from any two suche justices of peace as is aforesaide to levie aswell the saide sumes of money, and all arrerages, of every one that shall refuse to contribute accordinge as they shalbe assessed, by distresse and sale of the offender's goodes, as the sumes of money or stocke whiche shalbe behinde upon any accompte to be made as aforesaide, rendringe to the parties the overplus ; . .

By s. 1 of the Act, the overseers, at the end of their period of office, which lasts for one year, are to render an account to the justices showing receipts of money by them and expenditure and money they have in their hands. I think that counsel for the rating authority is right when he says that the words in s. 2 “as the sumes of money or stocke whiche shall be behinde upon any accompte to be made as aforesaide,” show that distress can be levied, not only against the defaulting ratepayers, but also on overseers and churchwardens who have not handed over any money remaining in their hands at the end of the accounting period.

It appears that in *Tracy v. Talbot* (2), which related to whether a general warrant made before a rate was a lawful warrant under which overseers could distrain for a current rate, **HOLT, C.J.**, said (2 Salk. 532) that a distress would not be taken for a quarter's rate before the quarter was ended. That was an observation which was not necessary for the decision of the case. It seems to have caused some surprise, because the jury before whom the case was tried appear to have immediately protested and said that the custom, by which, I suppose, they meant the practice, was otherwise, and it appears in another report of the case (6 Mod. Rep. 214) that **HOLT, C.J.**, resiled from the position he had taken up. In *BOTT'S POOR LAW* (vol. I, p. 250) a note is contained of a subsequent decision (*Charlwood v. Best* (1748)) which was not in accordance with the Chief Justice's observation.

So far as this court is concerned, the point is put beyond all doubt by *Davis v. Burrell* (3) in which **JERVIS, C.J.**, who was a very great authority on all matters relating to poor law, said (10 C.B. 825):

The question resolves itself into one of fact. If the rates were due, and were not paid, the defendant Burrell was lawfully in possession of the premises at the time the plaintiff made the forcible attempt to get in. When a rate is duly made and published, it is the duty of the parties assessed to seek out the collector and to pay it.

In other words, **JERVIS, C.J.**, there laid down in the clearest possible terms that a rate is due and payable at the moment it is made, and that, I think, has been generally understood by every ratepayer and local authority in this country, at any rate, for two hundred years. If the rate is due and payable when it is made, it follows that, if the ratepayer does not pay, a distress warrant can be applied for. That was done in this case, and, in my opinion, the justices were perfectly entitled to issue the warrant when they did. There is no doubt that a rate is payable as soon as it is made. This court has no hesitation in laying down that, as soon as a rate is made and published, the rate is payable. Naturally, local authorities do not at once apply for a distress warrant. They only seek warrants against recalcitrant ratepayers who refuse to pay, and they

can take that action before or after the rate has expired, as has been shown by *Gill v. Mellor* (4).

ATKINSON, J. : There are before us two text books in which it is said plainly that a rate becomes payable as soon as it has been made and published : *BURNS' JUSTICE OF THE PEACE*, 30th ed., vol. IV, p. 1077, and *RYDE ON RATING*, 8th ed., p. 943. Then there are the cases referred to by my Lord—*R. v. Price* (1), where *COCKBURN, C.J.*, said (5 Q.B.D. 301) that the rate itself is the order, and *Gill v. Mellor* (4) which seems to me to put the matter beyond argument, because there it was argued that the rate could not be demanded after the year had expired, and that, if payment was evaded for a year, the ratepayers were free, but it was taken for granted that it could be demanded during the year. I read ss. 1 and 2 of the Act of 1601 as meaning that the outgoing overseers had to be ready with their accounts in four days. In those accounts they had to state what they had received, what they had not received, and the amount of the arrears, and s. 4 gives the new overseers power to recover as arrears those rates which are shown in the accounts as unpaid. The Act seems to me to treat those sums which the account shows have not yet been received as already being in arrears. I must say I have felt that the matter was too clear for argument.

LEWIS, J. : I agree.

Appeal dismissed with costs.

Solicitors : *G. W. R. Thomson* (for the ratepayers) ; *C. Eric Staddon*, town clerk, Beckenham (for the rating authority).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

R. v. SURREY (NORTH EASTERN AREA) ASSESSMENT COMMITTEE, *Ex parte* SURREY COUNTY VALUATION COMMITTEE.

[**KING'S BENCH DIVISION** (Lord Goddard, C.J., Atkinson and Lewis, JJ.),
July 2, 3, 1947.]

Rates and Rating—Valuation list—Amendment—Appearance before assessment committee—County valuation committee—Officer authorised by general resolution of valuation committee—Rating and Valuation Act, 1925 (c. 90), s. 31 (9). Statutes—Construction—Headings and marginal notes—Reference to.

A ratepayer made a proposal under s. 37 of the Rating and Valuation Act, 1925, for the amendment of the valuation list, contending that his factory should be derated, and at the same time the rating authority made a proposal to the assessment committee that the valuation should be increased. On both these matters coming before the assessment committee at their meeting, the county valuation officer appeared, and claimed the right to represent the views of that committee by virtue of a general resolution passed by the county valuation committee. The assessment committee refused to hear the valuation officer on the ground that the proposals had not been expressly before the county valuation committee, and they had not specially authorised the valuation officer to appear at the hearing. On motions for orders of *certiorari* and *mandamus* directed to the assessment committee :

HELD : although the marginal note to s. 31 of the Act read : " Appeals to quarter sessions," and the section mainly dealt with such appeals, sub-s. (9) of the section was not confined to those appeals, but gave the valuation committee power by general resolution to authorise any officer to institute, carry on and defend any proceedings whatsoever in relation to the valuation list, and, consequently, orders for *certiorari* and *mandamus* must go.

[**FOR THE RATING AND VALUATION ACT, 1925, s. 31 (9),** see *HALSBURY'S STATUTES*, Vol. 14, p. 659.

AS TO REFERENCE TO HEADINGS AND MARGINAL NOTES IN INTERPRETATION OF STATUTES, see *HALSBURY*, Hailsham Edn., Vol. 31, pp. 464, 465, paras. 565-567 ; and **FOR CASES,** see *DIGEST*, Vol. 42, pp. 654-656, Nos. 634-649.]

Cases referred to :

- (1) *Hammersmith and City Ry. Co. v. Brand*, (1869), L.R. 4 H.L. 171 ; 38 L.J.Q.B. 265 ; 21 L.T. 238 ; 34 J.P. 36 ; 42 Digest 655, 638.
- (2) *Fletcher v. Birkenhead Corpn.*, [1907] 1 K.B. 205 ; 76 L.J.K.B. 218 ; 96 L.T. 287 ; 71 J.P. 111 ; 42 Digest 652, 597.

A MOTIONS for an order of *certiorari* to quash the determination of an assessment committee to refuse to hear the county valuation officer who had been appointed to appear before them by a general resolution of the county valuation committee, and for an order of *mandamus* directing the assessment committee to hear and determine the matter according to law. The Divisional Court made the orders.

Simes, K.C., and *C. E. Scholefield* for the applicants (the valuation committee).

B *Rowe, K.C.*, and *Geoffrey Lawrence* for the respondents (the assessment committee).

C LORD GODDARD, C.J. : In this case leave was obtained to move for orders of *certiorari* and *mandamus* addressed to the Assessment Committee of the North Eastern Area of Surrey to bring up and quash the determination by them of an application by the county valuation committee made by their officer, the county valuation officer, in the matter of the assessment of certain premises in the current valuation list. The assessment committee refused to hear the officer, and on that ground *certiorari* is sought to quash that determination and a *mandamus* to hear and determine the matter according to law.

The matter arises in this way. Section 37 of the Rating and Valuation Act, 1925, provides :

D Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter, or by the valuation as a single hereditament of a building or a portion of a building . . . may make in manner provided by this section a proposal for the amendment of the list . . .

E It appears that a ratepayer in the district for which the assessment committee acts made a proposal for the amendment of the list, contending that his factory should be derated. At the same time the rating authority made a proposal to the assessment committee that the valuation should be increased, and on both of those matters coming before the assessment committee at their meeting, the county valuation officer appeared and claimed the right to represent the views of the county valuation committee. It is not disputed that the county valuation committee has the right to appear and be heard on proposals or objections, but before the assessment committee objection was made that the county valuation committee had not specially authorised the valuation officer to appear on the hearing of this objection or proposal. The county valuation officer claimed to appear and be heard by reason of a general resolution which had been passed by the body which appointed him in these terms :

G That the clerk of the county council and the county valuation officer be and they are hereby authorised on behalf of the county valuation committee to institute, carry on or defend any proceedings in relation to any valuation lists which this committee are themselves authorised to institute, carry on or defend in accordance with the Rating and Valuation Act, 1925, and any other power them enabling.

H Objection was taken that that was a general authority, it being said that the law did not permit the county valuation officer to appear for the county valuation committee unless it was shown that the county valuation committee had applied their minds to the particular objection or proposal. It was not disputed that, if they had done that, they could, by a special resolution, or possibly, without any resolution, but by a direction or some other method, have appointed the county valuation officer to represent them before the assessment committee.

In the long run this case comes down simply to a question of the construction of s. 31 of the Rating and Valuation Act, 1925. Several proceedings may take place before assessment committees in regard to valuation lists. There can be objections to the draft list, which can be made by the county valuation committee, or by the rating authority, or by a ratepayer who is assessed, and there are various provisions relating to the meetings of the assessment committee, and so

forth. If a party does not get from the assessment committee the relief to which he considers himself entitled, he may appeal to quarter sessions. Sections 19 to 24 of the Act come under a cross-heading "Valuation lists," and ss. 25 to 30, under "Preparation of valuation lists." "Appeals" are dealt with in ss. 31 to 36, and the "Revision of current lists," to which these applications related, in s. 37. There is no question that s. 31 deals primarily with appeals to quarter sessions. The marginal note, if one is entitled to look at it at all, shows that, but so do the clear terms of the section. Sub-section (1) is :

Any person who appeared before the assessment committee on the consideration of an objection made before the committee under this Part of this Act may, if he is aggrieved by the decision of the committee on the objection, appeal against the decision, in manner provided by this Part of this Act, to the court of quarter sessions . . .

Sub-section (2) provides :

Any person on whom a copy of a notice of an appeal to a court of quarter sessions under this part of this Act is required to be served may, if he thinks fit, appear as respondent to the appeal . . .

By sub-s. (4) :

On an appeal under this section the court shall, as it thinks just, either confirm the valuation list or alter the valuation list . . .

Sub-section (5) deals with an appeal to the High Court on a point of law, and provides :

On the determination of an appeal under this section any party to the appeal may, if dissatisfied with the decision of the court as being erroneous in point of law, make an application in writing at any time within 21 days after the date of the decision to have a Case stated for the opinion of the High Court . . .

Then sub-s. (6) substitutes certain provisions for those in Baines' Act with regard to referring appeals of this character to arbitration :

Sections 12, 13 and 14 of the Quarter Sessions Act, 1849 (which relate to arbitration) shall not apply in the case of an appeal under this section . . .

and certain provisions are then made. In sub-s. (7) provision is made for the award of an arbitrator to whom the matter is referred being enrolled as an order of quarter sessions. Sub-section (8) is :

A writ of *certiorari* for questioning any decision of a court of quarter sessions on an appeal under this Act shall be sued out within three months after the decision is given.

Sub-section (10) is :

Where the decision on an appeal under this section or any award of an arbitrator or judgment of a superior court which has been enrolled at quarter sessions involves an alteration of the valuation list, the clerk of the court . . .

shall perform certain functions.

It is to be observed that every one of the sub-sections I have read, except sub-s. (7), which is merely complementary to sub-s. (6), all refer to appeals under this Act or under this section. When one comes to sub-s. (9), it is in these terms :

Any officer of an assessment committee, rating authority, or county valuation committee acting under any special or general resolution of the committee or authority may authorise the institution, carrying on or defence of any proceedings in relation to the valuation list which the committee or authority are themselves authorised to institute, carry on or defend.

Admittedly, if that sub-section stood alone or in another part of the Act, it could not be doubted that it gives the county valuation committee power, by a general resolution, to authorise their officer to institute, carry on and defend any proceedings in relation to the valuation list, but it is said that we are bound to read this sub-section as relating only to appeals to quarter sessions because it is found in a section which, except for this sub-section, deals entirely with appeals to quarter sessions and proceedings consequent thereon or in substitution therefor. While, however, the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is clear that those headings cannot be used to give a different effect to clear words in the section where there cannot be any doubt

as to the ordinary meaning of the words. The leading authority for that is *Hammersmith & City Ry. Co. v. Brand* (1), and the matter has been more recently considered in *Fletcher v. Birkenhead Corpn.* (2). There SIR RICHARD HENN COLLINS, M.R., said ([1907] 1 K.B. 213) :

A The headnote to the report of the case of *Hammersmith and City Ry. Co. v. Brand* (1), seems to me to state fairly the result of that decision, as being that "the headings of different portions of a statute are to be referred to, to determine the sense of any doubtful expression in a section ranged under any particular heading." LORD CHELMSFORD said, in giving judgment : "The sections of the Railways Clauses Acts are, as your Lordships know, arranged in order under different heads, which indicate the general object of the provisions immediately following : and these may be usefully referred to, to determine the sense of any doubtful expression in a section ranged under a particular heading."

B It seems to me clear that the House of Lords and the Court of Appeal emphasised that reference can be made to headings only where the construction is doubtful. What doubt can there be about such words as those in s. 31 (9) : "the institution, carrying on or defence of any proceedings in relation to the valuation list ?" The proposals and objections in the present case are certainly proceedings in relation to the valuation list. I have not referred specifically to the terms of the Railways Clauses Acts which were considered in *Hammer-smith & City Ry. Co. v. Brand* (1), but it is to be noticed that in this Act, C as is often the case in modern Acts of Parliament which have to deal with a big subject and many sections, is divided into parts, and Part II deals with valuation. It is true there are sub-headings such as "Areas," "Authorities," "Valuation lists," "Preparation of valuation lists," "Appeals," and so forth, but this is all contained in a part of the Act which deals with valuation, and one of the matters dealing with valuation which is provided for in the various sections is the preparation of the valuation list, the objections to the D draft valuation list, the valuation list and the current list.

In my opinion, we do not require to refer to the headings to ascertain the construction of such clear words as these. It is possible, and, indeed, it may be probable, that the draughtsman of the Act, when dealing with appeals to quarter sessions, recognising that it would be necessary or desirable to make some special provision with regard to an officer having what I may call charge E of the appeal, saw that there were other matters of which it would be desirable that the officer should be put in charge by a general resolution, and, therefore, used the words he did. Those words seem to me to be incapable of any other meaning than that the committee may, by a special or a general resolution, authorise any officer they choose to carry on and defend any proceedings whatever. As these are proceedings in relation to the valuation list, it seems to me to follow that the county valuation committee were given express statutory F power to authorise their officer by a general resolution to do what he sought to do in this case, and it is unnecessary to consider what the position would have been if there had not been this special provision in the Act of Parliament. I base my decision entirely on the fact that sub-s. (9) of s. 31 cannot be restricted to the matter of appeals to quarter sessions, and an overwhelming or conclusive reason, as it seems to me, is that in every other sub-section of the section one finds the words "appeal under this Act," or "appeal under G this section." Those words are left out of sub-s. (9), and it must be assumed that they were deliberately left out, and, therefore, it remains a sub-section of entirely general application. For these reasons I think the orders both for *certiorari* and *mandamus* must go.

ATKINSON, J. : I agree.

H LEWIS, J. : I agree.

Orders accordingly.

Solicitors : Wyatt & Co., agents for Dudley Aukland, Clerk to the Surrey County Council (for the applicants) ; Clement G. Lawrence, agent for Durham & Co., Kingston-on-Thames (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WESSEL v. CARTER PATERSON AND PICKFORDS CARRIERS, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Macnaghten and Lynskey, JJ.), July 7, 1947.]

Criminal Law—Aiding and abetting—Receiving stolen goods—Thief convicted as a receiver—Summary Jurisdiction Act, 1848 (c. 43), s. 5.

A person who aids and abets the commission of an offence is a principal in the second degree and, under the Summary Jurisdiction Act, 1848, s. 5, he can be convicted, charged and punished as a principal in the first degree.

Where a thief gives or sells goods, which he has stolen, to a receiver, or leaves them with him, he can properly be convicted as a receiver, under s. 5 of the Act of 1848, because he has procured the commission of the offence by the receiver.

[AS TO AIDERS AND ABETTORS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 28-40, paras. 28-40; and FOR CASES, see DIGEST, Vol. 14, pp. 91, 92, Nos. 605-616.]

CASE STATED by the Recorder of Nottingham.

Leslie James Wessel appealed to Nottingham Quarter Sessions against a conviction by justices of receiving property knowing it to have been stolen, contrary to the Larceny Act, 1916, s. 33. The recorder held that while, on the facts, Wessel might have been convicted of stealing, he could not be convicted of receiving, and he, therefore, quashed the conviction. The prosecution now appealed from the decision of the recorder, to the Divisional Court who allowed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

Anthony Hawke for the prosecution.

The respondent did not appear.

LORD GODDARD, C.J.: This is a Case stated by the recorder of Nottingham on the appeal of one Wessel, against whom an information had been preferred by his employers, Carter Paterson & Pickfords Carriers, Ltd., alleging (i) that between Oct. 6 and 7, 1946, he, being a servant of the company, stole from them a quantity of women's and children's underwear to the value of £69 ls. 3d., contrary to the Larceny Act, 1916, s. 17 (1) (a); and (ii) that, together with one Walter Lawrence, on Oct. 6, he received a quantity of women's and children's underwear to the value of £69 ls. 3d., the property of the said Carter Paterson & Pickfords Carriers, Ltd., knowing it to have been stolen, contrary to the Larceny Act, 1916, s. 33. The justices convicted Wessel of receiving, but found him Not Guilty of stealing, and he appealed against the conviction. On the hearing of the appeal, the recorder came to the conclusion that, while Wessel might have been convicted of stealing, he could not be convicted of receiving, and he, therefore, quashed the conviction. Although [under the Summary Jurisdiction Act, 1879, s. 31 (1) (vii) as substituted by the Summary Jurisdiction (Appeals) Act, 1933, s. 1] he had jurisdiction to vary the order of the justices, he could not exercise that power which the section gives him by recording a finding of larceny because the justices themselves had acquitted the man of larceny.

Wessel was one of Carter Paterson's drivers. On a certain day some bales of goods were put on his van, two parcels by mistake not being entered on the consignment sheets. Knowing that this had taken place, Wessel determined to steal the goods, and on a journey from Leicester to Nottingham he stopped, took off a bale and a carton from the van, and put them at the side of the road. Having finished his journey, he met his co-defendant, Walter Lawrence, and he and Lawrence returned in a car and took possession of the goods. That case having been proved to the satisfaction of the justices, I do not know why, they acquitted Wessel of the offence of larceny as a servant, but they convicted him of receiving. So far as the offence of receiving was concerned, it would be impossible to treat Wessel as a principal in the first degree because he was the thief. He had not parted with felonious possession of the goods, and he certainly did not receive them from any person after they had been stolen. He was constructively in possession of the goods although it was felonious possession all the time.

Therefore, the recorder was right in the view which he took, but for one thing. His attention was not called to the Summary Jurisdiction Act, 1848, s. 5, which is in the same terms as the Accessories and Abettors Act, 1861. I think, as counsel for the prosecution said, that the Accessories and Abettors Act, 1861, is really only declaratory of the common law, because, if two people are concerned in the commission of an offence, they are both equally guilty. Under the old law, if a man was not present at the time an offence was committed, but aided, abetted, counselled or procured the commission of it, he was called an accessory before the fact. If he was present at the time the offence was committed, he was called an aider and abettor, and s. 5 of the Summary Jurisdiction Act, 1848, applies whether a person is technically an accessory or technically an abettor. Section 5 is in these terms :

Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable, and may be proceeded against and convicted either in the county, riding, division, liberty, city, borough, or place where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counselling, or procuring may have been committed.

This deals with offences which may be dealt with summarily, and one of the offences which may be dealt with summarily is an offence under the Accessories and Abettors Act, 1861, s. 8. The result of the section is that a person who aids and abets the commission of an offence is a principal in the second degree, and he can be convicted, charged and punished as a principal in the first degree. In this case, which is the first time this has ever happened, in my opinion, Wessel ought to have been convicted of receiving. He ought to have been convicted, of course, of stealing, but having been convicted of receiving, the appeal ought to have been dismissed on the ground that, although he was not a principal in the first degree, he was a principal in the second degree, and the Summary Jurisdiction Act, 1848, s. 5, covers the case. If ever there was a case in which a person "aided, abetted, counselled or procured the commission of" the offence of receiving, surely this is that case. Wessel fetched Lawrence, who was the principal receiver, brought him there in the car, and thereby enabled the offence to be committed by him. In the ordinary course, if a man is convicted of stealing and another man is convicted of receiving, one does not trouble to consider whether the thief aided and abetted the receiver, but that is the position, in fact, if it is the thief who hands or sells the goods to the receiver, because, except for the action of the thief, in those cases where the thief hands the goods or leaves them with the receiver or sells them to him, the receiver would not have been able to receive the goods. Therefore, although this point has not arisen before, it seems to me to be clear that a man who acts in this way can properly be convicted as a receiver, although he is also the thief, because he has procured the commission of the offence by the receiver. In those circumstances, and on that ground, the recorder could and ought to have upheld the conviction. We send this case back to him with an intimation that the conviction of receiving ought not to have been quashed inasmuch as the Summary Jurisdiction Act, 1848, s. 5, enabled him to convict Wessel of receiving because he had been aiding, abetting, counselling or procuring the commission of the offence by Lawrence. The appeal is allowed. I am reminded that it is not a question of restoring the order. The case will go back to the recorder with an intimation that the appeal should be dismissed on the ground that I have indicated, and it will then be for the recorder to consider what the appropriate penalty is which he should inflict on the respondent. He has the same powers as the Court of Criminal Appeal in that respect.

MACNAGHTEN, J. : I am of the same opinion.

LYNSKEY, J. : I agree.

Appeal allowed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *J. E. Richards*, Town Clerk, Nottingham (for the appellants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

**Re POWER'S WILL TRUSTS, PUBLIC TRUSTEE
v. HASTINGS AND OTHERS.**

[CHANCERY DIVISION (Jenkins, J.), June 26, 1947.]

Wills—Construction—Investment clause—Trustee empowered to invest trust moneys in purchase of freehold property—Whether empowered to purchase freehold house as home for widow and children.

By his will, a testator empowered his trustee to invest "all moneys requiring to be invested" under the will "in any manner in which he may in his absolute discretion think fit in all respects as if he were the sole beneficial owner of such moneys including the purchase of freehold property in England or Wales." The question to be determined was whether the trustee was empowered to purchase out of the trust fund a freehold house to be occupied by the testator's widow and children:—

HELD: on the true construction of the will, the trustee was not empowered to purchase a freehold house as a home for the widow and children, because he was authorised to purchase freehold property only as an investment, and the purchase of a house with vacant possession to permit someone to occupy it was not a purchase by way of investment.

[AS TO INVESTMENT BY TRUSTEES, see HALSBURY, Hailsham Edn., Vol. 33, pp. 233-235, paras. 416-418; and FOR CASES, see DIGEST, Vol. 43, pp. 927, 928, Nos. 3648-3663.]

Cases referred to:

- (1) *Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58; 88 L.J. Ch. 269; 121 L.T. 78; 43 Digest 928, 3662.
- (2) *Dilworth v. Stamps Comrs.*, *Dilworth v. Land and Income Tax Comrs.*, [1899] A.C. 99; 79 L.T. 473; *sub nom. Dilworth v. New Zealand Stamps Comrs.*, 68 L.J.P.C. 1; 19 Digest 586, 182.

ADJOURNED SUMMONS to determine whether the trustee of the testator's will was empowered by the will to purchase out of the trust funds a freehold house as a home for the tenant for life (the testator's widow) and the testator's children. It was held that he was not. The facts and the relevant clause of the will appear in the judgment.

T. A. C. Burgess for the Public Trustee.

Winterbotham for the tenant for life.

A. W. L. Franklin for the testator's children.

JENKINS, J.: The question raised by this summons is whether the Public Trustee, as sole trustee of the will of the testator, is empowered by the will to apply part of the trust fund in the purchase of a freehold house, to be occupied as a home by the tenant for life (the testator's widow, who has since his death remarried) and the testator's children, on suitable terms as to repair, insurance, and so forth. This question turns entirely on cl. 8 of the will, which is in the following terms:

All moneys requiring to be invested under this my will may be invested by the trustee in any manner in which he may in his absolute discretion think fit in all respects as if he were the sole beneficial owner of such moneys including the purchase of freehold property in England or Wales.

It has been argued by counsel for the tenant for life that this clause authorises the purchase of a house as a home for the family for the following reasons. In the first place, he points out that, if one looks at cl. 8 independently of the final provision introduced by the word "including," it is wide enough to authorise the purchase of freehold property as an investment. In support of that contention, he referred me to *Re Wragg, Wragg v. Palmer* (1), where the wording of the clause was, if anything, narrower than the wording in the present case, and P. O. LAWRENCE, J. held that it would authorise the purchase of real estate as an investment. I agree with counsel for the tenant for life that the words of this clause, without regard to the final provision introduced by the word "including," would be wide enough to authorise the purchase

of real estate as an investment. That really follows from the decision in *Re Wragg* (1).

A Having established that proposition, the next step of counsel for the tenant for life is to argue that the addition of the words "including the purchase of freehold property in England or Wales" must be construed as extending the effect of the clause so as to authorise the purchase of freehold property otherwise than as an investment, because, he says, if that were not so, these words would be meaningless. He has referred me to *Dilworth v. Stamps Comrs.*, *Dilworth v. Land and Income Tax Comrs.* (2), in support of the proposition that where the word "including" introduces expressions explanatory of the meaning of a word, *prima facie* it enlarges the meaning of that word, but it seems to me that these words, "including the purchase of freehold property in England or Wales," can be sufficiently accounted for by regarding them as having been inserted by the draftsman *ex abundanti cautela* to make sure that no one would suggest that the clause did not extend to purchasing freehold property as an investment. It is pressing the argument altogether too far to say that the effect of inserting these words must be to introduce some process which is not investment at all. If one looks at the wording of the clause, one finds that "including" refers back to "in any manner." One thus gets "moneys . . . may be invested . . . in any manner . . . including" a particular manner. B That leads to the conclusion that the modes of investment authorised are to include investment in the purchase of freehold property. Therefore, it seems to me that this clause, on its true construction, only authorises the purchase of freehold property as an investment. C

I think it is clearly stated by P. O. LAWRENCE, J., in *Re Wragg* (1), that for this purpose there is a distinction between purchasing freehold property for the sake of the income which will be obtained from it and purchasing freehold property to occupy it or permit somebody else to occupy it: ([1919] 2 Ch. 64, 65). In the former case, the purchase is accurately described as an "investment." In the latter case, it is not necessarily an investment, for it is a purchase for some other purpose than the receipt of income, and it may be a purchase which, from the financial point of view, will not be beneficial, because part of the price may be attributable to the special need to acquire a suitable place in which to live. It seems to me, therefore, to follow that the clause does not authorise the purchase of a freehold house with vacant possession as a home for the tenant for life and the testator's children, because such a purchase would not be a purchase by way of investment, or, perhaps, more accurately, might not be a purchase by way of investment, inasmuch as part of the money would or might be paid for the advantage of vacant possession and the benefit which the family would get by living in the house. D E

F For those reasons, I propose to declare that the Public Trustee has no power under the will to purchase a freehold residence and premises in England or Wales, not as an investment, but with vacant possession and for the occupation of the tenant for life as a home for herself and for the testator's children.

Declaration accordingly.

G Solicitors: *Woodcock, Ryland & Co.*, agents for *Preston & Redman*, Bournemouth (for all parties).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

ROBIN & RAMBLER COACHES, LTD. v. TURNER.

[KING'S BENCH DIVISION (Hilbery, J.), May 20, 21, June 23, 24, 1947.]

Sale of Goods—Contract—Voidable contract—Fraud—Hire purchase of motor car—Hirer selling car for cash and another car—Resale of second car—Title to second car—Sale of Goods Act, 1893 (c. 71), ss. 12 (1), 23.

On Jan. 5, 1946, B. entered into a hire purchase agreement with W. to purchase a Hillman motor car for £686. On Apr. 4, 1946, after paying a deposit of £200 and one instalment of £40 10s. 0d. he purported to sell the car, in return for £275 and a Jaguar motor car, to the plaintiffs. On Apr. 10, 1946, B. purported to sell the Jaguar car to the defendant for £525, and subsequently the defendant sold it to F. for £550. W. repudiated the hire purchase agreement on the ground that B. had ceased to pay the instalments, and, having claimed the car back from the plaintiffs, agreed to sell it to them for £455 10s. 0d. (being the balance of the purchase price plus their costs). The plaintiffs then claimed from the defendant the return of the Jaguar car or damages for its conversion or detention :—

HELD : B.'s contract with the plaintiffs was induced by the fraudulent misrepresentation of B. and was voidable at the instance of the plaintiffs, but not void, and, as it was not avoided before the transaction between B. and the defendant, and as the defendant bought in good faith, the property in the Jaguar car passed to the defendant.

[AS TO SALE UNDER A VOIDABLE TITLE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 108-110, para. 131; and FOR CASES, see DIGEST, Vol. 39, pp. 532-535, Nos. 1443-1460.]

Case referred to :

(1) *Peirce v. London Horse & Carriage Repository, Ltd.*, [1922] W.N. 170.

ACTION for the return of a motor car or damages for its conversion or detention.

The facts appear in the headnote. HILBERY, J., gave judgment for the defendant.

Tilling for the plaintiffs.

S. Rees for the defendant.

HILBERY, J., [after stating the facts] : Counsel urges on behalf of the plaintiffs that the first transaction which took place between Mr. Messenger, the managing director of the plaintiff firm, and Mr. Berry on Apr. 4, when Mr. Berry purported to sell the Hillman car to Mr. Messenger, was a void transaction. I think that is the point in this case which must determine the matter in one way or the other : Was the transaction voidable or was it void ?

I hope I am not misrepresenting or failing to do justice to counsel for the plaintiffs if I seek to summarise his contentions. He says that this transaction purported to be a sale of goods. In a sale of goods transaction the essential thing about which the parties are contracting is the property in the chattel which is the subject of the transaction. If, therefore, one party purports to sell an article in which he has no property, the mere fact that the article is passed over and the form of making a contract is gone through does not result in there being a contract. It merely results in a void transaction. Here then, says counsel, Berry had no property in the Hillman car. The whole transaction was in form one of a sale of goods, but it was, in fact and in truth, void. I do not think that that argument is well founded. The first question to be decided is whether Berry was fraudulent when he entered into the transaction with Mr. Messenger. If Berry were not fraudulent—if at that time he had an honest intention, having sold the Hillman to Mr. Messenger and having added to the price realised the amount for which he could sell the Jaguar, to perfect his title under the hire purchase agreement by paying off the balance out of the proceeds—then there was no fraud. If, on the other hand, the inference to be drawn is that he intended not to perfect his title to the Hillman, but merely to take the proceeds of the sale of what he knew belonged to the hire purchase company and the proceeds of the sale of the Jaguar and use those for his own purposes, he was fraudulent at the time he sold the goods.

I think that the inference, in the whole of the circumstances, is that he was fraudulently minded, so I approach the problem from that standpoint. What is the result? It seems to be that Mr. Messenger was induced to enter into the contract by the fraudulent misrepresentation which Berry was making. That fraudulent misrepresentation, on the strength of which Mr. Messenger took the Hillman from Berry and paid him £275 cash and handed over the S.S. Jaguar, was that Mr. Berry had property in the Hillman car and was in a position to sell it—in other words, could warrant his title to it. That warranty, or “condition” as it is under the Sale of Goods Act, 1893, was intended, I think, to be a condition of that contract. In the receipt given at the time the parties stated: “It is understood that this car is free from any lien in any shape or form.” It is true, if that is the correct view, that Mr. Messenger could have avoided that contract on discovering the fraud, and, if he had done so before the Jaguar had passed to the defendant, the latter could not have obtained any title to the Jaguar, but Mr. Messenger did not do that. Mr. Turner bought the Jaguar on Apr. 10, and at that time Mr. Messenger had not discovered the fraud or avoided his contract with Mr. Berry.

It is not, as counsel for the plaintiffs suggests, that there was a mutual mistake over the identity of the subject-matter of the transaction between Berry and Mr. Messenger, which was the property in the car. The fact that Berry was fraudulent shows that there was no mistake on his part about the property in the car not being in him. The very fact that he was fraudulently representing that the property was in him when he knew it was not excludes the contention that he was acting under any mistake whatever. He acted deliberately in misrepresenting the facts. Whatever mistake there was about where the property in the car lay, it was the unilateral mistake made by Mr. Messenger, induced by the fraud of Berry.

In this connection one case is important—*Peirce v. London Horse & Carriage Repository* (1), and it is impossible to conceive why, if the right view in such circumstances is that the contract is void and not merely voidable, both the Court of Appeal and the judge of first instance in that case should never have considered that point.

I have come to the conclusion, therefore, that this contract induced by fraud was a voidable contract and, until it was avoided, the property in the car passed under it sufficiently to give the buyer of the Jaguar car, Mr. Turner—who bought without knowing there was any fraud—a good title.

I am fortified in that view by the Sale of Goods Act, 1893, ss. 12 and 23 of which, in my opinion, support the view which I have adopted. It is observable that under s. 12:

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property [in the goods] is to pass . . .

Section 23 provides:

When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

In the circumstances I think that, as Mr. Turner bought from Mr. Berry the Jaguar car in good faith and before the voidable contract between Mr. Berry and Mr. Messenger had been avoided by Mr. Messenger, Mr. Turner got a good title to the Jaguar and passed it, when he did so, to Mr. Farquharson.

The plaintiffs claim must fail, which will mean that the loss has to fall upon them. There will be judgment for the defendant.

Judgment for the defendant with costs.

Solicitors: G. A. Elkin (for the plaintiffs); Walker, Rowe & Clark, agents for Close & Son, Camberley (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

OKEN v. PERRATON.

[KING'S BENCH DIVISION (Hilbery, J.), June 3, 4, 5, July 1, 1947.]

Emergency Legislation—Registration of living accommodation—"Dwelling"—"Living accommodation"—Premises let for business purposes—Previous occupation as residence—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended), reg. 68 CB (1).

By a tenancy agreement, dated Dec. 11, 1945, the tenant undertook to use the leased premises only for his business of a photographic studio, and not for residential purposes, and not to assign, underlet, share, or part with possession of the premises or any part thereof. The premises consisted of two floors of a building above shop premises. The tenant had lived on the premises under a previous tenancy agreement, but, in Nov., 1940, the building had been damaged by enemy action, and he had disclaimed the agreement. In Jan., 1946, the tenant applied to the local housing authority as a person "having in [a] dwelling . . . occupied by him living accommodation which he is willing to make available . . . without furniture for use therein, for occupation by tenants . . ." within the Defence (General) Regulations, 1939, reg. 68 CB (1), to register three rooms on the top floor of the premises as such "living accommodation." The rooms were duly registered and sublet, and the landlord sought possession on the ground that the tenant was in breach of his tenancy agreement.

HELD: as, at the time of his application for registration of the rooms, the right of the tenant to occupy the premises was limited under the tenancy agreement of Dec. 11, 1945, to a right to occupy them for business, and not residential, purposes, he was not tenant of a "dwelling" within the meaning of the regulation, nor, for the same reason, had he "living accommodation" to offer, with the result that reg. 68 CB (1) had no application to the premises, the tenant had broken his agreement, and the landlord was entitled to possession. It is at the time when the application for registration is made that the person applying for it must have in a "dwelling" the "accommodation" which he is willing to make available, and, therefore, the fact that the premises had originally been constructed and used as a dwelling did not prevent the terms on which they were subsequently let from divesting them of that character.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 68 CB (1), see HALSBURY'S STATUTES, Vol. 39, pp. 1045, 1046.]

ACTION by the landlord for possession of premises let to the tenant for the purposes of his business of a photographic studio. The tenant registered three rooms as "living accommodation" under reg. 68 CB (1) of the Defence (General) Regulations, 1939, despite his covenant in the tenancy agreement not to use the premises otherwise than for his business purposes. He claimed that reg. 68 CB (4) had the effect of rendering his action lawful. HILBERY, J., made an order for possession.

Millner for the landlord.

F. Whitworth for the tenant.

Cur. adv. vult.

July 1. HILBERY, J., read the following judgment. The plaintiff is the owner of premises known as 199, High Street, Penge, which consist of a lock-up shop on the street level and two floors above. Access is had to the floors above the shop by entrances and staircases at the front and at the rear of the building. The defendant is the tenant of these two floors above the shop on the terms of a tenancy agreement in writing dated Dec. 11, 1945, for a term of three years from Aug. 13, 1945, at a net rent of £97 10s. 0d. per annum, payable by weekly instalments of £1 17s. 6d. in advance, on Monday in each week. By cl. 2 (6) of this agreement the tenant agreed to use the premises for the business of a photographic studio and for no other purpose whatsoever, and not for residential or sleeping purposes, and by cl. 2 (9):

. . . not to assign underlet share or part with possession of the said premises or any part thereof.

By cl. 4 (1) it was, *inter alia*, agreed that the landlord might determine the tenancy and re-enter on the premises in the event of the tenant failing to observe any of the stipulations on his part therein contained.

A Since Aug. 13, 1945, the tenant has occupied the premises pursuant to the terms of this tenancy agreement. Until the end of Jan., 1946, he used them for the business of a photographic studio which his wife carried on there. Then, by letters of Jan. 9 and 11, 1946, he applied to the Penge Urban District Council to register the three rooms on the top floor under reg. 68 CB (1) of the Defence (General) Regulations, 1939, as unfurnished living accommodation available for occupation by a tenant at £1 a week. By a letter dated Jan. 26, 1946, the clerk to the council informed the tenant's wife that he had registered these rooms for letting at an inclusive weekly rent of £1. The clerk to the council was not informed that the premises were let to the tenant and occupied by him as business premises only. The tenant's object in taking this course was not to provide living accommodation for an unfortunate citizen, who, because of the housing shortage, was unable to find any place to live in, but, as he has admitted in the witness box, it was to take advantage, if he lawfully could, of the regulations so as to reduce his overhead expenses by the £1 a week which he would get from this sub-letting, without incurring any liability for breach of his express contract.

C The landlord now claims that the tenant had no legal right under reg. 68 CB (1), to apply for the registration of this accommodation, and asserts that, the registration being unlawful, the sub-letting which the tenant has effected is a breach of the tenant's undertakings in the tenancy agreement not to use the premises otherwise than for the business of a photographic studio, not to use them for residential or sleeping purposes, and not to underlet, share or part with the possession of any part of the premises. The landlord claims, therefore, to have the tenancy agreement terminated, and to be entitled to an order for possession. The tenant asserts that he was entitled as a matter of law to act as he has done in procuring the registration of part of the premises as accommodation for occupation by a tenant, and that by reg. 68 CB (4) such action on his part is rendered lawful, notwithstanding the express provisions of his tenancy agreement. By way of counterclaim the tenant prays that if, contrary to his contention, he has acted illegally and in breach of the terms of his tenancy agreement, he may be relieved of the forfeiture, and by his counsel at the trial he offered, if the court should decide against his contention, forthwith to apply to the local housing authority for cancellation of the registration in question and to cause the tenant, to whom he has sub-let, to vacate the premises, and to abide by such other terms as to costs or otherwise as the court might order.

F [His LORDSHIP referred to the evidence, and stated that, until Nov., 1940, the tenant had lived on the premises, but at that date the premises were damaged by enemy action and he disclaimed the tenancy and lived elsewhere, and continued:—]. The question which, therefore, arises for determination is one of construction of reg. 68 CB (1), which provides :

G Where a local housing authority have established a register for the purposes of this regulation, any person having in any dwelling in the area of the authority occupied by him living accommodation which he is willing to make available, whether with or without furniture for use therein, for occupation by tenants or lodgers, may apply to the authority for registration of the accommodation and of the terms on which the householder is willing to make it available as aforesaid.

H Whether the tenant, occupying the premises in question in the circumstances which I have related, was a person who had in a dwelling "living accommodation" which he was willing to make available for occupation by a tenant, within the meaning of that regulation, is the question which the parties raise for my decision. In my view, the tenant was not such a person. To come within the regulation he must show two things. In the first place, he must show that at the time when he applied for the registration of the accommodation which he was willing to make available for a tenant, he was a person who had in "a dwelling" the accommodation which he was asking should be registered, and

he must show that it was "living accommodation" in that dwelling which he was willing to make available. The tenant was not in occupation of premises which were a dwelling. When he made his application they were business premises, the only right to occupy which was limited to a right to occupy for a business purpose only and excluded their use for residential or sleeping purposes. Used in the context in which it occurs in this regulation, the word "dwelling" is intended to refer to a building which is a place of residence, and support for this view is to be found in the fact that what a person in any dwelling is empowered to apply to have registered is "living accommodation" in the dwelling. I see no reason to give the word "dwelling," when so used in the regulation, any other than its normal and popular meaning.

I am, further, of opinion that the tenant, occupying, as he did, for a business purpose only, could not be said to have "living accommodation" which he was willing to make available. He had expressly agreed that his occupation should be for a business purpose only and not for residential or sleeping purposes. Unless, therefore, the fact that the premises had originally been constructed as a dwelling-house, and used for residential purposes, prevented the subsequent terms on which they were let and were occupied from divesting them of that character, they were not a dwelling and there was no living accommodation in a dwelling at the time when the tenant procured the registration of the top floor as living accommodation available for a tenant and sublet that accommodation, as he did. It appears to me to be reasonably clear on the wording of the regulation in question that it is at the time when the application for registration is made that the person applying for the registration must have the accommodation available in what is at that time a dwelling. Many buildings in London, and in some cases in whole districts in London, which were constructed as dwellings or places of residence, in the course of time have come to be let and occupied solely as business premises and have in this way changed what was their original character. So it is with the premises in question in this action. Their character has been changed. That it has been comparatively recently changed makes no difference. They have become business premises and are not a "dwelling" interpreting that word, as I do, as meaning a place of residence. No one has dwelt in the premises since the tenant disclaimed his tenancy in 1940.

In my opinion, the regulation in question has no application to the premises I am here concerned with, and the tenant offered for registration accommodation which the housing authority had no power to register. The tenant is, therefore, in breach of his tenancy agreement, and the landlord is entitled to the relief she claims. In the circumstances, however, I think the tenant should be granted relief against his forfeiture.

Judgment for plaintiff.

Solicitors: *Maltz, Mitchell & Co.* (for the landlord); *Kingsford, Dorman & Co.* (for the tenant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

FRANKLIN AND OTHERS v. MINISTER OF TOWN AND COUNTRY PLANNING.

[HOUSE OF LORDS (Lord Thankerton, Lord Porter, Lord Uthwatt, Lord du Parcq and Lord Normand), June 23, 24, 26, July 24, 1947.]

Town and Country Planning—New town—Duty of Minister—Administrative capacity—Need to support proposed order by public inquiry—"Bias"—New Towns Act, 1946 (c. 68), s. 1 (1), sched. I (3).

Pursuant to the New Towns Act, 1946, sched. I, para. 3, the Minister of Town and Country Planning held a public local inquiry into objections to a proposed order under s. 1 (1) of that Act, called the Stevenage New Town Designation Order, 1946, by which Stevenage was designated as a "new town" within the Act. In a speech at a public meeting prior to the passing of the Act, the Minister had stated that the Bill would become law, that Stevenage was a most suitable site and should be the first scheme under the Act, and that the Stevenage project would go forward. At the inquiry, no evidence in support of the order was adduced, and the objections then made were subsequently considered and rejected by the Minister. He dealt in writing with the substance of all objections except that directed to the difficulties of water supply and sewage disposal, with regard to which he said he was taking advice, having in mind a scheme which representatives of the Metropolitan Water Board and the Lee Conservancy had agreed would meet the difficulty. The appellants, who were local residents and landowners, challenged the order under s. 16 of the Town and Country Planning Act, 1944, on the grounds that (i) before considering the objections the Minister stated that he would make the order, and was thereby biased in any consideration of the objections which the Act of 1946 impliedly required should be fairly and properly considered, and (ii) the inquiry did not comply with the statutory requirements for such a public local inquiry in respect that no evidence in support of the draft order was led on behalf of the Minister:—

HELD: (i) no judicial or quasi-judicial duty was imposed on the Minister in the discharge of his statutory duties, those duties being purely administrative; the only question was whether he had complied with the statutory direction to appoint a person to hold the public inquiry and to consider that person's report; and the appellants had not established either that in his speech he had prejudged any genuine consideration of the objections or that he had not genuinely considered the objections at a later stage when they were submitted to him.

(ii) the words "in respect thereto" in para. (3) of sched. I to the Act of 1946 meant "in respect to the objections"; they definitely limited the scope of the inquiry, and none of the general procedural provisions of s. 290 of the Local Government Act, 1933, could be held to extend its scope; the object of the inquiry was further to inform the mind of the Minister and not to consider any issue between the Minister and the objectors, which was for the Minister thereafter to consider and decide; and, therefore, there was no need for the Minister to lead evidence at the inquiry in support of the draft order.

Per LORD THANKERTON: The proper significance of the word "bias" is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, such as an arbitrator.

[EDITORIAL NOTE. This decision finally determines the powers and position of the Minister of Town and Country Planning under the New Towns Act, 1946. HENN COLLINS, J., took the view that under the statute the Minister acted in a quasi-judicial, and not merely in an administrative, capacity, and on the facts he found that the Minister had not come to the matter with an open mind, but had shown bias. The Court of Appeal held that the only obligation which rested on the Minister after the inquiry was fairly and *bona fide* to consider the report of the person by whom the inquiry was held, and, after consultation with any local authorities concerned, to decide whether it was expedient in the national interest that the new town should be developed as proposed, and they held that the objectors had failed to show that this obligation had not been carried out and to provide any evidence of bias. The House of Lords now make it clear that the Act imposes no judicial or quasi-judicial

duty on the Minister and that any reference in the present case to "bias" was irrelevant. The Minister's duties are purely administrative. All he is bound to do is genuinely to consider any objections to a proposed scheme and the report of the inquiry, *i.e.*, not to come to those matters with a "foreclosed mind." The position, therefore, of the Minister of Town and Country Planning under the Act of 1946 is different from that of the Minister of Health under the Housing Acts. In *Errington v. Minister of Health* ([1935] 1 K.B. 249; 99 J.P. 15), and a number of later cases it has been held that the Minister of Health exercises a quasi-judicial function in confirming clearance and compulsory purchase orders under the Housing Acts and so must act judicially in arriving at his decision.

FOR THE NEW TOWNS ACT, 1946, s. 1 (1), SCHED. I (3), see HALSBURY'S STATUTES, Vol. 39, pp. 664, 683.]

Cases referred to:

- (1) *Ranger v. Great Western Railway Co.*, (1854), 5 H.L. Cas. 72; 24 L.T.O.S. 22; 2 Digest 400, 580.
- (2) *R. v. Sussex JJ., Ex p. McCarthy*, [1924] 1 K.B., 256; 93 L.J.K.B. 129; 88 J.P. 3; *sub nom. R. v. Hurst, Ex p. McCarthy*, 130 L.T. 510; 33 Digest 294, 97.
- (3) *R. v. Essex JJ., Ex p. Perkins*, [1927] 2 K.B. 475; 96 L.J.K.B. 530; 137 L.T. 455; 91 J.P. 94; Digest Supp.
- (4) *Re the Trunk Roads Act, 1936, and Re the London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2)*, 1938, [1939] 2 All E.R. 464; [1939] 2 K.B. 515; 108 L.J.K.B. 555; 160 L.T. 554; Digest Supp.

APPEAL from a decision of the Court of Appeal (LORD OAKSEY, MORTON and TUCKER, L.J.J.), dated Feb. 20, 1947, and reported [1947] 1 All E.R. 612, reversing a decision of HENN COLLINS, J., dated Feb. 20, 1947, and reported *ibid.*, 396.

On Nov. 11, 1946, the Minister of Town and Country Planning, after having held a public local inquiry, made the Stevenage New Town Designation Order, 1946. The objectors, who were residents and landowners of Stevenage, opposed the order and appealed to the court, under s. 16 of the Town and Country Planning Act, 1944, on the grounds that (1) the Minister had not acted within his powers in making the order, and that (2) in considering the objections to the proposed order, he failed to carry out his duty to give the objections fair and proper consideration. HENN COLLINS, J., held that the order was not *ultra vires*, but that the Minister had been biased in his consideration of the objections, and he, therefore, quashed the order. The Court of Appeal held that the only obligation which vested in the Minister after the inquiry was fairly and *bona fide* to consider the report of the person by whom the inquiry was held, and, after consultation, under s. 1 of the Act, with any local authorities who appeared to him to be concerned, to decide whether it was expedient in the national interest that the new town should be developed as proposed. The Court of Appeal held that the objectors had failed to discharge the onus which was on them to show that this obligation had not been carried out and to provide evidence of bias. They, therefore, reversed the decision of HENN COLLINS, J. The objectors appealed to the House of Lords.

The House took time for consideration and affirmed the decision of the Court of Appeal.

Capewell, K.C., and *Squibb* for the appellants.

The Attorney-General (Sir Hartley Shawcross, K.C.) and *H. L. Parker* for the respondent.

LORD THANKERTON: My Lords, the appellants, who are the owners and occupiers of dwelling-houses and land situate at Stevenage, challenge the validity of the Stevenage New Town (Designation) Order, 1946, made on Nov. 11, 1946, by the respondent, under the New Towns Act, 1946, which had received the Royal Assent on Aug. 1, 1946. This challenge is made under s. 16 of the Town and Country Planning Act, 1944, which provides by sub-s. (1) (b) that the court, if satisfied that the order or any provision therein is not within the powers of the Act or that the interests of the applicant have been substantially prejudiced by any requirement of the Act or of any regulation made thereunder not having been complied with, may quash the order or any provision contained therein, either generally or in so far as it affects any property of the applicant.

The relevant provisions of the New Towns Act, 1946, are as follows :

1.—(1) If the Minister is satisfied, after consultation with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town by a corporation established under this Act, he may make an order designating that area as the site of the proposed new town. (2) The provisions of sched. I to this Act shall have effect with respect to the procedure to be followed in connection with the making of orders under this section ; and ss. 16 and 17 of the Town and Country Planning Act, 1944 (which relate respectively to the validity and date of operation of orders under s. 1 of that Act, and to the registration of such orders in the register of local land charges) shall apply to an order made under this section as they apply to an order made under s. 1 of that Act.

The relevant provisions of sched. I as to orders under s. 1 are as follows :

1. Where the Minister proposes to make an order under s 1 of this Act, he shall prepare a draft of the order, describing the area to be designated as the site of the proposed new town by reference to a map, either with or without descriptive matter (which in the case of any discrepancy with the map, shall prevail except in so far as may be otherwise provided by the draft order) together with such statement as the Minister considers necessary for indicating the size and general character of the proposed new town. 2. Before making the order the Minister shall publish in the LONDON GAZETTE, in one or more newspapers circulating in the locality in which the proposed new town will be situated, and in such other newspapers, if any, as he considers appropriate in the circumstances, a notice— (a) describing the area to be designated as the site of the proposed new town ; (b) stating that the draft of an order under s.1 of this Act has been prepared by the Minister in relation thereto and is about to be considered by him ; (c) naming a place within the said area where a copy of the draft order (including any map or descriptive matter annexed thereto) and of the statement required by the foregoing paragraph, may be seen at all reasonable hours ; and (d) specifying the time (not being less than twenty-eight days from the publication of the notice in the GAZETTE) within which, and the manner in which, objections to the proposed order may be made, and shall, not later than the date on which the notice is published in the GAZETTE, serve a like notice on the council of the county and of the county district in which the land, or any part of the land, to which the order relates is situated, and on any other local authority who appear to him to be concerned with the order. 3. If any objection is duly made to the proposed order and is not withdrawn, the Minister shall, before making the order, cause a public local inquiry to be held with respect thereto, and shall consider the report of the person by whom the inquiry was held. 4. Subject to the provisions of the last foregoing paragraph the Minister may make the order in terms of the draft or subject to such modifications as he thinks fit : Provided that, except with the consent of all persons interested, the Minister shall not make the order subject to a modification including in the area designated as the site of the proposed new town any land not so designated in the draft order.

Section 16 of the Town and Country Planning Act, 1944, thus incorporated by s. 1 (2) of the Act of 1946, restricts the remedy open to any person desiring to challenge the validity of an order, or of any provision therein, to the ground that it is not within the powers of the Act or that some requirement of the Act has not been complied with, so that he must proceed by application to the High Court, as therein provided, and he requires to satisfy the court that the order is not within the powers of the Act, or that his interests have been substantially prejudiced by any requirement of the Act not having been complied with.

On Aug. 3, 1946, the respondent prepared the Draft Stevenage New Town (Designation) Order, 1946, and, on or about Aug. 6, 1946, he caused the same to be published and notices to be given as prescribed by para. 2 of sched. I to the Act of 1946. Thereafter, objections were received from a number of persons, including the appellants. Accordingly, the respondent instructed Mr. Arnold Morris, an inspector of the Ministry of Town and Country Planning, to hold a public local inquiry, as prescribed by para. 3 of the said schedule. Mr. Morris held the inquiry at the Town Hall, Stevenage, on Oct. 7 and 8, 1946, and on Oct. 25 made a report to the respondent, in which he set out a summary of the submissions made and the evidence given by and on behalf of the objectors and attached thereto a complete transcript of the proceedings, which began with an opening statement by Mr. Morris giving a brief recapitulation of the reasons that had led to the designation of Stevenage as the site of a new town. As already stated, on Nov. 11, 1946, the respondent made the order, which is under challenge. On Dec. 9, 1946, the appellants, by notice of motion, applied to the High Court to have the order quashed, on the following grounds :—

(1) That the said order is not within the powers of the New Towns Act, 1946, or alternatively that the requirements of the said Act have not been complied with and the interests of the applicants have been thereby substantially prejudiced in that—
 (a) before considering the objections of the applicants the Minister stated that he would make the said order, and was thereby biased in any consideration of the said objections; and
 (b) the Minister did not before making the said order cause a public local inquiry to be held with respect thereto; and

(2) that the New Towns Act, 1946, impliedly requires that the objections of the applicants should be fairly and properly considered by the Minister and that the Minister should give fair and proper effect to the result of such consideration in deciding whether the said order should be made and that such implied requirements were not complied with.

There does not appear to be much dispute as to the facts, but a great deal rests on the proper inference to be drawn from these facts, which may be stated chronologically as follows. On Jan. 21, 1946, a committee appointed in 1945 by the respondent, as Minister of Town and Country Planning, and the Secretary of State for Scotland, known as the "Reith Committee," made an interim report, dated Jan. 21, 1946, and published as Command Paper 6759, in which it is stated in para. 16:

(1) Stevenage is suggested in the Greater London Plan, 1944, as one of the new towns in the outer ring round London. We are informed that the development of this town is a matter of urgency, and that the agency must be chosen before legislation can be obtained. (2) It is possible that by a special arrangement with the Hertfordshire County Council, at the request of the Minister of Town and Country Planning, the necessary land may be acquired for the county council under s. 35 of the Town and Country Planning Act, 1932, the Exchequer providing the necessary finance. We recommend that there shall be an arrangement between the county council and a government sponsored corporation established by Royal Charter, which will enable the latter to proceed in advance of legislation. (3) A draft charter for this corporation, drawn up at our request by the Treasury Solicitor, is in Appendix 4 (Note: Charters for corporations established after legislation has been passed would derive from that legislation and be different in content).

The committee recommended in the 9th place:

Stevenage. Arrangements should be made for setting up immediately a public corporation for the development of a new town at Stevenage to proceed with the necessary work in advance of legislation—para 16.

The New Towns Bill was introduced by the respondent in the House of Commons on Apr. 17, 1946, and was ordered to be printed. On or about Apr. 24, 1946, the respondent sent letters to 179 owners of land at Stevenage inquiring whether they were prepared to sell land to the respondent, with a view to the development of the area as a garden city, as provided by s. 35 of the Town and Country Planning Act, 1932. There is no evidence that any land was acquired by the respondent as the outcome of these letters, and we are entitled to assume that the Minister was acting on the suggestion of the Reith Committee and that the proposal was superseded by the passage of the New Towns Act. On May 6, 1946, the respondent attended and spoke at a public meeting in Stevenage Town Hall, called to consider a proposal for designating an area of land in the neighbourhood of Stevenage as the site of a new town. The appellants base their case mainly on the statements made in an advance Press notice issued by the respondent prior to the meeting, and statements made by the respondent in the course of his speech, as evidence that the respondent had by that time completely made up his mind that the designation of Stevenage as a new town would be carried through, whatever was said at the meeting or subsequently. Both the Press notice and the speech gave a somewhat detailed statement of the development of the plans for relief of density of the population of London by the formation of new towns, and the particular advantages of the Stevenage area for such a purpose, but it is unnecessary to do more than quote the passages founded on by the appellants as demonstrating the state of the respondent's mind along with some of the immediate context. All such passages in the Press notice are to be found in the respondent's speech, but the speech contains one short additional passage, and the report of the speech also gives some of the interruptions of the audience, and the reactions of the respondent thereto, and records that the respondent, on rising to begin his speech, was greeted with cheers from the platform and some booing from the hall. It seems that the

meeting might fairly be described as a lively one. The relevant passages are as follows :

(1) After review of the Abercrombie Plan for Greater London, the interim reports of the Reith Committee, the unanimous approval given to build the first new town at Stevenage, and the consideration of the matter by the government and inter-departmental committees, the respondent said :

A I have now had the advantage of two interim reports—both unanimous—from this committee (the Reith Committee) and based upon these reports the government has decided to introduce legislation to facilitate the creation of these new towns. The New Towns Bill, published twelve days ago, will receive its second reading on Wednesday, and I am here to-day—(*Voice* : You are leaving it a bit late.) In anticipation of the passage of the Bill—and I have no doubt that it will go through—certain preliminary steps have been taken regarding Stevenage by way of discussion with local authorities concerned—(*Voice* : There has been no discussion with the Stevenage local authority)—
B and the preparation of a plan, and the giving of notices for the acquisition of land under powers which I already have in pursuance of the Town and Country Planning Act, 1932.

(2) In reference to the choice of the Stevenage area :

I think you will agree that, if we are to carry out our policy of creating a number of new towns to relieve congestion in London, we could hardly have chosen for the site of one of them a better place than Stevenage. Now I know that many objections have
C been raised by the inhabitants of Stevenage, perhaps not unnaturally.

(3) Later the respondent said, in two passages :

I want to carry out in Stevenage a daring exercise in town planning—(*Jeers*). It is no good your jeering : it is going to be done —(*Applause and boos*). (*Cries of " Dictator "*). After all this new town is to be built in order to provide for the happiness and welfare of some 60,000 men, women and children . . . For a number of years we in this country
D stood together and suffered together, whilst fighting for an ideal, for a democracy in which we believed. I am sure that this spirit is not dead in Stevenage, and if you are satisfied that this project is worth while, and for the benefit of large numbers of your fellow human beings, you will be prepared to play your part to make it a success. The project will go forward because it must go forward. It will do so more surely and more smoothly and more successfully with your help and co-operation. Stevenage will in a short time become world famous—(*Laughter*). People from all over the world
E will come to Stevenage to see how we here in this country are building for the new way of life.

(4) In answer to a question whether the rates would be increased by the development, the respondent said :

No, in due course Stevenage will gain. Local authorities will be consulted all the way through. But we have a duty to perform, and I am not going to be deterred from that duty. While I will consult as far as possible all the local authorities, at
F the end, if people become fractious and unreasonable, I shall have to carry out my duty—(*Voice* : Gestapo!)

The New Towns Bill received a second reading in the House of Commons on May 8, 1946, and received the Royal Assent on Aug. 1, 1946. The statutory duty of carrying out the designation of new towns thus became imposed on the respondent as Minister of Town and Country Planning. Under para. 1 of
G sched. I to the Act, the respondent prepared, on Aug. 3, 1946, a draft order for the designation of the Stevenage area, and on or about Aug. 6, 1946, caused the Draft Stevenage New Town (Designation) Order, 1946, to be published and notices to be given as prescribed by para. 2 of the schedule. As already stated, objections were thereafter received, and on the instructions of the respondent, a public local inquiry was held by Mr. Morris on Oct. 7 and 8, 1946, and Mr. Morris made a report to the respondent on Oct. 25, 1946. It was conceded
H by the appellants that there was no evidence of any person having been deterred from lodging objections by any of the facts already stated, and there is no criticism of the conduct of the inquiry by Mr. Morris except that which is involved in the other contention of the appellants as to the range of the inquiry, which is claimed by them not to have been in compliance with the statutory requirements. On Nov. 8, 1946, the respondent caused a letter to be sent to the objectors, in which, after stating that he had considered Mr. Morris' report, and that, after giving careful consideration to the various submissions made to him on behalf of the interested local authorities and statutory undertakings

and by private individuals affected by the proposals, he had decided to make the order, the respondent, in fourteen paragraphs, dealt in turn with the main objections raised. The appellants sought to maintain that, in para. 13, the respondent had not effectively dealt with the objections raised by the Metropolitan Water Board, the Lee Conservancy Board and the Lee Conservancy Catchment Board as to water supply and sewage disposal, which the appellants contended were vital to the practicability of the whole proposal, but only stated that he had appointed a consultant to examine the possibilities of a scheme which will apply to a much wider area than that of the immediate vicinity of Stevenage. In my opinion, this contention of the appellants was correctly disposed of by LORD OAKSEY, L.J., ([1947] 1 All E.R. 616), who pointed out that none of these authorities had ever suggested that it was an entirely unpracticable scheme, and that it really raised a question of expense. The respondent said that these problems had been taken into account from the beginning and had been the subject of discussions with the Ministry of Health from an early stage and subsequently with the Metropolitan Water Board and the Lee Conservancy Board. (The appellants seek to throw doubt on the statement as to discussion with these two Boards). The respondent added that he felt justified in going forward with the establishment of a properly planned community and would maintain close contact with the Ministry of Health and the statutory undertakers at every stage of the development. From this it is clear that the respondent, after very long and full consideration of the matter, came to the conclusion that these objections were in no degree fatal to the scheme, but were matters to be examined and determined during the stage of development of the new town, which comes after the making of the order, when the development corporation is established under s. 2 of the Act. The appellants admit that, if the respondent did so decide, his decision is not open to challenge by them. It may further be observed that, during this later stage, the Minister of Health, under s. 9 of the Act, has the power, on his own initiative, of constituting larger areas than the designated area for the purposes of public health. It appears to me that the respondent's letter of Nov. 8 not only does not support the appellants' contention, but that it is evidence that the Minister had properly considered the objections.

As already stated, the Stevenage New Town (Designation) Order was made by the respondent in terms of para. 4 of sched. I to the Act, and its validity is the subject of challenge in these proceedings. HENN COLLINS, J. ([1947] 1 All E.R. 399) upheld the first contention of the appellants on the ground that the respondent's functions in considering the report of Mr. Morris' inquiry were quasi-judicial, that he did not consider the objections with an open mind, and that "he did not consider or decide the question Aye or No should the order be confirmed with an open mind, but that he meant to confirm it whatever the force of the objections might be, trusting that some solution would be found." The learned judge based his view on the respondent's speech of May 6, 1946, and on para. 13 of the respondent's letter of Nov. 8. As regards the former he says (*ibid.*, 398):

If I am to judge by what he said at the public meeting which was held very shortly before the Bill, then published, became an Act of Parliament, I could have no doubt but that any issue raised by objectors was forejudged. The Minister's language leaves no doubt about that. He was not saying that there must be and shall be satellite towns, but he was saying that Stevenage was to be the first of them. But, when he made that speech, and gave his answers to questions which were asked, he had no administrative functions in relation to the Act in question, for the Act had not then been passed. Though that was his attitude two days before the Bill received its second reading, it is upon the objectors to prove that the Minister was in a like mind, or, at least, had not an open mind, from and after, at latest the inception of the public inquiry, which was held in Oct. 1946.

As regards the letter of Nov. 8, 1946, he says (*ibid.*, 399):

In this case, however, as was then only to be expected of him, the Minister has dealt, in writing, with the substance of the objections—with one exception, namely, that directed to the difficulties of water supply and sewage disposal. It is obvious that those difficulties must be met before the scheme can go through. The Minister acknowledges that they have not been met, and that he is taking advice as to how it can be done. *Non constat* that any way will be found, and yet, with that fundamental problem still outstanding, the Minister confirms his order. How can it be said that he weighed the

objection with an open mind when he acknowledges that he did not and does not know the force of it? When, therefore, I ask myself whether the objectors have satisfied me that from and after the inception of the inquiry up to and including the moment at which the Minister decided to confirm his order, he had not an open mind, my answer is that they have.

A It is clear that, had the learned judge appreciated, as was pointed out in the Court of Appeal, that no witness had suggested that the scheme could not go through unless the suggested difficulties of water supply and sewage disposal had been met, and had he realised that he had put a wrong construction on para. 13 of the letter of Nov. 8, 1946, he would not only have been left without any evidence that from and after the inception of the inquiry up to and including the confirmation of the order the respondent had not an open mind, but he would have had the evidence of the letter of Nov. 8, 1946, that the respondent had so considered the report, and he should also have taken account of the B unchallenged affidavit of the respondent on Jan. 21, 1947, referred to by the Court of Appeal ([1947] 1 All E.R. 616) that :

“ Before causing the said order to be made, I personally considered all the objections made by the objectors, including the present applicants, together with the submissions made and evidence given on their behalf as appearing in the said transcript. I also carefully considered the report of the said Arnold Morris.”

C The learned judge makes no reference to this affidavit. In that aspect of the evidence it appears that the learned judge, in view of his reasoning, as above quoted, would not have quashed the order.

D The Court of Appeal accepted this view of the reasoning of the learned judge, and, while assuming that his inference from the respondent's speech of May 6, 1946, that the respondent had not then an open mind and that any issue raised by the objectors was forejudged was well-founded, held that the learned judge's statement of the evidence of the objectors as to water supply and sewage disposal was incorrect, it not having been suggested that the scheme was entirely unpracticable, and on his erroneous construction of the letter of Nov. 8, 1946, set aside the decision of HENN COLLINS, J., and restored the Stevenage New Town (Designation) Order of the respondent.

E My Lords, I agree with the decision of the Court of Appeal, but I am of opinion that an incorrect view of the law applicable in this case was taken by the learned judge, and I feel bound, despite the assumption of its correctness by the Court of Appeal, to examine the correctness of the learned judge's view as to the proper inference from the respondent's speech of May 6, 1946. While the fact that the speech was made just before the second reading of the Bill, and some months before the statutory duties as to designation of new towns was imposed on the respondent has some bearing on the fair construction of the speech, I am prepared F to assume in favour of the appellants that, under the Bill as introduced, it was proposed to impose these duties on the respondent, as Minister of Town and Country Planning, and that these duties presented no material difference from those contained in the Bill when passed into law. It could hardly be suggested that, prior to its enactment, he was subject to any higher duty than is to be found in the statute.

G In my opinion, no judicial, or quasi-judicial, duty was imposed on the respondent, and any reference to judicial duty, or bias, is irrelevant in the present case. The respondent's duties under s. 1 of the Act and sched. I thereto are, in my opinion, purely administrative, but the Act prescribes certain methods of, or steps in, the discharge of that duty. It is obvious that, before making the draft order, which must contain a definite proposal to designate the area concerned as the site of a new town, the respondent must have made elaborate inquiry into the matter, and have consulted any local authorities who appear H to him to be concerned, and, obviously, other departments of the government, such as the Ministry of Health, would naturally require to be consulted. It would seem, accordingly, that the respondent was required to satisfy himself that it was a sound scheme before he took the serious step of issuing a draft order. It seems clear also, that the purpose of inviting objections, and, where they are not withdrawn, of having a public inquiry, to be held by someone other than the respondent, to whom that person reports, was for the further information of the respondent, in order to the final consideration of the soundness of the scheme of the designation, and it is important to note that the development

of the site, after the order is made, is primarily the duty of the development corporation established under s. 2 of the Act. I am of opinion that no judicial duty is laid on the respondent in discharge of these statutory duties, and that the only question is whether he has complied with the statutory directions to appoint a person to hold the public inquiry, and to consider that person's report. On this contention of the appellants no suggestion is made that the public inquiry was not properly conducted, nor is there any criticism of the report by Mr. Morris. In such a case the only ground of challenge must be either that the respondent did not, in fact, consider the report and the objections, of which there is here no evidence, or that his mind was so foreclosed that he gave no genuine consideration to them, which is the case made by the appellants. Although I am unable to agree exactly with the view of the respondent's duty expressed by the learned judge, or with some of the expressions used by the Court of Appeal in regard to that matter, it does appear to me that the issue was treated in both courts as being whether the respondent had genuinely considered the objections and the report, as directed by the Act. A

My Lords, I could wish that the use of the word "bias" should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute. As LORD CRANWORTH, L.C., says in *Ranger v. Great Western Railway Co.* (1) (5 H.L. Cas. 89): B

... a judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias inducing him to lean to the one side rather than to the other. In ordinary cases it is a just ground of exception to a judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent. C

To this may be added the statement by LORD HEWART, C.J., in *R. v. Sussex Justices, Ex p. McCarthy* (2) ([1924] 1 K.B. 258): D

It is said, and, no doubt, truly, that when that gentleman [the deputy clerk] retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question, therefore, is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. E

This was followed in *R. v. Essex Justices, Ex p. Perkins* (3), but, in the present case, the respondent having no judicial duty, the only question is what the respondent actually did, i.e., whether, in fact, he did genuinely consider the report and the objections. F

Coming now to the inference of the learned judge from the respondent's speech on May 6 that he had not then a mind open to conviction, the learned judge states it thus ([1947] 1 All E.R. 398): G

If I am to judge by what he said at the public meeting which was held very shortly before the Bill, then published, became an Act of Parliament, I could have no doubt but that any issue raised by objectors was forejudged. The Minister's language leaves no doubt about that. He was not saying that there must be and shall be satellite towns, but he was saying that Stevenage was to be the first of them. H

It seems probable that the learned judge's mind was influenced by his having already held that the respondent's function was quasi-judicial, which would raise the question of bias, but, in any view, I am clearly of opinion that nothing said by the respondent was inconsistent with the discharge of his statutory duty, when subsequently objections were lodged, and the local public inquiry took place, followed by the report of that inquiry, genuinely to consider the report and the objections. The only passages in the speech quoted in the appel-

lants' Case are contained in the third quotation I have made from the speech, and are as follows :

A I want to carry out in Stevenage a daring exercise in town planning (*jeers*). It is no good your jeering : it is going to be done . . . After all, this new town is to be built in order to provide for the happiness and welfare of some 60,000 men, women and children . . . The project will go forward, because it must go forward. It will do so more surely and more smoothly and more successfully with your help and co-operation. Stevenage will in a short time become world famous. People from all over the world will come to Stevenage to see how we here in this country are building for the new way of life.

The only two additional passages founded on by the appellants' counsel at the hearing before this House were the sentence in my first quotation :

B In anticipation of the passage of this Bill—and I have no doubt that it will go through, and, in my fourth quotation :

But we have a duty to perform, and I am not going to be deterred from that duty. While I will consult as far as possible all the local authorities, at the end, if people become fractious and unreasonable, I shall have to carry out my duty—(Voice : Gestapo!)

C My Lords, these passages in a speech, which was of a political nature, and of the kind familiar in a speech on second reading, demonstrate (1) the speaker's view that the Bill would become law, that Stevenage was a most suitable site and should be the first scheme in the operation, and that the Stevenage project would go forward, and (2) the speaker's reaction to the hostile interruptions of a section of the audience. In my opinion, these passages are not inconsistent with an intention to carry out any statutory duty imposed on him by Parliament, although he intended to press for the enactment of the Bill, and thereafter to carry out the duties thereby involved, including the consideration of objections which were neither fractious nor unreasonable. I am, therefore, of opinion D that the first contention of the appellants fails, in that they have not established either that in the respondent's speech he had forejudged any genuine consideration of the objections or that he had not genuinely considered the objections at the later stage when they were submitted to him.

E The remaining contention of the appellants is that the inquiry held by Mr. Morris did not comply with the statutory requirements for such a public local inquiry, in respect that no evidence in support of the draft order was led on behalf of the respondent. This contention rests on para. 3 of sched. I to the Act of 1946, read along with s. 19 (3) of the Act, which incorporates *inter alia* as to local inquiries s. 41 of the Town and Country Planning Act, 1944, which, in turn, incorporates sub-ss. (2) to (5) of s. 290 of the Local Government Act, 1933, which relate to the giving of evidence on, and defraying the costs, of local inquiries. The terms of para. 3 of sched. I to the Act of 1946, may conveniently F be recalled :

If any objection is duly made to the proposed order and is not withdrawn, the Minister shall, before making the order, cause a public local inquiry to be held with respect thereto, and shall consider the report of the person by whom the inquiry was held.

G It has been held in both courts below that the words "with respect thereto" mean "with respect to the objections," and the appellants did not challenge that construction in this House. In the only analogous case of *Re the Trunk Roads Act, 1936, and the London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2) 1938* (4), generally known as the *Kingston Bypass* case, it was held that, under similar statutory provisions, other than the absence of the words "in respect thereto," it was not the duty of the Minister to call evidence before the inquiry, but the duty of the objectors to state their objections and H call such evidence as they might be advised. While I find no reason to doubt the correctness of that decision, which was admittedly contrary to the present appellants' contention, the words "in respect thereto," here present, definitely limit the scope of the inquiry, and none of the general procedural provisions of s. 290 of the Local Government Act, 1933, can be held to extend its scope. As I have already pointed out, the object of the inquiry is further to inform the mind of the Minister, and not to consider any issue between the Minister and the objectors. That is for the Minister thereafter to consider and decide. Accordingly, I am of opinion that this contention of the appellants also fails.

In my opinion, the appeal should be dismissed and the judgment of the Court of Appeal should be affirmed. The appellants should pay the respondent's costs of this appeal.

My Lords, **LORD PORTER** and **LORD UTHWATT** have desired me to express their concurrence in the opinion which I have just delivered.

LORD DU PARCQ : My Lords, I concur.

LORD NORMAND : My Lords, I also concur.

Appeal dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.* (for the appellants) ; *Treasury Solicitor* (for the respondent).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

Affirmed. H.L. [1948] 2 All E.R. 509.

SHORT AND ANOTHER v. TREASURY COMMISSIONERS.

[COURT OF APPEAL (Tucker, Somervell and Evershed, L.JJ.), June 25, 26, July 22, 1947.]

Emergency Legislation—Control of undertaking—Compulsory acquisition of company—Transfer of shares to government nominees—Price to be paid for shares—Defence (General) Regulations, 1939 (S. R. & O., 1939, No. 927, as amended), reg. 78 (5).

By orders made under regs. 55 (4) and 78 (1) of the Defence (General) Regulations, 1939, the Minister of Aircraft Production took control of the undertaking of a company and directed that the shares thereof should be transferred to his nominees to hold on his behalf. By a further order made under reg. 78 (5) of the Defence Regulations, the price of the shares so transferred was fixed at 22s. 3d. or 29s. 3d. per share according to class, figures which were arrived at simply by reference to the prices of the shares of those classes ruling on the Stock Exchange at the date of the transfer. The shareholders contended that, as the transfer was of all the shares in the company, the appropriate mode of fixing the price of the shares was either (1) to ascertain the value of the whole undertaking and then to determine the proportionate value of the separate classes of shares and of individual shares within each class, or (2) to apportion the value of the totality of the shares in one hand, so as to comprehend the value of the complete control thereby conferred.

HELD : the effect of the order under reg. 78 was to transfer shareholdings from individual shareholders to the competent authority or its nominees, and the ordinary and reasonable construction of reg. 78 (5) led to the conclusion that the price to be paid to each holder was to be not less than the value of his shares on the basis of a separate bargain of sale by a willing individual seller to a willing individual buyer of those shares.

Per cur : Apart from any special words in the regulation, each shareholder was entitled to get only the value of what he possessed, and, while it might well be that an individual shareholding, being such as to give the holder effective control of the company's affairs, was of a value exceeding the sum reached by aggregating the market value of each of the shares, neither claimant in this case had such a holding. The fact that a purchaser might be prepared, if he could thereby acquire the whole of the shares, to pay more than the "market" value of each individual share, did not affect the principle that the claimants were only entitled to the value of what they had, and the regulation could not be construed as entitling the claimants to be paid for something more than that to which they were severally entitled immediately before the appropriate date.

Semble : the Stock Exchange quotation need not necessarily be the value adopted and it is open to any shareholder to seek to displace by evidence such quotations, provided such evidence is directed to the value as between a willing buyer and a willing seller of the particular holding *per se*.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, regs. 55 and 78, see HALSBURY'S STATUTES, Vol. 39, pp. 985 and 1057 respectively.]

APPEAL by the claimants from a decision of MORRIS, J., reported [1947] 1 All E.R. 22.

MORRIS, J., held that when the order was made transferring the shares each shareholder was divested of the value of the shares which he held and the rights to which the shares entitled him, and not of some aliquot part of the property of the company, and, therefore, the basis of valuation adopted for which the Treasury contended, *viz.*, the Stock Exchange quotations, was correct. The Court of Appeal now dismissed the appeal. The relevant facts appear in the judgment.

Sir David Maxwell Fyfe, K.C., and Cecil W. Turner for the claimants.

Sir Cyril Radcliffe, K.C., and H. L. Parker for the Treasury.

Cur. adv. vult.

July 22. **EVERSHED, L.J.**, read the following judgment of the court. This appeal turns on the construction of the Defence (General) Regulations, 1939, reg. 78. which provides :

(1) Where, by an order made under para. (4) of reg. 55 of these regulations, a competent authority has authorised an authorised controller to exercise functions of control on behalf of His Majesty with respect to any undertaking or part of an undertaking carried on by a company, then, if the competent authority is satisfied that it is necessary for the purpose of securing effective control of the undertaking or part so to do, the competent authority may exercise either or both of the following powers, that is to say : . . . (b) if it appears to the competent authority that it is expedient that all the shares in the company should be held on behalf of that authority, the competent authority may by order made with the consent of the Treasury transfer the shares of the company to such nominees of the competent authority (in this regulation referred to as "the transferees") as may be specified in the order . . .

(4) Where an order is made by a competent authority under para. (1) of this regulation transferring the shares in any company—(a) the shares shall on such date as may be specified in the order (in this regulation referred to as "the date of transfer"), vest in the transferees on behalf of the competent authority free from any mortgage, pledge, or charge, and the transferees shall be entitled to be entered in the register of members in respect of the shares without the delivery to the company of any instrument of transfer ; (b) it shall be the duty of the former holder of any of the shares, and of any other person having the custody of any certificate or warrant relating thereto, to deliver the certificate or warrant to the competent authority or to such person as that authority may direct ; (c) the transferees shall on the date of transfer become exclusively entitled to all the rights and advantages of members of the company notwithstanding that they are not entered in the register of members ; . . .

(5) The price to be paid by a competent authority in respect of any shares transferred by virtue of such an order as aforesaid shall be such price as may be specified in an order made by the Treasury, being a price which, in the opinion of the Treasury, is not less than the value of those shares as between a willing buyer and a willing seller on the date of the order made by that authority under para. (4) of the said reg. 55 ; . . .

(7) Without prejudice to the provisions of s. 3 of the Rules Publication Act, 1893, any order made by the Treasury under para. (5) of this regulation shall as soon as may be after the making thereof be published in such manner as appears to the Treasury to be most suitable for bringing the order to the notice of persons affected thereby ; and if within three months after the date on which any such order is made, or within such further time as the Treasury may in special circumstances allow, any person who immediately before the date of transfer had an interest in any of the shares to which the order relates gives notice in writing to the Treasury claiming that the price specified in the order is less than the value aforesaid, the value of the shares in which that person had an interest shall be determined by the arbitration of a qualified accountant . . .

On Mar. 17, 1943, the Ministry of Aircraft Production (hereinafter referred to as "the competent authority") made an order under reg. 55 (4) appointing a controller of Short Brothers (Rochester and Bedford) Ltd. (hereinafter referred to as "the company"). On Mar. 22, 1943, the competent authority made an order under reg. 78 transferring all the shares in the company to named nominees. The validity of those orders is not challenged.

The issued shares of the company were 230,475 5 per cent. redeemable cumulative preference shares of £1 each, 250,000 "A" ordinary shares of 5s. each, and 581,302 ordinary shares of 5s. each. On May 31, 1943, the Treasury made an order

under para. (5) of reg. 78 specifying the prices of the above different classes of shares at 22s. 3d., 29s. 3d., and 29s. 3d., respectively. The first claimant was at the material date holder of 22,958 "A" ordinary shares, and the second claimant was holder of 3,000 ordinary shares. The claimants gave notices in writing under para. (7) of reg. 78 claiming that the prices specified in the order in respect of the shares held by them were less than their "value" as provided for in para. (5), and the matter went to arbitration. The arbitrator stated his award in the form of a Special Case. I read paras. 10 to 15 and 17 of that Case :

10. In the course of the evidence it appeared that the figure of 29s. 3d. per share which was the price mentioned in the said order of May 31, 1943, was fixed simply by reference to the prices of such shares ruling on the Stock Exchange on the date of transfer of the shares, namely, Mar. 23, 1943. 11. On behalf of the [Treasury] it was contended that the proper basis of valuation under reg. 78 of the Defence (General) Regulations (S.R. & O. 1941, No. 1023) was to assume that the Minister had acquired all the shares in individual blocks from individual shareholders on the date of transfer, and on this assumption to fix the value of all the shares on the basis of the prices ruling on the Stock Exchange on such date. 12. On behalf of the claimants it was contended that, the transfer effected by the above-mentioned order of Mar. 22, 1943, being a transfer of all the shares in Short Brothers (Rochester and Bedford), Ltd., it was improper to fix the value on the hypothesis of the purchase of individual blocks of shares from individual shareholders, and that the appropriate mode of fixing the price of the shares would be, first, to ascertain the value of the whole undertaking and then to determine the proportionate value of the separate classes of shares, and of individual shares within each class. Following this mode of valuation, I came to the conclusion, after considering the evidence, that a fair price for the "A" ordinary shares and for the ordinary shares in Short Brothers (Rochester and Bedford), Ltd., at the date of transfer would be 41s. 9d. per share. 13. The question for the opinion of the court concerns the mode of valuation which is proper to be followed in fixing the price of the shares. 14. If the court be of opinion that the contention of the [Treasury] is correct, then I award and determine that the respondents do pay or cause to be paid to the respective claimants the sum of 29s. 3d. in respect of each of the said 22,958 "A" ordinary shares and the sum of 29s. 3d. in respect of the said 3,000 ordinary shares. 15. If the court be of opinion that the contention of the claimants is correct, then I award and determine that the respondents do pay or cause to be paid to the respective claimants the sum of 41s. 9d. in respect of each of the said 22,958 "A" ordinary shares and the sum of 41s. 9d. in respect of each of the said 3,000 ordinary shares. 17. If either party shall fail to set down the award for argument before the court as a Special Case within 21 days, then I award and direct as follows, that the respondents shall pay or cause to be paid to the respective claimants the sum of 41s. 9d. in respect of each of the said 22,958 "A" ordinary shares and the sum of 41s. 9d. in respect of each of the said 3,000 ordinary shares.

Although the findings of fact and the issues of law might, perhaps, have been somewhat more clearly stated, it is, in our view, sufficiently plain that the Crown submitted that, as a matter of law (that is, as a matter of construction of para. (5) of the regulation), the "value" in every case of shares transferred under the regulation was the value to the shareholder of his individual holding—the price which would be obtained from a willing buyer on a sale of that holding to him, such sale being a distinct transaction without regard being had to the fact or assumption that all the other shareholders in the company were selling their individual holdings at the same time to the same buyer. The claimants, on the other hand, submitted as a matter of law (that is, of the construction of the regulation) that it is impossible in fixing "the value" of the shares transferred to exclude the consideration that the whole of the shares in the company are—as they necessarily are under the powers of the regulation—being transferred at the same time to the same purchaser, and that, this being so, the total price to be paid is the value of all the shares in one hand. On this basis (according to the claimants' submission) the value of any shares is an appropriate part, having regard to the number of and the rights attached to those shares, of the value of the whole undertaking.

The arbitrator has, we think, found as a fact that, if the Crown's contention in law is right, the prices specified in the order are correct. If, on the other hand, the claimants' contention in law is right, then he has found as a fact that the value of each class of ordinary shares is £2 1s. 9d., this figure being, we were told, based on the value of the whole undertaking and an apportionment of that value to each ordinary share. The findings of the arbitrator appropriate to the claimants' submissions proceeded, as we have said, on the basis of the statement

A of their case. It does not, however, follow that, if the claimants are entitled to succeed, that basis of calculation is necessarily correct. Shareholders are not, in the eye of the law, part owners of the undertaking. The undertaking is something different from the totality of the shareholdings. The claimants recognised this difficulty, and in this court their main argument was, we think, addressed to an alternative statement of their case, that is, that the value of their shares must be calculated on the basis of an apportionment of the value of the totality of the shares in one hand, so as to comprehend the value of the complete control thereby conferred. This alternative is not in terms set out in the award, but, as we have already indicated, the real issues between the parties are, in our judgment, sufficiently raised by the award.

B It is said, on the one hand, that it is of the essence of the matter that the Crown is, as it is bound to do, acquiring all the shares of the company. That is true, but, on the other hand, it is also the fact that the Crown is acquiring shares from a number of individual shareholders. *Prima facie*, as it seems to us, and apart from any special words in the regulation, each shareholder is entitled to get and to get only the value of what he possesses, for that is all he has to sell or transfer. If an individual shareholder in a company owns such a number of shares in that company as gives him effectual control of the company's affairs, it may well be that the value to be attributed to that holding, upon a sale of it as a separate transaction, is a figure greater than the sum arrived at by multiplying the number of his shares by the "market" value for the time being of a single share. In such a case the shareholder in question has, it may be said, got, and is able to sell, something more than a mere parcel of shares, each having the rights as to dividend and otherwise conferred on it by the company's regulations. In the present case neither of the claimants has such a holding of shares as confers effective control of the company's affairs. No claim on the part of either is made on that basis. The claim of each is to have added to the value appropriate to his individual parcel of shares, it being sold separately, a rateable proportion of the added or "control" value belonging to the totality of the shares—an item of value which he, as an individual, does not, in fact, possess. On Mar. 17, 1943, the first claimant, on the facts as found in the Case, could have got 29s. 3d. for each of his ordinary shares from a willing buyer. He is claiming 41s. 9d. The difference represents his share of the extra value which a purchaser, it is said, is prepared to give if he can get hold of all the shares. We can ourselves see no reason in principle why the first claimant should receive more than the value of what he has. We observe that, if some third shareholder, in fact, held a controlling interest in the company's capital, the effect of the claimants' contention would appear to be to appropriate to their own holdings some part of the "control," value which the third shareholder might well allege was an item of value belonging to him. In any case, the argument would, as it seems to us, involve necessarily the view that the claimants would be entitled on the construction of the regulation to be paid for something more than, and added to, the particular item of property which immediately before the appropriate date they, in fact, severally enjoyed. In our judgment, it would need clear language to produce such a result.

F Turning to the language of para. (5), we agree with the judge's view of the "ordinary and reasonable construction" of the words used. He said ([1947] 1 All E.R. 25):

I In my view, the ordinary and reasonable construction of the regulation leads to the conclusion which I have indicated. The compensation or the price to be paid to each holder is to be not less than the value of his shares, assuming that at the specified date he, as a willing seller, was selling his shares to a willing buyer. This is the view which was put forward before me on behalf of the Treasury and which was put forward at the arbitration.

The formula "as between a willing buyer and a willing seller" is a common one, and, in our judgment, when applied to a transfer of any shares, imports, according to its ordinary and natural meaning, the conception of a separate bargain of sale by an individual seller to an individual buyer of those shares.

The effect of the order is to transfer shareholdings from individual shareholders to the competent authority or its nominees. The language of the section seems to us the language which one would expect on the Crown's contention. What is the value of a share or of a number of shares of a certain class belonging to

an individual shareholder as between willing buyer and willing seller of these shares? That is what is to be specified. If a shareholder has 1,000 shares, then *prima facie* the price to be paid to him is 1,000 times the value of a single share. We doubt, indeed, whether para. (5) is, in any case, capable of the construction which the claimants seek to put on it. The principle underlying that construction would have been difficult to apply, though, at least, it would have been easy to indicate. It would at once raise the question how, when the price attributable to the whole shareholding had been arrived at, it was to be apportioned between different classes of shares. There is no reference to any such apportionment. One would have expected provision for cases in which a shareholder of a particular class, though accepting the total figure, wished to argue that his class of share had not had a sufficient proportion assigned to it. This issue would be one in which all other classes would be interested, but not the Treasury.

We, therefore, come to the conclusion that the judge was right on the question of construction. Paragraph 11 of the Case might be read as meaning that, as a matter of law, the Stock Exchange quotation, if there was one, must be the value. Counsel for the Crown disclaimed any such proposition. He did not dispute the right of any shareholder to seek to displace by evidence such quotations, provided such evidence was directed to the value as between willing buyer and willing seller of the particular holding *per se*. In the present case it appears to have been admitted throughout that, if the Crown's contention as to the law was correct, then on the material before the arbitrator the Stock Exchange quotation would be the best value. In the result, we are of opinion that the appeal should be dismissed and the award should be upheld in the terms of para. 14.

Appeal dismissed with costs.

Solicitors: *William Charles Crocker* (for the claimants); *Treasury Solicitor* (for the Crown).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

Re SANDYS' WILL TRUST, SANDYS v. KIRTON.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), June 11, 12, 13, July 8, 1947.]

Trusts and Trustees—Professional trustee—Will—Charging clause—Construction—Testator having property in England and Canada—Trust company with separate English and Canadian scales of charges—Scale intended by testator.

A testator, domiciled in England, died in France possessing property in England, Canada and other countries. By his will, which was made in English form and executed in England, he appointed a company to be one of the executors and trustees, the charging clause providing: "My trustees may in the execution of the trusts hereof or of any codicil hereto act by their proper officers who as well as the trustees may employ and pay such agents as may be thought fit without being responsible for the default of any agent so employed and in addition to such reimbursement of expenses incurred in the execution of the trusts as my trustees may be entitled to in equity shall be entitled to remuneration in accordance with their rates or mode of charging for trust business for the time being including the customary share of brokerage on any sale or purchase of marketable securities." The testator described the company as having its head office in Canada and a branch in England. The administration charges made by the company in Canada and in England were set out in two separate booklets, neither of which had been seen by the testator. The charges in the Canadian booklet were higher than those in the English one, which provided, however, for a charge in respect of foreign property, and also for a share of brokerage which was not within the Canadian charges. The testator expressed in his will the desire that an English firm of solicitors should be employed. The will was proved in England and not in Canada:—

HELD: on the true construction of the charging clause, the testator had in mind one rate or mode of charging, and, having regard to the facts—particularly the English form of the will and its execution in England, the reference to the employment of an English firm of solicitors, and the form of the charging clause which was substantially that in the English booklet—the rate intended was that applied by the English branch.

[As TO REMUNERATION OF TRUSTEES, see HALSBURY, Hailsham Edn., Vol. 33, pp. 277-280, paras. 490-494; and FOR CASES, see DIGEST, Vol. 43, pp. 773-776, Nos. 2136-2160.]

APPEAL by the plaintiff from an order of VAISEY, J., dated Jan. 16, 1947.

VAISEY, J., held that the English booklet governed the charges in respect of the business in England and that the Canadian booklet governed the charges with regard to Canadian business. The plaintiff's appeal was allowed by the Court of Appeal which considered that only the English scale of charges was contemplated by the testator. The facts appear in the judgment.

Christie, K.C., and *R. E. Megarry* for the plaintiff.

Andrew Clark, K.C., and *Winterbotham* for the defendant company.

Cur. adv. vult.

July 8. COHEN, L.J., read the following judgment of the court. This appeal raises a question as to the rate or mode of charging to be applied in calculating the remuneration to which the defendant company, the Royal Trust Co. (Montreal, Canada), is entitled as one of the executors nominated by the will of Captain George John Sandys, who died on Sept. 3, 1937, in France.

His will was in English form. It was executed in England and bore date Sept. 11, 1936. By it he declared that he was domiciled and resident in the Principality of Monaco and appointed the defendant company and his wife, the plaintiff (now Mrs. Roberts), to be executors and trustees of his will. He described the company as a "body politic having its head office at 105, St. James Street, in the city of Montreal in the Dominion of Canada, and having a branch and being authorised to carry on business at 3, St. James Square in the county of London." Clause 3 of his will, on which in the main the determination of the question before us turns, is in the following terms:

My trustees may in the execution of the trusts hereof or of any codicil hereto act by their proper officers who as well as the trustees may employ and pay such agents as may be thought fit without being responsible for the default of any agent so employed and in addition to such reimbursement of expenses incurred in the execution of the trusts as my trustees may be entitled to in equity shall be entitled to remuneration in accordance with their rates or mode of charging for trust business for the time being including the customary share of brokerage on any sale or purchase of marketable securities.

By cl. 4 he desired that the solicitors to be employed in connection with the administration of his estate should, if possible, be Joynson-Hicks & Co., of Lennox House, Norfolk Street, London. On Nov. 3, 1937, letters of administration with the will annexed were granted to Mr. Kirton and Mr. Stopford, respectively secretary and trust officer of the London branch of the defendant company, for the use and benefit of the said company and until further representation be granted. The plaintiff renounced probate.

The effect of the will was that substantially the only persons interested were the testator's son (Mr. Edwin Duncan Sandys), and the plaintiff, and, by a deed of family arrangement, dated May 14, 1938, and made between the said son and the plaintiff, it was, among other things, agreed that the will should operate and have full force and effect as therein modified. Under the deed the plaintiff was to have a power of appointment in her lifetime by deed or deeds revocable or irrevocable as well as by will or codicil. On July 13, 1938, the plaintiff exercised that power of appointment and irrevocably appointed that the residuary estate of the testator should belong to and be vested in herself absolutely.

In the early stages the administration was complicated by two matters. First, a claim was made in France on behalf of Mlle. Quennesson that she was the natural child of the testator and she obtained a default judgment in an action for declaration of paternity before the Civil Tribunal of Nice on Dec. 14, 1938. A claim was also made that, on the basis of that declaration, she was entitled to a share in the estate of the testator under the law of the

Principality of Monaco, the validity of the latter claim depending on the domicile of the testator. Accordingly, proceedings were commenced in England for the determination of the question of domicile, to which proceedings all the interested persons, including the French infant, were made parties. This matter came before SIMONDS, J., on June 13, 1940, and he made an order declaring that the testator was, at the date of his death, domiciled in England. As a large part of the estate was situate in Canada, similar proceedings were commenced in the province of Quebec, and on Aug. 3, 1945, an order was made by CASGRAIN, J., directing the company to deliver up the testator's Canadian assets to Mr. Kirton and Mr. Stopford as the administrators in England with the will annexed and declaring that the plaintiff, Mr. Edwin Duncan Sandys, and Mlle. Quennesson were bound by the order. We were informed that the legacies had been paid and that the plaintiff was now absolutely entitled to the residue, subject to a few small questions of administration which remain to be settled.

Accounts were from time to time supplied by the company to the plaintiff, and they were examined by her accountants on Jan. 9, 1946. The plaintiff's then solicitors wrote to Mr. Stopford a letter dealing with a number of points on the accounts and concluding by saying: "the remaining query on the accounts at the moment is in connection with your company's fees" and asking for a list of the scales of the remuneration to which the company claimed to be entitled. Correspondence continued to pass between the plaintiff's solicitors and Mr. Stopford or the company's solicitors down to May 13, 1946. Throughout the plaintiff's solicitors were pressing for information which would enable them to advise their client as to the propriety of the remuneration which the company were seeking to charge. They were supplied with a copy of the company's booklet on the administration of estates in England and a copy of the company's booklet entitled "Approximate charges for administration of estates in the province of Quebec," but they were never given information—to which, in our opinion, the plaintiff was clearly entitled—which would enable her to ascertain how the remuneration, aggregating some £8,500, which the company were claiming was calculated. In the result, on May 13, 1946, the plaintiff's solicitors wrote to the company's solicitors stating that, unless they received an undertaking within three days to supply the information within four weeks, proceedings would be taken. This undertaking was not forthcoming and on May 21, 1946, the summons in this matter was issued. Substantially, it asks for a declaration that, on the true construction of the testator's will, the company was not entitled to make any charge for remuneration otherwise than in accordance with the terms set out in the above mentioned English booklet and for an account of the remuneration, out of pocket legal costs and all other payments whatsoever properly chargeable and due to the company in respect of the administration of the testator's estate.

The summons having been issued, evidence was filed on both sides, from which it appeared that the testator left assets in England, Scotland, Ireland, France, Monaco, Gibraltar, the provinces of Quebec and Saskatchewan and in the United States, of a total value of about £380,000. The affidavits do not show how that amount was distributed among the various countries, but by agreement between the parties a statement was put in before us from which it appeared that the approximate value of the English estate was £81,500; of the American estate, £125,600; and of the Canadian estate, £174,600; the small balance being distributed between Monaco, Gibraltar and Ireland. It also appeared that by far the largest portion of the estate consisted of what may be shortly described as Stock Exchange investments. There was no evidence that the testator had seen either the Canadian or the English booklets.

The first edition of the English booklet was not published until Apr. 1, 1937, that is, after the date of the testator's will, but Mr. Foreman, the assistant manager of the London branch of the company, deposed that in the case of normal estates in which administration ran on the usual lines, the English booklet did represent something like the charges that would have been made for such administration during the years immediately preceding the publication of the booklet. The English booklet gave a list of the principal officers of the London branch, including Mr. Stopford and Mr. Kirton, and of an advisory board. It stated that the company might be appointed, both in England and

in Canada, as the executors and trustees of a will, and that the advisory board of the company met regularly to consider recommendations by the company's officers in the administration of estates and trusts. It also contained this paragraph under the heading "Canadian Property":

To estates and trusts owning land or other property in Canada the appointment of the company with its branches and agencies throughout the Dominion offers particular advantages.

- A It then proceeded to set out the fees which would be charged by the company for acting as executor and trustee. Paragraph 1 of this part of the booklet provided for an acceptance fee, the amount of which varied according to the size of the estate, the charge being £1 per cent on gross capital value for the first £5,000, and a lower rate on the excess over £5,000, decreasing rateably until on the excess over £50,000 it was only two shillings per cent. Paragraph 2 provided for an income fee of 2 per cent up to £2,000, and 1 per cent. on any excess over £2,000. That fee was to be calculated on the actual income received, but on a date which was agreed as being June 15, 1941, "gross income" was substituted for "actual income received." Paragraph 3 provided for a withdrawal fee calculated at the average rate per cent. borne by the whole trust fund on acceptance. Paragraph 4 provided for an investment fee. It declared that the company should be entitled to the customary share of brokerage on the sale and purchase of marketable securities. Paragraph 5, so far as material, is in the following terms:—

- In addition to the foregoing, special fees may be payable in the following cases; the charges will be commensurate with the special services rendered, or may be subject to arrangement. (i) Where an estate or trust holds mortgages, real estate or ground rents, for collection of income and the general management of the property... (iii) Where an estate or trust is involved in litigation... (v) Where an estate or trust holds property situate abroad... (vii) Where information, etc., is supplied for the purpose of any dealing (actual or intended) with a beneficial interest in trust property.

- The Canadian booklet provided for charges on capital and on revenue and for a commission on sales and investments. On capital it provided for a reasonable charge to be made for preliminary administration, including taking over the assets and establishing the liabilities, settling the succession duties, paying the debts and cash legacies, and services in connection with the preparation of the inventory and transmission of assets, etc., and for 1 per cent. on distributions of capital among the heirs. On revenue it provided for a charge of 4 per cent. or 5 per cent., according to the nature of the property from which the revenue was derived. It also contained a note that there would be special rates for large estates. As regards commission on sales and investments, it provided for a brokerage of one-eighth of 1 per cent. on purchases and sales of stocks, stock rights and bonds, and for other commissions not material to the case before us. It declared that all the company's charges were, of course, in addition to out of pocket expenses.

- It will be observed that, so far as charge on revenue is concerned, the charges in the Canadian booklet were much in excess of the charges in the English booklet. As regards capital, the distribution fee (which is the equivalent of "withdrawal fee" in the English booklet), the charge on large estates must necessarily work out much higher on the Canadian scale than on the English scale. So far as preliminary administration (which is the equivalent of the acceptance fee in the English booklet) is concerned, there was no fixed Canadian scale, but it was plain from Mr. Foreman's affidavit that, if the practice hitherto applied by the company in dealing with preliminary administration in Canada was applied to the present case, the charges would be much higher than the acceptance fee payable under the English booklet. So far as the question of commission was concerned, it is to be observed that the Canadian booklet provides for a fixed rate whereas the English booklet provides for "the customary share of brokerage."

On this evidence, the case came before VAISEY, J. Counsel for the plaintiff argued that, on the true construction of the testator's will, he must be taken to have directed that the company were entitled to be remunerated in accordance with the practice of their English branch. Counsel relied, among other points, on the fact that the will was executed in England and was in English form; that the testator went out of his way to describe the defendant company, not

only by its Canadian address, but also as having a branch and carrying on business at its English address; that cl. 3 was substantially in the form suggested in the English booklet, and, in particular, that it referred to the customary share of brokerage which was, in fact, a charge provided for by the English booklet and not to be found in the Canadian booklet. He also stressed that the testator expressed a desire that an English firm of solicitors should be employed in connection with the administration of the estate, and he emphasised that the scheme of the will did not contemplate two different scales or modes of charging in force at one and the same time, but one rate or mode of charging which might vary from time to time. Counsel for the defendant company, on the other hand, argued that the testator was contemplating two separate scales of charges, one to be found in the Canadian booklet and to be applicable to work done through the head office in relation to property in Canada and the U.S.A., and the other applicable to work done through the London office in relation to property in Europe. He relied on the fact that the testator mentioned both head office and London branch and that the testator had, and must be taken to have, known that he had by far the largest portion of his estate in Canada or the U.S.A. In these circumstances, said counsel, the testator, who had been a client of the head office from 1905 until his death, must be taken to have contemplated that the larger portion of the work would have to be done through the head office and to have intended that the defendant company should be entitled to charge for such work the rates which the company were accustomed to charge for such work in the administration of estates in the province of Quebec. This argument was, in substance, accepted by VAISEY, J., in the following passage from his judgment, which was delivered on Jan. 16, 1947:

In the absence of other information I think that I must assume that the English booklet governs, more or less, what is done in English trusts and I think the Canadian booklet shows, more or less, what is done in regard to trust business which has to be transacted in Canada, or rather from the Head Office.

VAISEY, J., then proceeded to make an order to give effect to his conclusions. By para. 1 the order declared: (a) That the defendant company was entitled to charge for work done in the administration of the estate or in the execution of the trusts of the will as varied by the deed of family arrangement, dated May 14, 1938, and the deed of appointment, dated July 13, 1938, and in accordance with the terms set out in the English booklet, and, in the events which have happened, to charge special fees commensurate with the special services rendered under each of sub-clauses (i), (iii), (v) and (vii) of para. 5 in that booklet. (b) That the company was entitled to include, as part of the special fees under para. 5 (iii) aforesaid, the reasonable and proper charges of their head office in Canada in respect of any proper litigation in Canada upon the basis of the said Canadian booklet and on the basis that such litigation formed part of the "preliminary administration" within the meaning of that booklet. (c) That the company was entitled to include, as part of the special fees under para. 5 (v) aforesaid, the reasonable and proper charges of their head office in Canada on the basis of the Canadian booklet in respect of all property in Canada or the U.S.A. administered by or through such head office, but excluding any charges separately made under para. 5 (iii) in respect of litigation.

We pause here to observe, and, indeed, counsel for the company agreed, that this paragraph is open to the objection that it involves duplication of charges as the company would be entitled to charge for the same work under (a) an acceptance fee and under (c) a reasonable charge for "preliminary administration." It was agreed that, if we were prepared to affirm the order, para. 1 would require amendment to prevent duplication of charges. Paragraph 2 of the order provided that such part of the remuneration of the company for work done by the English branch in the administration as properly falls under the head of an income fee was to be calculated down to June 15, 1941, in accordance with the terms as printed in para. 2 in the English booklet and thereafter in accordance with the terms of the said paragraph as amended in the English booklet.

From this order the plaintiff appeals. In substance, the appeal was aimed only against that part of the order which directed any reference to the Canadian

booklet. Counsel for the plaintiff was prepared to accept para. 1 (a) of the order, but he said that the English booklet must govern the whole matter. Having regard to the nature of the estate, he admitted that the company would be entitled to special fees commensurate with the special services rendered in relation to property situate outside England, and he recognised that it would be open to the company to put forward their Canadian booklet and their practice as evidence of what charges were commensurate with the special services rendered, but he objected to the order which had the effect of making the Canadian booklet conclusive evidence on that subject. He supported the appeal by the argument which we have already summarised and, in our opinion, that argument is well founded.

We are unable to accept the view that, on the proper construction of the testator's will, he contemplated two rates or modes of charging in force at the same time. We think that, on its true construction, the will contemplates one scale or rate of charging in force at any particular time, though it might vary from time to time. If that be so, we think that the terms of the will inevitably lead to the conclusion that the scale or mode of charging which the testator had in mind was that applied by the English branch. He uses a clause which, in substance, accords with the clause which it was the practice of the English branch to suggest for inclusion in wills where the English branch was asked whether the company would be prepared to act as executors. The will is in English form, it was executed in England and it contains an express declaration that the testator desired that the solicitors to be employed in the administration of the estate should be an English firm whose only address given in the will was in London. VAISEY J., relied, among other things, on the fact that only approximately one fifth of the testator's estate was situate here. We do not think much importance can be attached to that circumstance in view of the fact that the English booklet itself contains the passages we have quoted in relation to Canadian property and to property situate abroad. He also relied on the declaration as to domicile in Monaco and pointed out that there are indications that the testator did not wish it to be supposed that he was predominantly, or at all, an Englishman. We cannot help suspecting that this declaration and these indications were directed to tax provisions rather than to forum of administration, since the testator must have known that, as he had property in England, the will must be proved here. When we are considering the question as between England and Canada, the declaration and the other indications to which we have referred seem to us to be neutral, since we can find no indication that the testator had any desire to be particularly associated with Canada. VAISEY, J., says that he did not think it would be right for him to say that this is an ordinary English administration such as would be, no doubt, within the purview of the English booklet. We do not think that, having regard to that booklet as a whole, and, in particular, having regard to the references to Canadian and foreign property to which we have already referred, the ambit of the English booklet was limited to ordinary English administrations.

For the reasons we have given, we come to the conclusion that by cl. 3 of the will the testator had in mind one rate or mode of charging and that rate or mode of charging was the one in practice at the English branch at the time of making his will. We derive further support for this conclusion from the fact that there was no evidence to suggest that the company had or has a method of charging under which, in the case of an estate comprising property both in England and in Canada, the fees in respect of the former are based on the scales in the English booklet and those in respect of the latter on the scales in the Canadian booklet. There is nothing in either booklet to suggest such a composite method of charging. The English booklet provides for a commensurate charge in respect of foreign property. This is not to say that the scale of fees mentioned in the Canadian booklet is, as such, to apply in respect of Canadian assets. The Canadian booklet does not suggest that, in the case of an estate comprising property both in Canada and in England which is accepted on the terms of that booklet, the scale of fees contained in the English booklet is to apply to the property in England. In fact, so far as the evidence goes, the practice of the company is to apply one booklet or the other, never a combination of both. The language used by the testator clearly

refers to the methods of charging actually employed by the company and cannot be construed so as to entitle them to introduce an entirely novel method of charging devised to meet the case of this will. We would add that the procedure in fact adopted by the company when the testator died, accords with the conclusion we have reached. They proved the will in England through the medium of attorneys from the staff of their English branch. They never proved the will in Canada. When it became necessary to get in the Canadian property, proceedings were commenced in Canada and the company submitted to judgment in favour of the English administrators.

In our opinion, therefore, the appeal must be allowed. Paragraphs (b) and (c) of para. 1 of the declaration made by VAISEY, J., must be struck out and in lieu of para. 2 the following declaration must be substituted :

In answer to para. 2 of the said originating summons that the income fees payable under para. 2 on p. 12 of the said English booklet is to be calculated down to June 15, 1941, in accordance with the terms printed in such paragraph and thereafter in accordance with the terms of the said paragraph as amended in ink in the said English booklet.

Appeal allowed.

Solicitors : *Hilder, Thompson & Dunn*, agents for *Bircham & Co.* (for the plaintiff) ; *Bischoff & Co.* (for the defendant company).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

Re INNS, INNS v. WALLACE AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), July 2, 10, 1947.]

Wills—Family provision—Provision for wife—Life interest in marital home and gift of income—Income insufficient to enable wife to live in marital home—Inheritance (Family Provision) Act, 1938 (c. 45), s. 1.

By his will a testator gave to his trustees the sum of £85,000, on trust to pay the income thereof to his wife during her widowhood, and a freehold house, which had been the marital home, on trust to permit the wife to live there during her widowhood, subject to her keeping it in good repair and comprehensively insured. The house was a large one, and, according to the wife's estimate, to be able to live in it she would require £3,612, whereas the income which she would receive under the will was £3,244 and she had no other source of income. During her widowhood the house could not be sold without her consent and that of the local authority to whom, under the will, it was to be offered on her death or remarriage. The value of the testator's net estate was £607,780. On an application by the wife under the Inheritance (Family Provision) Act, 1938, s. 1, for additional income out of the estate, she contended that the provision made for her by the will was not reasonable because it was insufficient to enable her to live in the marital home as the testator had intended her to do :—

HELD : the Inheritance (Family Provision) Act, 1938, proceeded on the postulate that a testator should continue to have freedom of testamentary disposition, provided that his disposition as regards dependants could be regarded by the court, in all the circumstances, as reasonable, and, so, the jurisdiction given to the court by the Act was essentially a limited jurisdiction, and was to be cautiously, if not sparingly, exercised ; the same principles must be applied in the case of a large estate as in that of a small one ; the provision which the testator had made for his wife by his will could not be considered unreasonable merely because he had intended that she should continue to live in the marital home but had given her insufficient income to enable her to do so ; and, therefore, she was not entitled to an order under the Act.

Re Styler, Styler v. Griffith ([1942] 2 All E.R. 201) and *Re Pugh, Pugh v. Pugh* ([1943] 2 All E.R. 361) applied.

[AS TO PROTECTION OF TESTATOR'S FAMILY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 439-445, paras. 486-505 ; and FOR CASES, see DIGEST, Supplement, Wills, Nos. 11, 163a-11,163j.]

Cases referred to :

- (1) *Re Styler, Styler v. Griffith*, [1942] 2 All E.R. 201 ; [1942] Ch. 387 ; 111 L.J. Ch. 263 ; 167 L.T. 295 ; Digest Supp.
- (2) *Re Brownbridge, Brownbridge v. Brownbridge*, (1942), 193 L.T. Jo. 185.
- (3) *Re, Pugh, Pugh v. Pugh*, [1943] 2 All E.R. 361 ; [1943] Ch. 387 ; 112 L.J. Ch. 311 ; 169 L.T. 284 ; Digest Supp.

A by a widow for additional provision for her maintenance out of the estate of her husband, on the ground that the provision made for her by her husband's will was unreasonable because he had intended her to continue to live in the marital home but had made insufficient provision for her to do so. WYNN-PARRY, J., held that the provision was not unreasonable and dismissed her application. The facts appear in the judgment.

B *Danckwerts* for the widow.
Milner Holland for the trustees.
J. A. Wolfe for a pecuniary legatee.
J. A. Reid for a residuary legatee.

Cur. adv. vult.

C July 10. WYNN-PARRY, J., read the following judgment. The plaintiff in this summons is the widow of Jeremiah Inns, who died on Aug. 28, 1945, and to whom I will refer as "the testator." The plaintiff was born on May 31, 1895, and married the testator, whose second wife she was, on Apr. 24, 1933, when she was 37 years old and he was 55 years old. Throughout the marriage the plaintiff and the testator, who was a very successful business man, lived at a house called "Springfield," High Street, Stevenage, Hertfordshire, the freehold of which was owned by the testator. The house is described by the plaintiff as follows :

D Springfield, though attractive artistically, is not at all an easy house to run . . . It has 9 bedrooms and 4 reception rooms in addition to the usual domestic offices and has a garden of about 3 acres. The staff required to run the house is three maids, in addition to two gardeners for the garden.

E The evidence leads to the conclusion that the parties lived together in a reasonable state of amity and in some little style. The plaintiff stated that the testator, in emphasising the need of economy on more than one occasion, observed that it cost £3,000 or £4,000 a year to live at "Springfield." The plaintiff further says that, from various statements made to her by the testator from time to time, it was plain to her that he anticipated that she would continue to live at "Springfield" after his death.

F By cl. 2 of his will, which is dated Apr. 18, 1945, the testator appointed the defendants, Walter Wallace and Richard Alfred Victor White, to be his executors and trustees. By cl. 3 he bequeathed his personal articles and effects to his trustees on trust to permit the plaintiff to have the use and enjoyment thereof, or such parts thereof as she might select, so long as she should remain his widow, subject to her keeping them in good repair and condition and insured at her own cost, and after her death or remarriage, if the Stevenage Urban District Council should accept the offer of "Springfield" for use as a hospital, as later provided in the will, the testator bequeathed those chattels to the council for the use or benefit of the hospital, but, if the offer should not be accepted by the council, he directed that they should fall into and form part of his residuary estate. By the same clause, after some ancillary directions as to the chattels, the testator bequeathed to the plaintiff absolutely his wines, liqueurs and consumable stores. By cl. 4 he devised "Springfield," with an exception to which it is not material to refer, to his trustees on trust that they should sell the property, but during the plaintiff's widowhood only with her consent and with the consent of the council, with power to postpone such sale and conversion, and he directed his trustees to invest the residue of the moneys in their names or under their control in or on investments of trust funds, with the usual power to change such investments. The testator directed that his trustees should stand possessed of "Springfield," if unsold, or the investments representing the proceeds of sale, and were to permit the plaintiff to reside in "Springfield" for so long as she should remain his widow, subject to her keeping it in good repair and condition, reasonable wear and tear excepted, and also

the garden in good condition and the house and outbuildings comprehensively insured. Secondly, to pay the income from the investments to the plaintiff during her widowhood, and from and after her death or remarriage he directed his trustees to stand possessed of "Springfield," if unsold, on trust to offer it to the council to be used for the purpose of a hospital on the terms mentioned in the will. By cl. 5 he provided that after the death or remarriage of the plaintiff, if the council should accept the offer of "Springfield," then he bequeathed to them the sum of £10,000 free of duty for the equipment and maintenance of the hospital. By cl. 6 he bequeathed to his trustees the sum of £85,000 free of all duties, on trust to invest the same in their names or under their control in any investments authorised by law for the time being for the investment of trust funds, with power to vary such investments for others of a like nature, and to stand possessed of the said investments and of the annual income thereof, on trust to pay the income to the plaintiff during her widowhood, and from and after her death or remarriage the testator declared that the capital and income of such investments should fall into and form part of his residuary estate. By cl. 7 and 8 he bequeathed the sums of £9,000 for the establishment of certain almshouses, and by cl. 9 he bequeathed trust funds of £7,000 each for 18 persons who were named in that clause for their lives, and after their deaths for their respective children for their lives. By cl. 10 he bequeathed pecuniary legacies amounting in the aggregate to £21,850, and by cl. 11, 12, and 13 he bequeathed three charitable legacies of £500 each. By cl. 14 the testator gave, devised and bequeathed all his real and personal estate whatsoever (except property otherwise disposed of by his will) to his trustees on trust for conversion, and directed his trustees to stand possessed of the residue in trust for the children of a number of named persons, on terms to which I need not refer.

On the face of the will there would appear to be substantial provision made for the plaintiff, but she maintains that the provision which has been made is not reasonable in the circumstances of this case. The value of the net estate as defined by the Inheritance (Family Provision) Act, 1938, s. 5 (1), is £607,780, which, invested at 3 per cent., would produce approximately £18,230 per annum. The amount required to implement various legacies, including the £85,000 in which the plaintiff has a life interest, is £323,550. The capital sum of £85,000 invested at 3 per cent. per annum would produce £2,550 less tax. In fact, the trustees have, to a large extent, appropriated mortgages to meet this legacy, and the income from this fund, it is estimated, should be approximately £3,244 per annum. Apart from her interests under the will, the plaintiff states that she has no property save a few pieces of jewellery, some furniture and a motor-car. The value of the chattels included in cl. 3 (a) of the will in which she has a life interest is £1,744. The value of the wines and consumable stores which are given to her absolutely by cl. 3 (b) is £551, while the value of "Springfield" is estimated at £7,500.

The plaintiff maintains that the testator intended her to be able to live at "Springfield," but with the income at her disposal she will be unable to do so, and that, therefore, in the circumstances, the provision made for her by the will is not reasonable. In support of her allegation that her income will be insufficient to maintain both herself and "Springfield," she has put in evidence an estimate of expenditure which she says she must incur in order to live in and maintain "Springfield." The various items total £2,073 2s. 10d., and there are added income tax at the standard rate obtaining for the financial year 1946-1947 £1,384 4s. 9d. and sur-tax £154 14s., making a total of £3,612 1s. 7d., a figure which exceeds the figure of estimated income, viz., £3,244. The plaintiff's estimate of expenditure includes the wages, insurance and keep of three indoor servants, together with an annual sum for their uniform, totalling £631. It also includes the wages and insurance of two gardeners, totalling £410 14s. 8d. Thus, there is a provision of over £1,040 for the wages of five servants to look after one woman, the plaintiff. The other items are of the usual nature, but the amounts thereof are, in the case of fuel and light and similar items, calculated on the basis of four persons living in the house. I mention the details of this estimate, not with a view to making any criticism of the scale on which the plaintiff is living, or on which she would propose to live, which is no concern of mine, but because it is necessary to

have a clear picture of the whole position in mind before coming to a conclusion on the question which I have to resolve, namely, whether in all the circumstances of this case the provision which the testator has made for the plaintiff is reasonable or not.

The question whether or not the jurisdiction which is given to the court by the Act should be exercised is, on occasion, a difficult one to answer. In *Re Styler*, *Styler v. Griffith* (1), MORTON, J., said ([1942] 2 All E.R. 204) :

A There are one or two observations in the cases decided on this Act to which I desire to refer, although I fully appreciate that every case must rest upon its own facts. In *Re Brownbridge* (2), BENNETT, J., said that the Act did not throw upon the testator a duty to make provision for his dependants. It only gave the court the right to interfere if it came to the conclusion that the dispositions which were made were unwarranted. In that . . . case BENNETT, J., did not think it right to interfere with the testator's disposition. I respectfully agree with those observations. I do not think the court should interfere with a . . . testator's dispositions merely because the judge may think that he would have been inclined, if he were in the position of the testator . . . to make some provision for a particular person. I think the court has to find that it was unreasonable on the part of . . . the testator to make no provision for the person in question or that it was unreasonable not to make a larger provision.

B Again, as appears from *Re Pugh*, *Pugh v. Pugh* (3), the mere circumstance that, if a judge had been sitting in the testator's armchair, he would have made more provision for the dependants is no ground, of itself, for exercising the jurisdiction. I must be satisfied that the provision is unreasonable. On the other hand, I must take into account the relations between the parties, their mode of living and the size of the testator's fortune. What would be a reasonable provision for the widow of, for instance, a farm labourer would in ordinary circumstances be unreasonable provision for the widow of a wealthy man.

C D Nevertheless, I cannot assent to the proposition which is involved in the argument of counsel for the widow that, if it appears that the testator intended his widow to live in the marital home, but by the same will by which he gave her the right to do so he made provision which was insufficient to enable her to do so, the provision that he has made for her must, therefore, be held to be unreasonable. In my view, the proposition only requires to be stated to be demonstrated unsound. By the law of England as it stood before the coming

E into effect of the Inheritance (Family Provision) Act, 1938, no man could be compelled to leave any part of his estate to any person who under the Act was a dependant. Still less could he be compelled to make provision that his wife, for instance, should be enabled to live in circumstances similar to those in which, during his life, he and she had lived together. The Act is not designed to bring about any such compulsion. It proceeds on the postulate that a testator should continue to have freedom of testamentary disposition, provided that

F his disposition as regards dependants should be capable, having regard to all the circumstances, of being regarded by the court as reasonable. From this it follows that the jurisdiction is essentially a limited jurisdiction. The legislature, presumably in its wisdom, gave no guidance to the court how the jurisdiction should be exercised, but the court in previous cases has evolved certain principles on which it should proceed. The previous decisions clearly

G establish that the jurisdiction is one which should be cautiously if not sparingly used. The main difference between this and earlier cases is that this, so far as the reported cases are concerned, is the first in which an estate of this magnitude has had to be considered. Notwithstanding the size of the estate, however, the same principles must be applied—and, applying those principles, it appears to me impossible to say that the provision which the testator has made for his widow is unreasonable, merely because there appears from the evidence

H and on the face of the will to be an anticipation by him—or even an intention on his part—that his widow should continue to live in the marital home, in which, for the purpose, he gives her a life interest followed by a gift of income which, in the event, proves insufficient to enable her to do so.

I cannot, therefore, accede to the application of the plaintiff that she should be provided with additional spending money out of the estate so that, with the income which is provided for her under the will, she will have sufficient money to maintain the previous style of living at "Springfield," and have, in addition, a spending fund for herself. She asks that this extra spending

fund shall be at the rate of £1,000 per annum, a rate which would necessitate a payment at a very large rate out of the income of the estate, having regard to the present incidence of income tax. There remains, however, the question whether any lesser additional provision should be made for the plaintiff out of the estate. I have given this aspect of the matter careful consideration, but I cannot feel justified in making any order in her favour. After an exhaustive consideration of all the circumstances, I come to the conclusion that, while, if I had been sitting in the testator's armchair, I might well have avoided tying up "Springfield," so that only the plaintiff's consent to its sale in her lifetime would have been required, and I might well have provided a somewhat larger fund than the £85,000 in view of the size of the estate, yet, bearing in mind the principles on which I am directed to proceed by the authorities which I regard as binding on me, and with which I am respectfully in agreement, I cannot bring myself to the conclusion that what has been provided is so little as to be unreasonable. From the plaintiff's point of view the provisions regarding "Springfield" are unfortunate in that neither she nor the trustees can bring about a sale during her lifetime. Nevertheless, the trustees have power to let the property under the Law of Property Act, 1925, s. 28. It was urged on me on behalf of the plaintiff that in all probability it would be difficult to effect a profitable letting of "Springfield." That may or may not be the case, but, in the absence of evidence on behalf of the plaintiff (on whom the *onus* lies) from some competent valuer or estate agent, I cannot proceed on any such assumption. Therefore, I cannot assume that the interest in the house given to the plaintiff under the will is valueless. But, further, even if I had been able to come to the conclusion that the interest in the house given to the plaintiff under the will was in the circumstances valueless, I do not see how, in exercising my jurisdiction under the Act, I could have come to the conclusion that the income of a fund of £85,000 during widowhood represents so small a provision to the plaintiff as to be unreasonable. The result of the framing of the testator's will may well be, and would appear to be, unfortunate from the plaintiff's point of view, in that she may be unable to continue to reside at "Springfield," at any rate, in the style in which she and the testator resided there, but that is the highest that this case can be put, and, so put, it affords me no ground for rewriting the will to any extent. I must, therefore, dismiss the application.

Order accordingly. Costs of all parties between solicitor and client to be taxed and paid out of the estate.

Solicitors : *Park Nelson & Co.* (for the widow); *Sharpe, Pritchard & Co.*, agents for *Longmores*, Hertford (for the trustees); *Nicholl, Manisty, Few & Co.* (for a pecuniary legatee); *Durrant Cooper & Hambling* (for a residuary legatee).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re RIDSDEL, RIDSDEL v. RAWLINSON AND OTHERS.

[CHANCERY DIVISION (Jenkins, J.), July 1, 1947.]

Trusts and Trustees—Judicial trustee—Power of compromise—Audit of accounts—Extent of auditors' duty—Sending of copy of accounts to beneficiaries—Judicial Trustees Act, 1896 (c. 35), s. 1 (1)—Trustee Act, 1925 (c. 19), s. 15 (f)—Judicial Trustee Rules, 1897, r. 12 (1), r. 15 (2).

The Judicial Trustee Rules, 1897, r. 12 (1), by which: "A judicial trustee may at any time request the court to give him directions as to the trust or its administration," does not have the effect of depriving the judicial trustee of the power of compromise conferred on trustees by the Trustee Act, 1925, s. 15 (f).

Where a payment in compromise of a claim has been made by a judicial trustee under s. 15 (f) of the Act of 1925, to justify the payment it is not necessary to establish that the claim would have succeeded had there been no compromise.

Re Shenton ([1935] Ch. 651) considered.

An officer of the court conducting the audit of a judicial trustee's account is not confined to the mere mechanical business of vouching those accounts

(*Thomas v. Devonport Corpn.* ([1900] 1 Q.B. 16), *applied*). Where he finds a payment which is improper on the face of it, it is his duty to disallow it, but where there is a payment of an authorised character, *e.g.*, a payment in compromise of a claim, supported by a statement by the trustee that the claim was made and that he considered it in the interest of the trust estate that payment should be made in settlement thereof, the auditor would be exceeding his function by disallowing the payment. If he thinks that the transaction might in any way give rise to some claim on the part of the beneficiaries (*e.g.*, if the propriety of a compromise appears to him to be open to doubt), his proper course is, not to disallow the payment, but to leave it in the account with an appropriate note calling attention to the relevant circumstances which might, in his view, give rise to a claim on the part of the beneficiaries.

The most satisfactory method of carrying out the requirement of the Judicial Trustee Rules, 1897, r. 15 (2), which provides for a copy of the accounts to be sent to beneficiaries, would be for the beneficiaries to receive copies of the account as submitted for audit, and, if there were any corrections or comments made on the audit, for them then to receive copies of those corrections and comments.

[AS TO JUDICIAL TRUSTEES, see HALSBURY, Hailsham Edn., Vol. 33, pp. 332-335, paras. 574-585; and FOR CASES, see DIGEST, Vol. 43, pp. 1032, 1033, Nos. 4721-4732.]

Cases referred to:

- (1) *Re Shenton*, [1935] Ch. 651; 153 L.T. 343; *sub nom. Re Shenton, Ex p. Bates*, 104 L.J.Ch. 311; *sub nom. Re Shenton, Bates v. Harris*, [1934-5] B. & C.R. 201; Digest Supp.
- (2) *Thomas v. Devonport Corpn.*, [1900] 1 Q.B. 16; 69 L.J.Q.B. 51; 81 L.T. 427; 63 J.P. 740; 33 Digest 90, 597.

PROCEDURE SUMMONS by the judicial trustee of a testator's will for an order that a payment made by the judicial trustee in compromise of a claim, which had been disallowed by the court examiner on the audit of the judicial trustee's account, should be allowed as a proper disbursement. JENKINS, J., now held that the item should be allowed on audit. The facts appear in the judgment.

J. H. Stamp for the judicial trustee.

J. L. Arnold for beneficiaries.

JENKINS, J.: This is an application by the Westminster Bank, Ltd., the judicial trustee appointed by an order dated Aug. 23, 1940, of the will of the testator, Ernest Bramwell Ridsdel. The application asks for an order that a certain item in the trustee's account in the following terms: "Yacht 'Aronia.' Oct. 19, 1945. Three months' hire to Oct. 31, 1945, paid to purchasers, £223 10s." disallowed by the court examiner on the audit of the judicial trustee's account, should be allowed as a proper disbursement.

The history of the matter is briefly this. Probate of the will was granted on Sept. 18, 1939. In Nov., 1939, the yacht to which the item relates was requisitioned by the Ministry of Shipping. On Aug. 23, 1940, the Westminster Bank was appointed judicial trustee. It seems that in Apr., 1945, the judicial trustee quite properly instructed Lieut. Stanley Gibbs Jones, a shipbroker, to see if he could find a purchaser for the yacht. Lieut. Jones appears to have found a purchaser who was prepared to pay £11,250. An agreement for sale at that price was entered into dated June 28, 1945. The agreement provided for a deposit of 10 per cent. of the purchase price to be paid on the signing of the agreement:

... and the balance by cash in London within 3 business days of vessel being ready for delivery (subject to charter) and receipt of permit sanctioning transfer of the vessel to the purchasers and in exchange for legal bill of sale.

The vessel was to be purchased:

... as she lies at Lowestoft and as inspected by or on behalf of the purchasers on June 13, 1945.

The purchaser was to take possession of the vessel with the benefit of the charter of the Ministry of War Transport, the terms of which were set out in a letter addressed to the sellers by the Ministry. There was a provision in the agreement for sale that:

The hire shall not be apportioned from day to day, but the sellers shall retain all monthly instalments of hire due before the date of payment of the balance of the purchase price and the buyers shall be entitled to all such instalments due thereafter.

It will be noted that no date was fixed for completion of the transaction. The evidence of Lieut. Jones is that in the ordinary way the sale of a vessel such as this yacht could be completed in ten days or a fortnight, but, when the title to the yacht was looked into with a view to completing the transaction, it was found that she was still registered in the name of the testator, and the registration had to be altered before the sale could be completed. That took a considerable time, and the judicial trustee was not in a position to complete the sale until Oct., 1946. In the meantime the purchaser became restive and threatened to rescind the contract and to make claims against the estate for loss of profit. In those circumstances the judicial trustee, by way of compromise and to settle the matter, paid to the purchaser this disputed item of £223 10s., representing three months' hire at the rate which was being paid by the Ministry of Shipping, namely, the rate of £74 10s. a month. Section 15 (f) of the Trustee Act, 1925, (with certain qualifications not here material with respect to sole trustees) empowers a trustee, as he thinks fit, to

compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust . . .

The section further provides that for any of those purposes he

. . . may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him . . . seem expedient, without being responsible for any loss occasioned by any act or thing so done by him . . . in good faith.

Therefore, *prima facie*, the payment in question was one which the trustee had power to make under s. 15 (f) in view of the claim that the purchaser was putting forward. It may be that the trustee was open to criticism for not having put the title to the yacht in order at some earlier date, but that is really a different matter and does not go to the power or the propriety of making this compromise in the circumstances which existed when it was made.

On the audit of the account under the provisions of the Judicial Trustees Act, 1896, and the rules made thereunder, the officer of the court conducting the audit disallowed the item. The Judicial Trustees Act, 1896, by s. 1 (1) empowers the court, in the circumstances there mentioned, with respect to any trust, in its discretion, to :

. . . appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees.

In exercise of that power in this case the Westminster Bank was appointed in place of all existing trustees. I apprehend that, subject to the express provisions of the Act (see s. 1 (3), as to a judicial trustee being subject to the control and supervision of the court, s. 1 (4) as to the power of the court to give directions, and s. 1 (6), as to the auditing of accounts) a trustee thus appointed is in the position of any other trustee and exercises all the powers of any other trustee, including the statutory powers of compromise. I do not think there is anything else in the Act (apart from the power to make rules under s. 4) to which I need refer.

Turning to the Judicial Trustee Rules, 1897, made under s. 4, one finds in r. 8 this provision :

(1) a judicial trustee must, unless in any case the court considers that it is unnecessary, as soon as may be after his appointment, furnish the court with a complete statement of the trust property, accompanied with an approximate estimate of the income and capital value of each item.

By r. 9 (1) :

A judicial trustee, if not an official of the court, must give security to the court . . .

By r. 10 (2) :

All title deeds and all certificates and other documents which are evidence of the title of the trustee to any of the trust property shall be deposited either with that bank or in such other custody as the court directs.

There is a further provision in r. 10 (3) about the method of depositing such deeds and documents. By r. 12:

(1) A judicial trustee may at any time request the court to give him directions as to the trust or its administration. (2) The request may be accompanied by a statement of the facts with regard to which directions are required, and by the fee required under these rules in respect of a communication from the court with regard to the administration of the trust. (3) The court may require the trustee or any other person to attend at chambers if it appears that such an attendance is necessary or convenient for the purpose of obtaining any information or explanation required for properly giving directions, or for the purpose of explaining the nature of the directions.

By r. 14:

(1) The court shall give directions to a judicial trustee as to the date to which the accounts of the trust are to be made up in each year, and shall fix in each year the time after that date within which the accounts are to be delivered to it for audit. (2) The accounts shall in ordinary cases be audited by the officer of the court, but the court, if it considers that the accounts are likely to involve questions of difficulty, may refer them to a professional accountant for report, and order the payment to him of such amount in respect of his report as the court may fix.

Rule 15 provides:

(1) The accounts of any trust of which there is a judicial trustee, with a note of any corrections made upon the audit, shall be filed as the court directs. (2) The judicial trustee shall send a copy of the accounts, or, if the court thinks fit, of a summary of the accounts, of the trust to such beneficiaries or other persons as the court thinks proper.

There is provision for allowing any person to inspect the accounts, and, in r. 17, provision for the remuneration of a judicial trustee.

The question for me is whether, having regard to the provisions of the rules and to the circumstances in which the payment of £223 10s. was made, the officer of the court conducting the audit was right in disallowing that payment. I have had the advantage of an argument addressed to me by counsel for the beneficiaries interested in income, and he strongly contends that the course taken on the audit was right. He says that on the face of it the compromise under which this payment of £223 10s. was made was not a proper compromise, and invites me to hold that it was clear on the face of the transaction that the purchasers of the vessel had no possible claim, so that the trustee was, in effect, merely making them a present. I am unable to share that view. It seems to me that, on the evidence of Lieut. Jones, the shipbroker who acted in the matter, there was a delay of a most unusual character in the completion of the transaction. It may well be that the claim made by the purchaser was well founded. It may also well be, and this would have been more serious, that the purchaser, owing to the delay, might have got out of the bargain altogether. It must be remembered that the price seems to have been highly advantageous. Lieut. Jones thought it was. Therefore, I decline to hold that this payment was, on the face of it, improper as a compromise payment. Then it is said that the necessity for a compromise arose from the negligence of the trustee bank in failing to see that the vessel was registered in their name. As to that, I do not think it is necessary for me to express any view. If it be true that there was negligence in that matter of such a character as would make the trustee personally liable, then it is open to any beneficiary who thinks it worth his while to take proper proceedings against the trustee to make good the resulting loss to the estate, but I cannot see that that possible liability can in any way affect the sum of £223 10s., appearing in the account for what it is, namely, a payment made in compromise of a claim.

Counsel for the beneficiaries referred me to *Re Shenton* (1), which was cited for the proposition that a payment under the Trustee Act, 1925, s. 15 (f), must be made in compromise of a claim. That I agree, but it does not follow that, to justify a compromise payment, it must be established that the claim, if there had not been a compromise, would have succeeded. It seems to me that, if one so treats a power of compromise, one reduces it in effect to a nullity. The only other case cited by counsel for the beneficiaries which I need mention is *Thomas v. Devonport Corpn.* (2), which was a claim for remuneration by an auditor to a local authority. In considering that claim, it became necessary for the court to consider the amount of work which such an auditor

had to do. LORD RUSSELL OF KILLOWEN, C.J., said ([1900] 1 Q.B. 20, 21) :

As regards the plaintiff's services as auditor of the urban sanitary authority, he was entitled to remuneration at the rate of not less than two guineas a day in respect of the days properly occupied in the work. If the matter had rested there, and the learned judge, having heard the witnesses, had come (as he did in fact) simply to the conclusion that 4 days in each half-year were ample for the work the plaintiff had to do in auditing the accounts, it would not be for the court to review that conclusion. But language was used which, in my view, suggests too narrow a judgment of what the proper duties of the elective auditor are. I do not subscribe to the doctrine that his sole duty is to see whether there are vouchers, apparently formal and regular, justifying each of the items in respect of which the authority seeks to get credit upon the accounts put before the auditors for audit. I think that is an incomplete and imperfect view of the duties of the auditors. I think an auditor is not only entitled, but justified and bound to go further than that, and by fair and reasonable examination of the vouchers to see that there are not amongst the payments so made payments which are not authorised by the duty of the authority, or contrary to the duty of the authority, or in any other way illegal or improper. If he discovers that any such improper or illegal payments appear to have been made, his duty will certainly be to make it public by report to the authority itself, and the burgesses who create that authority.

If I may say so, with respect, there is nothing whatever in that case with which I would venture to disagree. I propose to apply it so far as I can to the audit of a judicial trustee's account. It seems to me that the officer of the court conducting the audit is certainly not confined to the mere mechanical business of vouching those accounts. It seems to me also that, where he finds a payment in the account which is on the face of it improper—as, to give an example suggested by counsel for the judicial trustee, a sum paid in the purchase of an investment which, on the face of the trust instrument, is palpably an unauthorised investment—it is his duty to disallow the payment. Or again, if, on looking at the terms of the trust, he finds that income which ought to have been paid to X has, in fact, been paid to Y, that, being a payment which has no warrant or justification, likewise should be disallowed. But where there is a payment of an authorised character, such as a payment in compromise of a claim supported by a statement by the trustee that the claim was made and he (the trustee) considered it was in the interests of the trust that a payment should be made in settlement of it, it seems to me that by disallowing the payment so made the auditor would be exceeding his function. There is the payment. *Qua* payment it was actually made; that is proved. There is statutory warrant for making it. Therefore, it seems to me that an auditor should not strike it out. If, on going into the circumstances, it appears to him that the propriety of the compromise was open to doubt, or the necessity for compromise arose from some antecedent negligence of the trustee, or that the transaction in question might in some other way give rise to some claim on the part of the beneficiaries, it seems to me his proper course is, not to disallow the payment, but to leave it in the account with an appropriate note calling attention to whatever the relevant circumstances may be which, in his view, might give rise to some claim on the part of the beneficiaries. If he does that, he will, I think, properly discharge his duty. It will be noted that the Judicial Trustee Rules, 1897, include a provision under which the beneficiaries are to receive copies of the account [r. 15 (2)]. By acting in the manner which I have suggested, the auditor will, I think, fully protect the beneficiaries. They will have the account properly audited, palpably erroneous payments disallowed, and attention called to payments made in circumstances which, in the view of the auditor, are or may be open to question.

There is only one other point with which I need deal. It is suggested that the provision in the Judicial Trustee Rules, 1897, r. 12 (1), that the judicial trustee may at any time request the court to give him directions as to the trust or its administration, by implication deprives the judicial trustee of the power of compromise under the Trustee Act, 1925, s. 15 (f). I cannot think that that is the effect of this rule. After all, the object of the Judicial Trustees Act, 1896, as I understand it, was to provide a middle course in cases where the administration of the estate by the ordinary trustees had broken down and it was not desired to put the estate to the expense of a full administration. In those circumstances, a solution was found in the appointment of a judicial

trustee who acts in close concert with the court and under conditions which enable the court to supervise his transactions. I cannot think that it was intended to complicate the matter by prohibiting such a trustee from exercising any discretion without first going to the court and asking for directions. That, as counsel for the judicial trustee points out, would involve that, whenever the trustee wanted to exercise some discretion, such as the power of compromise under the Trustee Act, 1925, s. 15, he would, perforce, have to come to the court for directions. But (to give only one instance) the court would give no directions without summoning before it all persons interested in the exercise of the discretion, that the matter might be argued and decided in the presence of all parties. One would thus reduce the administration of an estate by a judicial trustee to very much the same position as where an estate is being administered by the court and every step has to be taken in pursuance of the court's directions. It does not seem to me to be right or necessary to construe the Judicial Trustee Rules, 1897, as having any such effect.

For the reasons which I have stated, it seems to me that the item of £223 10s. ought not to have been disallowed on audit. I wish to make it clear that the allowance of the item is without prejudice to any claim which a beneficiary may think it worth while to make against the Westminster Bank for negligence or breach of trust alleged to have been committed by the bank in relation to this matter. All I am saying is that, as a matter of audit, the item of £223 10s. should be allowed for what it is, namely, a compromise payment, without prejudice to any question which may be raised about the propriety of the payment, or the judicial trustee's conduct in the matter of the yacht, or any liability the judicial trustee may be under in respect of it.

Arnold (for the beneficiaries): There is one further matter on which your Lordship might give a direction. It is the practice at the moment that the accounts of the judicial trustee are circulated to the beneficiaries before the audit. In view of what has fallen from your Lordship, it might be that your Lordship would think it proper that circulation should in future take place afterwards.

Stamp (for the judicial trustee): Would not the best plan be to circulate before the audit, any addition by the auditor to be supplied afterwards? The beneficiaries would be then in a position to criticise the accounts.

JENKINS, J.: The Judicial Trustee Rules, 1897, r. 15, is ambiguous on the point. It says:

(1) The accounts of any trust of which there is a judicial trustee, with a note of any corrections made upon the audit, shall be filed as the court directs. (2) The judicial trustee shall send a copy of the accounts, or . . . a summary of the accounts, of the trust to such beneficiaries or other persons as the court thinks proper.

I think it would be consistent with that to take the course which you suggest, Mr. Stamp, which seems to me to be the most satisfactory course, that is to say, the beneficiaries should receive copies of the account as submitted for audit, and, if there are any alterations or corrections or any comments made on the account, then the beneficiaries should receive copies of those corrections and comments.

Declaration accordingly.

Solicitors: *Rawlinson & Son* (for the judicial trustee); *Bower, Cotton & Bower* (for beneficiaries).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

GOODMAN v. SERLE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Macnaghten and Lynskey, JJ.), July 8, 14, 1947.]

Street and Aerial Traffic—Public carriage—Fare—Metropolitan police area—Journey exceeding six miles—Agreed fare in excess of prescribed rates—London Hackney Carriage Act, 1853 (c. 33), s. 17 (1) (2)—Metropolitan Public Carriages Act, 1869 (c. 115), s. 9 (3), restriction (2)—London Cab Order, 1934 (S.R. & O. 1934, No. 1346).

A licensed taxicab driver, while plying for hire within the metropolitan police district, was hired by a passenger to convey her on a journey in excess of six miles, and it was orally agreed that the charge for the hire should be 12s. The amount shown on the meter at the end of the journey was 6s. 6d. The driver was convicted of demanding more than the proper fare, contrary to the London Hackney Carriage Act, 1853, s. 17 (1) :—

HELD : in view of the terms of s. 17 of the London Hackney Carriage Act, 1853, of s. 9 of the Metropolitan Public Carriages Act, 1869, and of the London Cab Order, 1934 (made by the Secretary of State under the Act of 1869), by which are fixed the fares for distance to be paid for hackney carriages within the metropolitan police district, those fares apply only to journeys not exceeding six miles, and, if a passenger wishes to be carried beyond that distance, the taxicab driver may make a bargain with regard to the fare, and, therefore, no offence had been committed by the driver in the present case, and the conviction should be quashed.

Per curiam : Section 44 of the London Hackney Carriage Act, 1831, may be regarded as obsolete.

[AS TO HACKNEY CARRIAGE FARES WITHIN THE METROPOLIS, see HALSBURY, Hailsham Edn., Vol. 31, p. 763, para. 1183; and FOR CASES, see DIGEST, Vol. 42, p. 860, Nos. 129-132.]

CASE STATED by Middlesex Quarter Sessions, who dismissed an appeal by the appellant against his conviction by Tottenham justices for demanding as a taxicab driver more than the proper fare, contrary to s. 17 of the London Hackney Carriage Act, 1853. The Divisional Court allowed the appeal and quashed the conviction.

Gerald Gardiner and O. S. MacLeay for the appellant.
F. H. Lawton for the respondent.

Cur adv. vult.

July 14. LORD GODDARD, C.J., read the following judgment of the court. This is a Special Case stated by the Middlesex Quarter Sessions who dismissed an appeal by the appellant against his conviction by a court of summary jurisdiction sitting at Tottenham for that he being the driver of a motor cab did demand more than the proper fare. The facts of the case are that on July 16, 1946, the appellant, who is a licensed cab driver, was plying for hire at a cab rank in the East India Dock Road. He was hired by a Mrs. Ryan to drive her from the cab rank to Mile End Hospital and thence to an address at Finsbury Park, a distance in excess of six miles. The Case finds also that it was orally agreed between Mrs. Ryan and the appellant at the hospital that the charge for the said hire should be 12s. and the quarter sessions find that it was an implied term of the agreement that the appellant and Mrs. Ryan should disregard whatever amount was shown on the taximeter. It would appear that this bargain had been made over the telephone, because the quarter sessions find that, on arriving at the address at Finsbury Park, Mrs. Ryan asked the appellant : "How much?" and he answered : "You know what the agreement over the telephone was, 12s." which sum she paid. The amount shown on the taximeter was 6s. 6d. It would, therefore, appear that Mrs. Ryan, regretting the bargain she had made, put the law in motion, and this information was preferred by a police officer.

The whole question depends on whether, the distance being over six miles, the agreement to pay 12s. was a lawful agreement. There appears to be no authority on the point, and it is obvious that a question of considerable importance both to cab drivers and to hirers of cabs is raised by the Case. It is necessary to refer as briefly as may be to the various Hackney Carriage

Acts that have been passed from time to time and to the London Cab Order, 1934. The first Act is the London Hackney Carriage Act, 1831. By s. 43 of that Act it is provided :

No agreement whatever made with the driver of any hackney carriage for the payment of more than his proper fare, as the same is allowed and limited by this Act, shall be binding on the person making the same . . .

A and provision is made for the recovery of any excess fare on a complaint made against the driver before a justice and a penalty upon the driver for demanding it. In sched. I to this Act rates and fares are laid down for the hire of hackney carriages whether by distance or time. By s. 44 it is provided :

B It shall be lawful for any person to require the driver of any hackney carriage to drive such hackney carriage, for a stated sum of money, a distance in the discretion of such driver, and in case such driver shall exceed the distance to which such person was entitled to be driven for such stated sum of money such driver shall not exact or demand more than the sum for which he was so engaged to drive . . .

C The construction of this section, were it necessary for the purposes of this present case, having regard to the terms of s. 43, would present very considerable difficulties. Though still unrepealed, we do not think that at the present day anyone avails themselves of its provisions and for all practical purposes it may be regarded as obsolete. In any case we do not find it necessary to consider it in arriving at a decision in this appeal.

D We turn next to s. 17 of the London Hackney Carriages Act, 1853. Here, again, the driver commits an offence if he demands or takes more than the proper fare set forth in the schedule, and he also commits an offence if he refuses to drive to any place within the limits of the Act, not exceeding six miles. This is the first Act in which the limit of six miles is prescribed. A further Act was passed in the same year known as the London Hackney Carriage (No. 2) Act, 1853, which gives the driver a right to make an increased charge for every mile that he is required to drive outside a four mile radius from Charing Cross. Reading the two Acts together, it is quite clear that, though a driver may be required to go beyond the four mile radius, he cannot be compelled to undertake a journey of more than six miles.

E We now come to the Metropolitan Public Carriages Act, 1869, and s. 9 of that Act seems to us to be the most important provision in this case. Under that section the Secretary of State may from time to time by order make regulations for certain purposes described in the section, and among them is :

(3) For fixing the rates or fares, as well for time as distance, to be paid for hackney carriages, and for securing the due publication of such fares . . .

F Those regulations are again subject to this restriction, that no hackney carriage shall be compelled to take any passenger a greater distance for any one drive than six miles. By s. 15 all the provisions of the Acts relating to hackney carriages which are in force at the time of the commencement of this Act are to continue in force. In 1907 the London Cab and Stage Carriage Act was passed which was the first Act which authorised taximeters to be fixed to cabs, and on Dec. 11, 1934, the London Cab Order was made by the Secretary of State in pursuance of this last mentioned Act and of the Act of 1869. The order prescribes the fares calculated by time and distance combined which G may be taken by drivers of taxicabs, but there is again a provision in art. 34 that the driver shall not be compelled to accept a hiring for a distance of more than six miles or a duration of more than one hour.

H The argument for the respondent in this case is that, while there is no obligation on a cab driver to accept a hiring for more than six miles, if he does so and agrees to drive, say, twelve miles, and all those twelve miles are within the metropolitan police area, he is only entitled to charge the prescribed fare for the whole twelve miles. The appellant contends that, if he agrees to drive a person who hires him for a longer distance than six miles, he is at liberty to make any bargain he likes as a condition of going beyond that distance.

The offence which it is said the driver has committed was an offence under s. 17 of the Act of 1853, which is continued in force by s. 15 of the Act of 1869, that is, demanding more than the proper fare. The proper fare is no longer that prescribed by the Act of 1853, but is the fare prescribed by the London Cab Order, 1934. As has been pointed out above, that order is made under

s. 9 of the Act of 1869 and for this purpose that section can be read in this way: "The Secretary of State may from time to time by order make regulations for fixing the rates or fares for distance to be paid for hackney carriages, provided that no hackney carriage shall be compelled to take any passenger a greater distance for any one drive than six miles." In our opinion, it follows that where the cabman has agreed to convey a fare more than six miles on one drive, no fare has been prescribed and it is left to a bargain between the parties. The purpose of the Acts is to protect ordinary cab users from extortionate fares demanded by drivers who are obliged to drive them if required. Cabs which ply for hire in London streets are primarily for short distances within the area for which they are licensed, certainly for distances not exceeding six miles. There seems no reason, therefore, why one should hold that a bargain made between cab driver and hirer for a long distance journey for which a hired motor car would certainly be equally, and probably more, appropriate should be held illegal unless there are words in the statute which compel one to do so. It is true that in 1831 when the London Hackney Carriage Act was passed voiding agreements to pay more than the fare prescribed in that Act there was no distance limit laid down beyond which a driver could refuse to go, but the subsequent Acts seem clearly to contemplate that anything above six miles is to be regarded as something in the nature of an abnormal hiring. If it were laid down by this court that a driver who is hired for a long distance, which in many circumstances it might be unreasonable to oblige him to undertake, but which he might be willing to perform for a special fare, cannot make a special bargain, it might well result that no taximan would ever take a fare for a greater distance than six miles, or at the end of six miles would stop and tell his fare to alight as he was going to turn round to go home.

We do not pretend to find the construction of these Acts at all easy, and in these days of mechanical vehicles capable of far longer journeys than the old horse cabs, it might be of assistance both to the trade and the public if the Secretary of State made an order which would put the matter beyond controversy, as he has clearly power to do, but, of the two possible constructions of the Acts, we prefer the one which seems to us the more reasonable and the one productive of the least inconvenience and hardship both to the public and the drivers, and that is to regard the fares as fixed by the Secretary of State as applying only to drives not exceeding six miles, *i.e.*, drives which a taxicab driver who is hired is bound to undertake, if required. In our opinion, if a fare desires to be carried beyond that distance, the taxicab driver is at liberty to make a bargain without regard to the prescribed fares. For these reasons, in our opinion, this appeal succeeds and the conviction is quashed, with costs to the appellant here and below.

Appeal allowed with costs.

Solicitors: *Philip Conway, Thomas & Co.* (for the appellant); *Solicitor for the Metropolitan Police* (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

LONDON COUNTY COUNCIL *v.* SHELLEY.

HARCOURT AND OTHERS *v.* LONDON COUNTY COUNCIL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Macnaghten and Lynskey, JJ.), July 11, 1947.]

Public Health—Housing—Accommodation of working classes—Recovery of possession—Rent exceeding £20—Summary procedure before justices—Suspension of warrant—Small Tenements Recovery Act, 1838 (c. 74), s. 1—Housing Act, 1936 (c. 51), ss. 83 (1), 156 (1) (a) (2).

The letting of premises to a member of the working classes is within the powers of management vested in a local authority by s. 83 (1) of the Housing Act, 1936, even although the eviction from the premises of another member of the working classes is involved. (*R. v. Snell, ex p. Marylebone Borough Council*, [1942] 1 All E.R. 612, *followed, but criticised*). Therefore, in such a case, a local authority may, by virtue of s. 156 (1) (a) and s. 156 (2) of the Act, recover possession under the Small Tenements Recovery Act, 1838, whatever may be the rent of the premises, and the Rent

Restrictions Acts are excluded. Accordingly, a warrant made by a magistrate for the possession of such premises cannot be suspended under the Increase of Rent and Mortgage Interest Restrictions Act, 1920, s. 5 (4), for such time as the magistrate directs, but only for a maximum of 30 days under the Small Tenements Recovery Act, 1838, s. 1.

[AS TO RECOVERY OF POSSESSION OF CONTROLLED HOUSES, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 581, 582, para. 1233; and FOR CASES, see DIGEST Supp., Vol. 38, title Public Health, No. 509e.]

Case referred to:

- (1) *R. v. Snell, Ex p. Marylebone Borough Council*, [1942] 1 All E.R. 612; [1942] 2 K.B. 137; 111 L.J.K.B. 530; 167 L.T. 13; 106 J.P. 160; Digest Supp.

CASES STATED by metropolitan magistrates.

In *London County Council v. Shelley* a complaint was preferred before the Tower Bridge magistrate by the appellant landlords, the London County Council, under the Small Tenements Recovery Act, 1838, s. 1, against the respondent tenant, Shelley, for neglecting to deliver up possession of a tenement, notwithstanding the determination of her tenancy by notice to quit and service on her by the council of a notice in writing under s. 1 of the Act of their intention to apply for the issue of a warrant to recover possession. The magistrate issued a warrant for possession of the premises, but, acting in accordance with s. 5 (4) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, she directed that the warrant should remain in force for three months and should not be executed until the last day of such period, and she further informed Shelley that she could apply before the expiration of that time for an extension of the period. The council now appealed against the determination and direction and the granting of liberty to apply for an extension of the period. The appeal was allowed.

In *Harcourt v. London County Council* a similar complaint under the Small Tenements Recovery Act, 1838, s. 1, was preferred by the landlords before the Clerkenwell magistrate. In this case the magistrate issued a warrant for delivery of possession within 30 days, the limit prescribed by s. 1 of the Act of 1838. The tenant, Harcourt, now appealed, and the appeal was dismissed.

The facts appear in the judgment of LORD GODDARD, C.J.

Lloyd-Jones for the London County Council.

Ackner for the tenant, Shelley.

H. Newman for the tenant, Harcourt, and others.

LORD GODDARD, C.J. : These are two Cases stated, one by the magistrate at the Tower Bridge police court, Miss Campbell, and the other by Mr. Bertram Reece at Clerkenwell.

In applications in each case by the London County Council for possession of a house or flat, their property, Miss Campbell made an order for possession under the Small Tenements Recovery Act, 1838, but suspended the operation of the warrant for three months, and indicated to the tenant that she could apply before the expiration of the period of three months for further extension, whereas the magistrate at Clerkenwell did not suspend the warrant, but issued a warrant giving the landlords possession within thirty days, which is the time mentioned in the Small Tenements Recovery Act, s. 1.

Mrs. Shelley is in occupation of a flat, 8, Barnaby Buildings, of which the rateable value is only £11 a year, for which she pays 14s. 5d. a week, and notice to quit was served on her expiring on Dec. 9, 1946. She did not give up possession, and the council, acting under s. 156 (2) of the Housing Act, 1936, instituted proceedings under the Small Tenements Recovery Act to obtain possession of the premises. The same may be said of Mrs. Harcourt's house. The only difference in the two cases was that no complaint whatever was made against Mrs. Shelley as a tenant, while Mrs. Harcourt had committed a breach of covenant. It is conceded that the provisions of the Housing Act, 1936, apply to both the house and the flat. By s. 83 of the Act:—

(1) The general management, regulation and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority, and the authority may make such reasonable charges for the tenancy or occupation of the houses as they may determine.

Section 156, which is the section which gives rise to the difficulty in this case provides :

(1) Nothing in the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, as amended by any subsequent enactment shall be deemed to affect the provisions of this Act relating to the obtaining possession of a house with respect to which a demolition order or a clearance order has been made, or to prevent possession being obtained—(a) of any house possession of which is required for the purpose of enabling a local authority to exercise their powers under any enactment relating to the housing of the working classes ; . . . (2) Where a local authority, for the purpose of exercising their powers under any enactment relating to the housing of the working classes, require possession of any building or any part of a building of which they are the owners, then, whatever may be the value or rent of the building or part of a building, they may obtain possession thereof under the Small Tenements Recovery Act, 1838, as in the cases therein provided for, at any time after the tenancy of the occupier has expired, or has been determined.

The first question which has to be considered is whether the provisions of the Small Tenements Recovery Act, 1838, under which both magistrates purported to act, applies to these cases. That seems to me to be concluded by the decision in *R. v. Snell, Ex p. St. Marylebone Borough Council* (1), where it was held that, so long as the purpose for which the local authority require possession is to let the premises to another member of the working classes, the matter is one of the "management" of the premises within s. 83 of the Act, and the authority, acting under s. 156 (2), may proceed under the Small Tenements Recovery Act, 1838, although the rent is over £20 a year, which ordinarily is the limit of rent for the purposes of that Act. I confess that I have had some difficulty in satisfying myself that where a house is occupied by a member of the working classes, as these premises were, the county council can be said to be exercising their powers of management under the Act of 1936 by turning out one member of the working classes to put in another. I expressly say nothing about the merits of this case because we have not gone into them. I do not want to assume that the London County Council are acting oppressively, but the plain fact in *Shelley's* case is that a member of the working classes, against whom, apparently, no suggestion is made as a tenant, is being ejected from her flat that another member of the working classes may be put in. This court, however, has held that if the council require a flat for a member of the working classes, although it involves turning out another member of the working classes, they are exercising their powers of management under s. 83. I hope that that decision will become the subject of review by a higher court, but at the moment this court is bound by *R. v. Snell, Ex p. Marylebone Borough Council* (1).

The council contend that when they have taken action under the Small Tenements Recovery Act, the provisions of the Rent Restrictions Acts do not apply, so that the court has only the discretion which it had before those Acts as regards giving the tenant extended possession of the house although the tenancy has expired. That raises a question of vital importance to hundreds and thousands of tenants of local authorities all over England, who are living in houses—and, I suggest, not only in houses, but also in fools' paradises, because they may think that, by reason of the rateable value of their houses, they have the security of tenure which the Rent Restrictions Acts give, whereas, in fact, they have not got that protection because the Housing Act, 1936, s. 156 (1) (a), provides that nothing in the Rent and Mortgage Interest Restrictions Acts shall be deemed to affect the provisions of the Housing Act relating to the obtaining of possession of a house where the local authority require it for the exercise of their powers under the Housing Act. If letting to another member of the working classes is, as has been held in *Snell's* case (1), an exercise of their powers under the Act relating to the housing of the working classes, it follows that none of the provisions of the Rent Restrictions Acts applies. Whether Parliament intended that result, it is not for me to discuss. Counsel for the London County Council called our attention to the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (2), which lends support to the suggestion that Parliament may have intended this result for it provides :

The principal Acts shall not . . . apply—(c) to any dwelling-house being, or forming part of, a house or dwelling in respect of which a local authority for the purposes of

Part V of the Housing Act, 1936, are required by s. 128 of that Act to keep a Housing Revenue Account, other than a house or dwelling to which sub-s. (3) of s. 129 of that Act applies.

If, therefore, this house is one of the houses described in that sub-section, it is clear that the Rent Restrictions Acts do not apply at all.

What is the result? By s. 5 (4) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:

A . . . every warrant for delivery of possession of, or to enter and give possession of, any dwelling-house to which this Act applies, shall remain in force for three months from the day next after the last day named in the judgment or order for delivery of possession or ejectment, or, in the case of a warrant under the Small Tenements Recovery Act, 1838, from the date of the issue of the warrant, and in either case for such further period or periods, if any, as the court shall from time to time, whether before or after the expiration of such three months, direct.

B It is evident from the report that the judges who decided *Snell's* case (1) were very much pressed with the fact, as HUMPHREYS, J., said, that there should be this great distinction between houses which belonged to a local authority and other houses, so that the local authority could not only go to the magistrates whatever the rent, but also were entitled to obtain possession without the court having a discretion to refuse to grant it. Their attention seems to have been called to s. 5 of the Act of 1920, and they thought that that applied, C but it looks as if they must have been under some misapprehension because, in holding that the matter came within s. 156 (2) of the Act of 1936, they could not have had in mind s. 156 (1) which provides that nothing in the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, shall be deemed to affect the provisions of the Housing Act, 1936, relating to possession in certain circumstances, one of which existed in that case as it does here. I cannot hold D that this provision of s. 5 (4) of the Act of 1920 applies, and, accordingly, it seems to me that the magistrate in the first case now before us had no option but to issue a warrant which she could not suspend for more than 30 days.

Counsel for the tenants has argued that under the Small Tenements Recovery Act, 1838, there always was a discretion in the court to issue a warrant for possession. I am afraid I cannot read the Act in that way. It is true that the expression used in s. 1 of the Act is:

E . . . it shall be lawful for the landlord of the said premises or his agent to cause the person so neglecting or refusing to quit and deliver up possession to be served . . . with a written notice . . . and if the tenant . . . shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices . . . reasonable cause why possession should not be given . . . and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or his agent to give to such justice proof of the holding, [and upon proof of service, and so forth] it shall F be lawful for the justices . . . in petty sessions assembled . . . to issue a warrant . . .

It is said by counsel for the tenants that, first, because the words "it shall be lawful" are used, and, secondly, because it is provided that it shall be lawful for the justices to issue their warrant if the tenant shall not appear and show to the satisfaction of the justices reasonable cause why possession should not be given under the provisions of this Act, the justices hearing a G complaint under the Small Tenements Recovery Act always have had a power equivalent to that which was conferred on courts under the Rent Restrictions Acts. Considering that this Act has been in force for 109 years, I cannot now say for the first time that that is its proper construction. The expression "it shall be lawful" was used because a wholly new jurisdiction was being conferred on justices. I think it means that the court is given full jurisdiction to deal with the case, and must deal with it if it comes before them. It cannot be read H as conferring on justices in 1838 the powers given to courts by the Rent Restrictions Acts. With regard to the words "reasonable cause," I think that where it is said in an Act that, if a landlord takes proceedings before a competent court, that court is to act in a certain way unless the tenant can show "reasonable cause," that must mean, unless the tenant has a defence, legal or equitable, and, as there is no pretence that there is any defence here, whether legal or equitable, I do not think the magistrate had any discretion to refuse to issue her warrant or suspend it for more than 30 days, which is the maximum the Small Tenements Recovery Act provides.

In these circumstances, the appeal must be allowed in *London County Council v. Shelley*, while the appeal in *Harcourt v. London County Council* must be dismissed. In my opinion, these cases are very fit to be taken before a court which has the power to reconsider *Snell's* case. It may be that such a court would take a different view of the matter which has given trouble to myself, and, I think, also to my brethren, *viz.*, the proper meaning to be attached to the words in the Housing Act, 1936, with regard to a local authority exercising their powers under any enactment relating to the housing of the working classes, especially considering the context and the place where they appear in the Act. A higher court may consider whether or not, in such cases as these, magistrates have a discretion similar to that exercised by county court or High Court judges under the Rent Restrictions Acts.

MACNAGHTEN, J. : I am of the same opinion, and I must confess I have been puzzled as to the meaning of s. 156 (2) of the Housing Act, 1936. I hope that some day it may be cleared up in another place. What seems to me so puzzling is that s. 155 is stated to deal with the recovery of possession of buildings, subject to demolition or clearance orders. Section 156 is stated to deal with the recovery of possession of controlled houses, and does, in fact, deal with that matter in sub-s. (1), but, when it comes to sub-s. (2), it seems to revert to s. 155 and deal only with buildings and not with houses, at least by name.

LYNSKEY, J. : I agree. If I had not been bound by authority I should probably have taken a different view from that which was taken by the court in *R. v. Snell* (1), but it is not necessary that I should come to a final conclusion on that point because, in my view, the decision in *R. v. Snell* covers this case, and we are bound by it. I agree that it is desirable that it should be tested elsewhere.

Order accordingly.

Solicitors : *J. H. Pawlyn* (for the London County Council) ; *E. L. Thackray* (for the tenant, Shelley) ; *Geoffrey B. Gush & Co.* (for the tenant, Harcourt, and others).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Applied. LAVENDER *v.* DIAMINTS, LTD. [1948] 2 All E.R. 249.

Applied. HOSKING *v.* DE HAVILLAND AIRCRAFT CO., LTD. [1949] 1 All E.R. 540.

WHITBY *v.* BURT BOULTON & HAYWARD, LTD. AND ANOTHER.

[KING'S BENCH DIVISION (Denning J.), July 7, 8, 9, 1947.]

Factories and Shops—Building operations—Operations in factory—Applicability of whole Act—Factories Act, 1937 (c. 67), ss. 26, 107.

Section 107 of the Factories Act, 1937, which provides that certain provisions of the Act (not including s. 26) shall apply to building operations, deals only with building operations which are not conducted in a factory. The whole of the Act applies in respect of building operations which are conducted in a factory, and, therefore, s. 26 applies and puts the responsibility on the occupier to provide safe means of access to every place at which any person has to work, even though the building operations are being carried out by a contractor.

[FOR THE FACTORIES ACT, 1937, s. 107, see HALSBURY'S STATUTES, Vol. 30, p. 274.]

Case referred to :

- (1) *Speed v. Swift (Thomas) & Co., Ltd.*, [1943] 1 All E.R. 539 ; [1943] 1 K.B. 557 ; 112 L.J.K.B. 487 ; 169 L.T. 67 ; Digest Supp.

ACTION for damages for negligence.

The first defendants, who were the occupiers of a factory, engaged independent contractors, the second defendants, to repair damage done in the factory by enemy action during the war. Corrugated iron sheets were required for part of the work, and the occupiers authorised the contractors to take down and

use sheets put up as a war time measure under a glass skylight in the roof of the factory. The sheets were nailed on to defective timber, and, in removing one of them, one of the timbers collapsed and the plaintiff, who was employed by the second defendants, fell some 20 ft. to the floor, thereby sustaining injuries, in respect of which he claimed damages from both defendants. Judgment was given for the plaintiff.

Beney, K.C., and Edgedale, K.C., for the plaintiff.

A *Paull, K.C., and Humfrey Edmunds for the occupiers.*

R. Marven Everett for the contractors.

DENNING, J, [stated the facts, held that at common law there was no liability on the occupiers, but that, applying the principles stated by LORD GREENE, M.R., in *Speed v. Thomas Swift & Co.* (1), the contractors were liable, and continued] :—The other head of claim was under the Factories Act, 1937.

B It was said for the plaintiff that the first defendants were the occupiers of the factory and liable under the Act, particularly under s. 26, which requires that :

(1) There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work.

C It is said that the means of access which was provided to these iron sheets and the nails fastening them to the timber were unsafe, and that, therefore, there was a breach of s. 26 for which the occupiers are liable. The occupiers raised an important point under the Act. They said that these were "building operations" and that s. 26 does not apply in respect of building operations because the only provisions which apply to "building operations" are those specified in s. 107, which do not include those of s. 26. In my opinion, however,

D s. 107 only deals with "building operations" which are not conducted in a factory. As a matter of construction I am satisfied that the whole of the Factories Act applies to building operations which are conducted in a factory. Any other construction would lead to remarkable results. For instance, in the circumstances of the present case, if a man had been sent up to clean at the top of this building, it would not have been a "building operation" and would be within the Factories Act, but, if he had been sent up to repair or maintain part of it it would have been a "building operation" and, accordingly, outside the Act. I am satisfied that no such result was intended. It is impossible to extricate building operations within a factory from other operations within a factory. Section 26, in my judgment, applies to this case and the occupiers were responsible for seeing that there was provided and maintained safe means of access. Although this may appear a harsh law when the occupiers of a factory employ contractors or sub-contractors, the consequences, so far as criminal responsibility is concerned, can be fairly adjusted under s. 137 of the Act and, so far as civil liability is concerned, can be fairly adjusted under the Law Reform (Tortfeasors) Act, 1935. I hold, therefore, that for the safeguarding of people in factories s. 26 applies and puts the responsibility on the occupier even though the building operations are being carried out by a contractor.

G [His LORDSHIP then held that there had been a breach of s. 26 of the Act, for which the occupiers were liable. Judgment for £4,000 was given against both defendants, but His LORDSHIP directed that the occupiers should be indemnified in that sum by the contractors, who should also pay the costs.]

Order accordingly.

Solicitors : *W. H. Thompson* (for the plaintiff); *L. Bingham & Co.* (for the occupiers); *Hair & Co.* (for the contractors).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

BARNES v. BARNES (AYRES cited).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), June 16, 17, 18, 19, 23, 1947.]

Divorce—Costs—Condonation—Revival of condoned offence—Effect on liability of co-respondent or party cited.

Condonation of adultery is not the same thing as forgiveness in the ordinary sense of that word. It operates merely as a suspension of the husband's rights to divorce, and that suspension lasts only so long as the wife is, in effect, of good behaviour. As soon as she misbehaves in a way (not necessarily in an adulterous way) which entitles the husband to come to the court, the protection of condonation is gone both as against the wife and as against the co-respondent or a party cited, who may, therefore, be ordered to pay the costs of the proceedings.

[AS TO REVIVAL OF CONDONED ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, p. 680, para. 1006; and FOR CASES, see DIGEST, Vol. 27, pp. 345, 346, Nos. 3266-3276.]

Cases referred to :

- (1) *Norris v. Norris, Lawson & Mason*, (1865), 4 Sw. & Tr. 237; 30 L.J.P.M. & A. 111; 27 Digest 346, 3270.
- (2) *Lloyd v. Lloyd and Hill*, [1947] 1 All E.R. 383.
- (3) *Beard v. Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; Digest Supp.
- (4) *Bernstein v. Bernstein*, [1893] P. 292; 69 L.T. 513; *sub nom. Bernstein v. Bernstein, Turner & Sampson*, 63 L.J.P. 3.

PETITION by the wife for divorce on the ground of cruelty, with cross-prayer by the husband for divorce on the ground of desertion reviving condoned adultery with the party cited. The wife's petition was dismissed, and the husband's prayer allowed with costs against the party cited. The report is confined to the question of costs.

Linton Thorpe, K.C. and *E. Bradley* for the wife.

C. E. B. Roberts for the party cited.

Melford Stevenson, K.C. and *R. T. Barnard* for the husband.

HODSON, J. : This case raises a question of jurisdiction to condemn a co-respondent or party cited in costs. RAYDEN ON DIVORCE, 4th edn., p. 360, contains this statement :

Once adultery has been condoned it is only a co-respondent's fresh adultery which will revive a right, even as to costs, against him.

The authority mentioned is *Norris v. Norris, Lawson and Mason* (1). I also considered *Lloyd v. Lloyd and Hill* (2).

It is true that, with regard to the two co-respondents in the earlier case to which I have referred, the Judge Ordinary said (4 Sw. & Tr. 237) :

I cannot condemn Lawson in costs. The petitioner, by condoning his wife's adultery with Lawson, has waived all right to any proceedings against him in this court. The usual course is to grant costs against a co-respondent when his conduct has made the suit necessary. Here the wife's subsequent misconduct, and not her adultery with Lawson, rendered the suit necessary.

In the present case the wife did not commit further adultery, but she deserted her husband and thereby revived the earlier adultery in accordance with the decision of the Court of Appeal in *Beard v. Beard* (3). *Norris v. Norris, Lawson and Mason* (1), was referred to in the Court of Appeal by two of the Lords Justices in *Bernstein v. Bernstein, Lampson and Turner* (4), and it is important to see exactly what the Court of Appeal were deciding in that case. They decided as stated in the headnote ([1893] P. 292) :

. . . that a condonation by a husband of adultery with one person is not avoided by the fact that the wife had previously to the condonation committed acts of adultery with another person of which he was not aware.

The second point they decided is :

. . . that, although at common law condonation by the husband of an act of adultery was no bar to an action for criminal conversation against the adulterer, but

only went in mitigation of damages, the case is different under the Divorce and Matrimonial Causes Act, 1857 (*sic*), and where, on a petition for divorce and for damages against the co-respondent, a divorce is refused on the ground that the adultery has been condoned, the petitioner is not entitled to a judgment, even for nominal damages, against the co-respondent.

A Neither of those points has anything to do with revival, but the learned Lords Justices did talk about revival and LINDLEY, L.J., certainly used language to indicate that any idea of revival was abhorrent to him. He said ([1893] P. 318):

... to condone a particular act of adultery and afterwards to make it the subject of a petition to which the wife is a party, to publish her condoned misconduct and to expose her to shame and misery, is to pursue a course of conduct so utterly inconsistent with condonation that I cannot bring myself to believe that the legislature intended to allow it.

B It is clear that LINDLEY, L.J., would have found it difficult to accept the doctrine of revival, but that that doctrine does exist and that the wife's previous misconduct can be revived even when condoned is clear from the decision in the Court of Appeal in *Beard v. Beard* (3). There the wife had committed adultery, it was condoned, and she afterwards left her husband who thereupon brought a petition.

C That being the case, one must appreciate that condonation is not the same thing as forgiveness in the ordinary sense of that word. It merely operates as a suspension of the husband's rights to divorce, and that suspension only lasts so long as the wife is of good behaviour. As soon as she misbehaves in a way (not necessarily in an adulterous way) which entitles the husband to come to the court, the protection of condonation is gone.

D So far as the party cited is concerned, it does not seem to me to help him to say that he had nothing to do with the misbehaviour by the wife which caused the condonation to disappear he having had nothing to do with the wife's desertion. For a number of years he had the benefit of a protection which was extended to the wife, and prevented any relief being obtained against either of them so long as the husband's rights were suspended. It seems to me impossible to come to any other conclusion but that, he not having in any sense been forgiven, and no charge having been waived or withdrawn against him (as I suppose might be the case if, for example, a deed were entered into between the husband and himself), once the condonation has gone against the wife, it must also go against him.

I come to the conclusion, in all the circumstances, that it would be right to make an order that the party cited, should pay the whole costs of the suit.

Order accordingly.

F Solicitors: Woodhouse, Smith & Co. (for the wife and the party cited); Wilkinson, Howlett & Moorhouse (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

G BACON v. BACON.

PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), June 9, 16, 1947.]

H Divorce—Maintenance—Consent order—"Settlement" within Settled Land Act—Husband to secure house jointly held to wife "for her life occupation"—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 192—Settled Land Act, 1925 (c. 18), s. 1 (1) and (7).

The parties purchased a house out of their joint moneys, the conveyance providing that they were to hold it in fee simple as joint tenants upon trust for sale. In pronouncing a decree *nisi*, which was duly made absolute, a consequential order was made, by consent, under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, that the husband should secure the house to the wife for her occupation "for her life":—

HELD: the consent order was an "agreement" within the meaning of s. 1 (1) of the Settled Land Act, 1925, the effect of which was to create

a life tenancy of the house under the Act, which took priority over the trust for sale, and the wife was entitled to the appropriate vesting deed and trust instrument under the Act.

[AS TO "SETTLEMENT" WITHIN SETTLED LAND ACT, 1925, see HALSBURY, Hailsham Edn., Vol. 29, p. 668, para. 952; and FOR CASES, see DIGEST, Vol. 40, pp. 726-728, Nos. 2572-2589.

AS TO VARIATION OF SETTLEMENTS BY COURT, see HALSBURY, Vol. 10, p. 800, para. 1274; and FOR CASES, see DIGEST, Vol. 27, pp. 518-521, Nos. 5583-5631.]

Cases referred to:

- (1) *Re Carne's Settled Estates*, [1899] 1 Ch. 324; 68 L.J.Ch. 120; *sub nom. Re St. Donats Settled Estates*, 79 L.T. 542; 40 Digest 735, 2647.
- (2) *Re Norton, Pinney v. Beauchamp*, [1929] 1 Ch. 84; 98 L.J. Ch. 219; 140 L.T. 348; Digest Supp.
- (3) *Re Sharpe's Deed of Release*, *Sharpe v. Fox*, [1938] 3 All E.R. 449; 54 T.L.R. 1039; Digest Supp.
- (4) *Re Hanson, Hanson v. Eastwood*, [1928] 1 Ch. 96; 97 L.J. Ch. 86; 138 L.T. 462; 40 Digest 753, 2828.
- (5) *Smith v. Smith*, [1945] 1 All E.R. 584; 114 L.J.P. 30; 173 L.T. 8; Digest Supp.
- (6) *Lievesley v. Gilmore*, (1866), L.R. 1 C.P. 570; Har. & Ruth, 849; 35 L.J.C.P. 351; 15 L.T. 386; 2 Digest 314, 14.
- (7) *Worthington & Co., Ltd. v. Abbott*, [1910] 1 Ch. 588; 79 L.J. Ch. 252; 101 L.T. 895; 35 Digest 538, 2677.
- (8) *Carmichael v. Carmichael*, (1925), 42 T.L.R. 133; 27 Digest 332, 3125.

REFERENCE from Birmingham District Registry. In pronouncing a decree *nisi*, which was made absolute in due course, an order was made, by consent, that the husband should secure to the wife a house jointly owned by them, "for her life occupation." The question for consideration was the nature of the instrument which should be executed by the parties to give effect to the order. WILLMER, J., now held that the effect of the order was to create a "settlement" within the meaning of the Settled Land Act, 1925, and that the wife was, therefore, entitled to the appropriate vesting deed and trust instrument under the Act.

W. T. Elverston for the wife.

R. L. Travers for the husband.

Cur. adv. vult.

June 16. WILLMER, J.: On Dec. 18, 1945, a decree *nisi* of dissolution was pronounced in this case by DENNING, J., at Birmingham Assizes. In pronouncing the decree *nisi*, the learned judge made certain further consequential orders. One of these, which has led to the present dispute, was in the following terms:

It is further ordered, by consent, that the petitioner, the husband, do secure to the respondent, the wife, for her life occupation of the house, 25, Erskine Road, Colwyn Bay, in the county of Denbigh . . .

The house in question was purchased by the parties in Apr., 1941, out of moneys belonging to them on a joint account, and the conveyance provided that they were to hold it in fee simple as joint tenants. It was further provided that they should stand possessed of the premises conveyed upon trust to sell the same, with power at discretion to postpone any sale, and that they should stand possessed of the net proceeds of sale, and of the net rents and profits until sale, in trust for themselves as joint tenants beneficially. The decree of dissolution was made absolute on Nov. 11, 1946.

The dispute which has arisen concerns the nature of the deed or instrument which should be executed by the parties in order to give effect to the agreement of the parties with regard to the occupation of the house as embodied in the consent order made by DENNING, J. The question is whether or not the effect of the order is to create a settlement within the meaning of the Settled Land Act, 1925. In view of the nature of the questions which arose I thought it right to adjourn the matter into court for argument, and I have taken time to consider my judgment.

The following are the relevant provisions of the Settled Land Act, 1925, omitting unnecessary words: Section 1 (1):

Any deed, will, agreement for a settlement or other agreement, Act of Parliament, or other instrument . . . under or by virtue of which instrument . . . any land

... stands for the time being . . . (i) limited in trust for any persons by way of succession ; . . . creates or is for the purpose of this Act a settlement and is in this Act referred to as a settlement, or as the settlement, as the case requires . . .

Section 1 (7) (added by the Law of Property (Amendment) Act, 1926) :

This section does not apply to land held upon trust for sale.

Section 19 (1) :

A The person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for his life is for the purposes of this Act the tenant for life of that land and the tenant for life under that settlement.

The argument for the wife was that, whatever the parties may have contemplated or intended at the time, the effect of the consent order made by DENNING, J., was to create a settlement under the Settled Land Act, *i.e.*, a beneficial interest to the wife for life, with remainder to the husband and wife as joint tenants.

B The only proper way, therefore, of giving effect to the consent order would be by way of the appropriate vesting deed and trust instrument under the Settled Land Act, drafts of which were submitted for my consideration. For the husband, on the other hand, it was contended that the effect of the consent order was not such as to create a settlement under the Settled Land Act, with all the consequences which would follow from that, but that its effect was intended to be limited to what it says, *viz.*, that the husband should secure to

C the wife for her life occupation of the house, no more and no less. It was suggested that effect could be given to the order by means of a deed, whereby the house would be conveyed to trustees upon trust to sell, with a proviso that they should not sell during the lifetime of the wife without the consent of both parties, and it should also be provided that, so long as the house remained unsold, the trustees should permit the wife to occupy it, and on its

D eventual sale they should hold the proceeds in trust for the husband and wife equally. A draft deed was submitted, which, with certain drafting amendments admittedly necessary, would achieve this result.

The crucial question which I have to determine is whether the consent order made by DENNING, J., amounted to an "agreement," or, alternatively, an "other instrument," so as to create a settlement, within the meaning of s. 1 (1) of the Settled Land Act, 1925. If there is a settlement within the Act, it was

E argued on behalf of the wife, and not disputed by the husband, that the effect of conferring a right to occupy for life would be to create a life tenancy. This seems to be the plain effect of s. 19 (1) of the Act, and the wife's contention is also supported by the decisions in *Re Carne's Settled Estates* (1), and the other later cases which were cited to me. It was also contended for the wife, and not disputed by the husband, that, if a life tenancy in favour of the wife were created, this would take priority over the trust for sale contained in

F the original conveyance, so that s. 1 (7) could not be relied on to exclude the operation of the Act. A trust for sale is defined by s. 205 (1) (xxix) of the Law of Property Act, 1925, in the following terms :

"Trust for sale," in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale ; . . .

G I was referred to the decisions of the Chancery Division in *Re Norton* (2), *Re Sharpe's Deed of Release* (3), and *Re Hanson* (4). Having regard to these decisions and to the definition of trust for sale in the Law of Property Act, I am satisfied that the argument for the wife on this point is well founded, *viz.*, that, if a life tenancy were created in consequence of the consent order, the trust for sale in the original conveyance would be postponed thereto, and could not, therefore, operate to exclude the Settled Land Act.

H I come back, therefore, to the vital question in this case. Was the consent order an "agreement" within the meaning of s. 1 (1) of the Act ? I would say in passing that I think counsel for the husband was well founded in submitting that what was done by DENNING, J., when he made his consent order, was done, and could only have been done, in the exercise of the powers conferred by s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, *i.e.*, the power to vary the application of property the subject of a post-nuptial settlement. In *Smith v. Smith* (5), where a house was purchased in the joint names of husband and wife in circumstances similar, and on terms similar,

to those in the present case, it was held by the same learned judge that the conveyance was a post-nuptial settlement within the meaning of s. 192 of the Act. I see no distinction between that and the present case, and I must, accordingly, assume that when DENNING, J., made the consent order in the present case he did so in the exercise of his power under s. 192 of the Act. The point is of some importance, in view of the argument addressed to me by counsel for the husband, because under s. 10 of the Matrimonial Causes Act, 1937, which provides that proceedings under s. 192 of the Act of 1925 may be commenced at any time after the presentation of the petition, no order under that section can be made unless and until a decree *nisi* is pronounced, and no such order, save in so far as it relates to the preparation, execution or approval of a deed or instrument, and no settlement made in pursuance of any such order, can take effect unless and until the decree is made absolute. Here, of course, the order was made at the time of pronouncing the decree *nisi*, i.e., the earliest moment at which it could have been made—and the decree has since been made absolute. A B

What is said for the wife is that the agreement between the parties with regard to the occupation of this house is none the less an agreement for being embodied in an order of the court. In effect, it is argued that a consent order is an agreement, so as to fall within s. 1 (1) of the Settled Land Act. In support of this proposition two cases were cited. The first of these, *Lievesley v. Gilmore* (6), is not, I think, of much assistance. In that case a consent order was made referring all matters in dispute to arbitration, and, subsequently, a further agreement was endorsed by the parties on the order empowering the arbitrator to order what the parties should do to prevent a repetition of the injuries complained of. The arbitrator made certain orders, and, the defendant having failed to comply with them, the plaintiff brought an action for the non-performance of the award. It was held that the action would lie as there was good evidence of an agreement that the arbitrator should have power to order what the parties should do. I think that counsel for the husband was well founded in distinguishing this case on the ground that it arose out of an arbitration, which, unlike divorce, is essentially contractual in its nature—more particularly as the breach complained of was a breach of an agreement subsequently and freely endorsed by the parties on the judge's order. The other case cited was *Worthington & Co. v. Abbott* (7), which arose out of a dispute between several mortgagees of a property. In the course of the proceedings a consent order had been made upon a summons, and it was argued that, properly construed, such an order was, in effect, an agreement embodying terms to and in which all the parties to the action subscribed and concurred. With regard to this argument, EVE, J., who heard the case, said ([1910] 1 Ch. 594): C D E

I am inclined to think that is the true construction to be placed on a consent order, and that, when the parties to an action agree an order purporting to be a consent order throughout, they are, in effect, putting their hands to an agreement which must be treated as embodying terms to which all assent and by which all are bound. F

I should certainly hesitate long before differing from such an expression of opinion, but it is argued by counsel for the husband that, although this may be a correct statement of the effect of a consent order in any other Division of the court, totally different considerations apply in this Division to a petition for divorce. The parties to a divorce suit are not free, as in other suits, to settle their disputes by agreement, and just as an agreement for a divorce would be void, so also an agreement during the pendency of a divorce suit with regard to maintenance or variation of a settlement would, to say the least, taint the transaction with suspicion of collusion, and should be avoided: see, e.g., *Carmichael v. Carmichael* (8). It seems clear that any such agreement, entered into during the pendency of the suit, would not be such as either party could sue on. Up to the time of decree *nisi*, at any rate, there could be no binding agreement. There could be no more than an agreed proposal for the judge's approval—a proposal which would be of no effect without such approval, and one which the judge would be free to sanction, or not, as he thought fit. It was, accordingly, submitted on behalf of the husband that in this case there was no agreement, but that the order of DENNING, J., must be treated as an order of the court pure and simple, the fact that it was made by consent being G H

wholly irrelevant. I find this argument extremely attractive, but, in my judgment, it is wholly fallacious. I am not informed as to how precisely the consent order in this case came to be made and embodied in the decree *nisi*—whether there had been prior consultation between the parties resulting in the submission to the judge of a proposed consent order, or whether they put their heads together after the pronouncing of the decree *nisi* and by a process of mutual concession arrived at an order to which both were prepared to consent. I must, however, assume that DENNING, J., was not unmindful of the duty laid upon the court by s. 178 (1) of the Judicature Act, 1925, as amended by s. 4 of the Matrimonial Causes Act, 1937, and that before pronouncing a decree *nisi* he satisfied himself that no collusion existed between the parties. Let it be that during the pendency of the suit it was not competent for the parties to enter into a binding agreement with regard to variation of the post-nuptial settlement. Equally, as I have pointed out, it was not competent for the court to make an order with regard thereto until the decree *nisi* was pronounced, but, once the decree was pronounced, the court had power to make the order—though, of course, it would not become operative until the decree was made absolute—and once the court had power to make the order, I do not see why it was not open to the parties to agree what order should be made, subject, of course, to the approval of the court. Here the court did approve of what the parties agreed, and made an order accordingly. At that stage of the suit it seems to me that the parties were in the same position as parties to any other kind of action in any Division of the court—i.e., if they chose to agree an order with regard to variation of the settlement, which only required the judge's approval to make it binding, they were, in the words of EVE, J., “in effect putting their hands to an agreement which must be treated as embodying terms to which all assent and by which all are bound.”

For these reasons, my conclusion is that the order of DENNING, J., must be treated as evidence of a binding agreement between the parties, and, therefore, as being within the terms of s. 1 (1) of the Settled Land Act, 1925. This conclusion renders it unnecessary for me to express any opinion on the further question whether the order of DENNING, J., if not an agreement, should at least be held to be an “other instrument” within the meaning of the section. It follows from what I have already said that, in my judgment, the effect of the agreement was to constitute the wife a life tenant of the house under the Settled Land Act. In these circumstances it appears to me that the wife is entitled to an order approving the draft deeds submitted on her behalf, at any rate, so far as the house is concerned. There was some question about certain articles of furniture mentioned in the order of DENNING, J., but this has not been argued before me, and I express no opinion thereon.

Order accordingly.

Solicitors : *Amphlett & Co.* (for the wife) ; *W. J. Pitman & Sons*, agents for *Charles C. Ladds*, Birmingham (for the husband).

[*Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.*]

G WINTER GARDEN THEATRE (LONDON), LTD. v. MILLENIUM PRODUCTIONS, LTD.

[HOUSE OF LORDS (Viscount Simon, Lord Porter, Lord Simonds, Lord Uthwatt and Lord MacDermott), April 24, 25, 28, 30, May 1, 2, July 28, 1947.]

Landlord and Tenant—Licence—Revocation—Length of notice—Reasonable notice
 —Licence for use of theatre—Express term entitling licensee to determine licence
 —No provision for determination by licensor.

The appellants, Winter Garden Theatre (London), Ltd., granted a licence of their theatre to the respondents, Millenium Productions, Ltd., for the purpose of producing stage plays, concerts or ballets. By the terms of the agreement, the licence was for 6 months from July 6, 1942, at £80 a week, with an option to continue for a further period of 6 months in consideration of an increased payment. On the expiration of the two periods of 6 months, the licensees were “to have the option of further continuing

the licence of the theatre " at a " rental " of £300 a week, and they were to give the licensors one month's notice of their intention of terminating the licence. They were to give 6 weeks' notice of their intention to exercise the first option and similar notice of their intention to exercise their " option to continue thereafter." The agreement provided for payments in advance and for the licensors to have 4 weeks' " rent " in hand. It further provided (*inter alia*) that the licensors should retain the bars and cloakrooms and the right to sell programmes, etc., but that the licensees were to participate equally in the net profits and losses thereof; that the licensees were not to grant a sub-licence of the theatre without the consent of the licensors, but that such consent would not be unreasonably withheld; and that the licensees were to leave the theatre in the same state and condition as then existed, reasonable wear and tear, etc., excepted. On Apr. 24, 1943, the licensees exercised their option to prolong the licence beyond the end of the 12 months from July 6, 1942. On Sept. 11, 1945, the licensors gave the licensees notice to vacate the theatre on Oct. 13, 1945, but they stated that they were prepared to give fresh notice for a later date if the licensees required further time to make other arrangements. The licensees contended that the licence was not revocable by the licensors, and, alternatively, that, if it were revocable, reasonable notice had not been given because, on Aug. 2, 1945, the licensees had entered into an agreement with L. & D., Ltd., for a play to be produced at the theatre :—

HELD: (i) whether the licence was or was not revocable was entirely a question of the construction of the contract, and, on the true construction of the terms of the contract, the licence was not intended to be perpetual.

Llanelly Ry. & Dock Co. v. London & North Western Ry. Co. (1875) (L.R. 7 H.L. 550) distinguished. *Wood v. Leadbitter* (1845) (13 M. & W. 838) "no longer law."

(ii) the contract was not such as to permit an immediate withdrawal of the licence, but there was an implied stipulation that, after the expiration of the first year, it might be terminated by the licensors on the expiration of a reasonable notice period duly communicated to the licensees.

(iii) in determining what was a reasonable notice, the commitments of the licensees which existed at the date of the notice, and which were consistent with the legitimate user of the rights granted by the licence, should be taken into consideration, and, in the circumstances, the notice given by the licensors must be considered valid and effectual.

Decision of the Court of Appeal ([1946] 1 All E.R. 678) reversed.

[AS TO REVOCATION OF LICENCE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 10-12, para. 6; and FOR CASES, see DIGEST, Vol. 30, pp. 512-514, Nos. 1669-1700.]

Cases referred to :

- (1) *Thomas v. Sorrell*, (1673), Vaugh. 330; 3 Keb. 264; Freem. K.B. 137; 30 Digest 501, 1594.
- (2) *Llanelly Ry. & Dock Co. v. London & North Western Ry. Co.*, (1875), L.R. 7 H.L. 550; 45 L.J.Ch. 539; 32 L.T. 575; *affg.*, (1873), 8 Ch. App. 942.
- (3) *Hurst v. Picture Theatres, Ltd.*, [1915] 1 K.B. 1; 83 L.J.K.B. 1837; 111 L.T. 972; 30 Digest 513, 1682.
- (4) *Wood v. Leadbitter*, (1845), 13 M. & W. 838; 14 L.J. Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 30 Digest 515, 1708.
- (5) *Kerrison v. Smith*, [1897] 2 Q.B. 445; 66 L.J.Q.B. 762; 77 L.T. 344; 30 Digest 512, 1675.
- (6) *Webb v. Paternoster*, (1619), 2 Roll. Rep. 143; Godb. 282; Palm. 71; Poph. 151; *sub nom. Plummer v. Webb*, Noy, 98; 30 Digest 513, 1684.
- (7) *R. v. Horndon-on-the-Hill (Inhabitants)*, (1816), 4 M. & S. 562; 30 Digest 504, 1628.
- (8) *Heulins v. Shippam*, (1826), 5 B. & C. 221; 7 Dow. & Ry. K.B. 783; 4 L.J.O.S.K.B. 241; 19 Digest 7, 2.
- (9) *Cornish v. Stubbs*, (1870), L.R. 5 C.P. 334; 39 L.J.C.P. 202; 22 L.T. 21; 30 Digest 513, 1685.
- (10) *Mellor v. Watkins*, (1874), L.R. 9 Q.B. 400; 30 Digest 513, 1686.
- (11) *Wilson v. Tavener*, [1901] 1 Ch. 578; 70 L.J.Ch. 263; 84 L.T. 48; 30 Digest 514, 1693.
- (12) *Canadian Pacific Ry. Co. v. R.*, [1931] A.C. 414; 100 L.J.P.C. 129; 145 L.T. 129; Digest Supp.

- (13) *Minister of Health v. Bellotti*, [1944] 1 All E.R. 238; [1944] 1 K.B. 298; 113 L.J.K.B. 436; 170 L.T. 146; Digest Supp.
 (14) *Doe d. Martin v. Watts*, (1797), 7 Term Rep. 83; 30 Digest 470, 1329.
 (15) *Lowe v. Adams*, [1901] 2 Ch. 598; 70 L.J.Ch. 783; 85 L.T. 195; 30 Digest 514, 1696.
 (16) *Mackay v. Dick*, (1881), 6 App. Cas. 251; 12 Digest 610, 5045.
 (17) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; Digest Supp.

A APPEAL by the licensors, Winter Garden Theatre (London), Ltd., from a decision of the Court of Appeal (LORD GREENE, M.R., SOMERVELL and COHEN, L.JJ.), dated Apr. 12, 1946, and reported [1946] 1 All E.R. 678, reversing an order of ROXBURGH, J., dated Mar. 6, 1946.

B By an agreement contained in two letters dated June 10, 1942, the licensors granted a licence of their theatre, on terms set out in the letters, to Countess de la Marr, and by an agreement dated Oct. 1, 1942, the licensors consented to the assignment of the licence by Countess de la Marr to the respondents, Millenium Productions, Ltd. On Sept. 11, 1945, the licensors purported to determine the licence. The licensees, Millenium Productions, Ltd., thereupon brought an action claiming (i) a declaration that the licence was not revocable by the licensors except on breach by the licensees of the terms of the licence; C (ii) alternatively, a declaration that the licence, if revocable at the option of the licensors, was valid and effective until after the expiration of a reasonable notice, or, alternatively, after the expiration of a reasonable period from the receipt by the licensees of notice of revocation. The licensors, in a counter-claim, claimed (i) a declaration that the licensees' licence to use the theatre had been determined and that the licensees had no right to use the theatre after the lapse of a time reasonably sufficient to vacate it; (ii) an injunction D to prevent the licensees from using the theatre; (iii) damages for trespass. ROXBURGH, J., dismissed the action, and on the counterclaim declared that the licensees' licence to use the theatre had been determined, and that, after the lapse of a time reasonably sufficient to vacate the theatre, they had no right to use it. The Court of Appeal reversed the decision of ROXBURGH, J., holding that the licensors had no power to revoke the licence and that an injunction E could be granted to restrain them from acting on the purported revocation, which was a breach of contract. On this appeal by the licensors to the House of Lords, the House reversed the decision of the Court of Appeal and restored the order of ROXBURGH, J. The facts and the relevant clauses of the agreement appear in the opinion of VISCOUNT SIMON.

Sir Valentine Holmes, K.C., and *T. G. Roche* for the appellants (the licensors).
Beyfus, K.C., and *Michael Albery* for the respondents (the licensees).

F The House took time for consideration.

July 28. The following opinions were delivered.

G VISCOUNT SIMON: My Lords, this is an appeal from an order of the Court of Appeal (LORD GREENE, M.R., SOMERVELL and COHEN, L.JJ.), allowing the respondents' appeal from the judgment of ROXBURGH, J., in an action in which the respondents were plaintiffs and the appellants defendants, and also plaintiffs by counter-claim. The judge dismissed the respondents' claim and gave judgment for the appellants on their counter-claim. The Court of Appeal reversed this decision, finding for the respondents on their claim and dismissing the appellants' counter-claim. The appellants are appealing from the order of the Court of Appeal in regard to both claim and counter-claim. The appeal relates to a licence under which the respondents were permitted to use the Winter H Garden Theatre, Drury Lane, which is the property of the appellants, for the purpose of producing stage plays, concerts or ballets, in return for a weekly payment which, at the time when the appellants sought to terminate the licence, amounted to £300 a week. There was no express term in the licence providing that the appellants could revoke it and the principal question of the case is whether, as the respondents contend, and as the Court of Appeal decided, the respondents are entitled to continue their use of the theatre in perpetuity if they so desire and continue the weekly payments, or whether, as the appellants contend, the licence is revocable by them by reasonable notice.

By letter dated June 10, 1942, from the appellants to the Countess de la Marr (hereinafter referred to as the countess), the appellants purported to grant to a company to be formed by the countess under the name Millenium, Ltd., a licence to use the theatre on the terms and conditions there set out. A counterpart of the said letter was signed by the countess "for and on behalf of Millenium, Ltd., in course of registration." By a further letter of the same date, the appellants stipulated that the licensees should keep deposited with the appellants a sum equal to four weeks' "rent" at the rate from time to time payable under the licence. By an agreement in writing dated Oct. 1, 1942, to which the appellants, the countess and the respondents were parties, the appellants consented to the assignment of the licence by the countess to the respondents and also consented to the respondents granting a sub-licence of the theatre to Messrs. Tom Arnold and Jack Hylton on certain terms and conditions. The parties have proceeded on the view that the effect of the agreement of Oct. 1 was to constitute the respondents from that date licensees of the theatre from the appellants. The Arnold and Hylton sub-licence came to an end in Sept., 1943, long before the matters now in question arose, and after such determination the respondents' licence was governed by the terms of the letter of June 10, 1942.

Many of the terms of this letter have required close examination during the argument of the appeal. The most important matters contained in it are as follows. Clause 1 provided that the licence should be for six months from July 6, 1942, at a weekly "rent" of £80 per week. Clause 2 provided that the respondents should have the following options:

At the expiration of the 6 months you are to have the option of continuing for a further period of 6 months at a rental of £100 per week plus 10 per cent. of the gross weekly receipts in excess of £500 (such receipts to be calculated after deduction of library discounts and entertainment tax) but it is understood and agreed that the maximum rental in any week, including this percentage, shall be £200. Further should an armistice be signed between Germany and Italy and Great Britain during the second period of your licence the rent which shall become due and payable shall be at the flat rate of £200 per week. On the expiration of the two periods of 6 months before mentioned you are to have the option of further continuing the licence of the theatre on the payment each week of a flat rental of £300 per week and you will give us one month's notice of your intention of then terminating the licence. You are to give us previous 6 weeks' notice of your intention to exercise your option to continue the licence for the further period of 6 months and 6 weeks' notice of your intention to exercise your option to continue thereafter.

Clause 3 provided that the respondents should be responsible for the running expenses of the theatre and should take over the existing staff. Clause 4 provided that the appellants should retain the bars and cloak rooms and the right to sell programmes and the profits or losses arising on these matters should be divided equally. Clause 5 provided that the respondents should comply with the terms of the Lord Chamberlain's licence and all other regulations and with the reasonable requests of the appellants' resident manager. Clause 6 provided that the respondents should not enter into any sub-licence of the theatre without the consent of the appellants, such consent not to be unreasonably withheld, provided mutual arrangement was made for a division of the resulting profit. The agreement further provided: (a) that possession of the theatre was retained by the appellants, but that the respondents should have the unrestricted right over all the rooms of the theatre with the exception of a certain office and the bars and cloakrooms; (b) that prices of admission should be fixed by the respondents who were, however, to do nothing which would affect the status of the theatre as a West End theatre; (c) that the appellants should pay all rates, taxes, assessments, licence fees and insurances; that the respondents would on the termination of the licence leave it in the same state as it then was (reasonable wear and tear, damage by storm, tempest and King's enemies excepted); any liability on the respondents for external or structural repairs was excluded; (d) that the agreement should not constitute a partnership. By letter dated Nov. 23, 1942, the respondents exercised their first option and by letter dated Apr. 24, 1943, the respondents exercised their further option to continue to use the theatre after the expiration of the two fixed periods.

It is to be noted that, although the expression "rent" or "rental" was used in the documents, it is agreed between the parties (as is plainly the fact)

that the respondents acquired no interest in land but were pure licensees for value, the consideration taking the form of a weekly payment. Such a licence is a contract, and this contract contains the express term that, if the respondents on proper notice, opt to continue the use of the theatre beyond the first twelve months, they may do so with the right of giving one month's notice of their intention of then terminating the licence. The licensors, on the other hand, are given by the documents no express right to terminate the licence at all. The question is : Is such a right to be implied, and, if so, on what terms ?

On Sept. 11, 1945, the appellants gave the respondents notice to vacate the theatre on Oct. 13, 1945, but, in case the respondents might require further time to make other arrangements, the appellants wrote a covering letter stating that, if Oct. 13 was not a convenient date, they would be prepared to give a fresh notice for some later date provided that the date of vacation was not seriously delayed. On Sept. 14 the respondents replied challenging the authority of the appellants to terminate the licence in this way. They added that they were heavily committed at the theatre, but did not suggest any other date for vacation. On Sept. 20 the appellants answered that they were entitled to revoke the licence, but that they recognised that the respondents were entitled to a reasonable period within which to move out and again asked the respondents to suggest a later date. On Sept. 25 the respondents replied that the licence was not revocable and that they were not prepared to vacate the theatre. They made no suggestion, then or later, of what would be a convenient date.

The respondents issued their writ on Oct. 9 claiming a declaration that the licence was not revocable by the appellants except on breach by the respondents of its terms. In the alternative, they claimed a declaration that, if the licence was revocable at the option of the appellants, such revocation did not become effective until after the lapse of a reasonable time from the notice of revocation and that such time had not elapsed. By an amendment made at the hearing, they claimed, in the further alternative, a declaration that the licence was only revocable by a reasonable notice and that no such notice had been given. The appellants' defence and counterclaim was delivered on Nov. 27, 1945. It alleged that the respondents' licence was revocable by notice and that after the lapse of a reasonable time from such notice the respondents had no further right to use the theatre and that a reasonable time had elapsed between the notice of Sept. 11 and the delivery of the counterclaim on Nov. 27. The appellants claimed declarations and an injunction in accordance with these allegations, and damages for trespass.

The effect of a licence by A to permit B to enter upon A's land or to use his premises for some purpose, is, in effect, an authority which prevents B from being regarded as a trespasser when he avails himself of the licence (*Thomas v. Sorrell* (1) (Vaugh. 351)). Such a licence may fall into one of various classes. It may be a purely gratuitous licence in return for which A gets nothing at all, e.g., a licence to B to walk across A's field. Such a gratuitous licence would plainly be revocable by notice given by A to B. Even in that case, however, notice of revocation conveyed to B when he was in the act of crossing A's field could not turn him into a trespasser until he was off the premises, but his future right of crossing would thereupon cease. There is another class of licences which may be called licences for value, in which B gives consideration for the permission he obtains from A, and this last class may be further subdivided. In some cases the consideration may be given once for all, as, for example, by the payment of a capital sum or by conferring a single benefit at the beginning. *Llanelli Ry. & Dock Co. v. London & N.W. Ry. Co.* (2), to which I will refer later, is an example of this. In other cases, the consideration may take the form of a periodic payment, as is the case in the appeal we are now considering. There is yet a third variant of a licence for value which constantly occurs, as in the sale of a ticket to enter premises and witness a particular event, such as a ticket for a seat at a particular performance at a theatre or for entering private ground to witness a day's sport. In this last class of case, the implication of the arrangement, however it may be classified in law, plainly is that the ticket entitles the purchaser to enter and, if he behaves himself, to remain on the premises until the end of the event which he has paid his money to witness. Such, for example, was the situation which gave rise to the decision of the Court of Appeal in *Hurst v. Picture Theatres, Ltd.* (3). I regard this case

as rightly decided, and repudiate the view that a licensor who is paid for granting his licensee to enter premises in order to view a particular event, can nevertheless, although the licensee is behaving properly, terminate the licence before the event is over, turn the licensee out, and leave him to an action for the return of the price of his ticket. The licence in such a case is granted under contractual conditions, one of which is that a well-behaved licensee shall not be treated as a trespasser until the event which he has paid to see is over, and until he has reasonable time thereafter to depart, and in *Hurst's* case (3), where the plaintiff was forced to leave prematurely, substantial damages for assault and false imprisonment rightly resulted. ✓

This brings up for reconsideration the oft-quoted and oft-considered decision of the Court of Exchequer in 1845 in *Wood v. Leadbitter* (4). I think that this decision can only be rightly understood by bearing in mind the state of the pleadings on which the decision depended. The old system of pleading was far more strict than the system now prevailing. The action was an action for the tort of assault and false imprisonment arising out of the circumstances that Wood had bought a ticket for admission to the grandstand at the Doncaster races, but that, while the races were going on, the defendant, acting under the orders of Lord Eglintoun, who was steward of the races and must be treated as having sold Wood his ticket, turned the plaintiff out. The defendant's plea was that the plaintiff was on Lord Eglintoun's ground, to which the plaintiff filed a replication that he was there "by the leave and licence of Lord Eglintoun." There was a traverse to this replication and issue was joined on that traverse. ALDERSON, B., at the beginning of his judgment sets all this carefully out and the language of the replication is printed in italics in the report. In *Hurst v. Picture Theatres, Ltd.* (3) KENNEDY, L.J., pointed out ([1915] 1 K.B. 13) that in *Wood v. Leadbitter* (4):

... it was not there suggested by the plaintiff "my right to remain is not merely by leave and licence of Lord Eglintoun; I have an implied contract that I should be there and that contract is not subject to revocation."

KENNEDY, L.J., went on:

Therefore, as I say, one must deal with that case upon the pleading, and upon that pleading the judgment of the court cannot be put more specifically or more correctly than in the passage I have quoted from the headnote.

The passage in the headnote [of *Wood v. Leadbitter* (4)] referred to by KENNEDY, L.J., is as follows:

A right to come and remain for a certain time on the land of another can be granted only by deed; and a parol licence to do so, though money be paid for it, is revocable at any time, and without paying back the money.

It seems plain, therefore, that the only issue to be decided in *Wood v. Leadbitter* (4) was whether the plaintiff, when he was forcibly removed from Lord Eglintoun's land, continued to have the leave of Lord Eglintoun to be there, and he had not this leave because it had been withdrawn. On the pleadings in that case the question was not open whether or not the effect of the contract was to preserve the plaintiff from being treated as a trespasser until the races were over. Until the Common Law Procedure Act, 1852, permitted the joinder of different causes of action in the same suit, a plaintiff in the position of Wood had to sue either in tort, as he did, or in *assumpsit*. In *Kerrison v. Smith* (5) COLLINS, J., referring to *Wood v. Leadbitter* (4), said ([1897] 2 Q.B. 448):

It was conceded that the grantor has a right to revoke a licence, but the point set up by the plaintiff, that there was a contract, for the breach of which the plaintiff was entitled to recover damages, was never properly dealt with.

It does not seem necessary to discuss, now that we are more than a hundred years from the decision, whether, if the Judicature Acts had then been passed, the Court of Exchequer could have protected Wood from what was an injustice. The instances given by the judges who were in a majority in *Hurst's* case (3) show how manifest the injustice is. Wood's position really was that Lord Eglintoun had agreed with him, for reward, not to treat him as a trespasser till the races were over and till he had a reasonable time after that to withdraw, but this was not the issue directly raised by the pleadings. It is enough to say that, at any rate since the fusion of law and equity, no court in this country would refuse to a plaintiff in Wood's situation the remedy for which he asked,

and the case, in my opinion, should no longer be regarded as an authority.

I had reached this point in drafting my opinion when I had the advantage of reading in print the opinion prepared by my noble and learned friend, LORD MACDERMOTT, in this appeal. He has so precisely and clearly expressed the view which I had formed on the case before us that it becomes unnecessary to deal independently with the application of the principles I have endeavoured to formulate to the matter in hand. I agree with him entirely that the decision of this House in *Llanelly Ry. & Dock Co. v. London & North Western Ry. Co.* (2) does not assist the present respondents, for the reasons he states. On the other hand, I accept his conclusion that, when the clauses of the present licence are carefully studied, the proper inference from the language used is that the licence was not perpetual but that the intention of the parties, to be inferred from the document, though not expressly stated, was that, upon the appellants' indicating their decision that the permission given by the licence would be withdrawn, the respondents were to have a reasonable time to withdraw after which they would become trespassers. There is, in my opinion, no reason at all for saying that the only alternative to a perpetual licence is an instant termination of the respondents' right without any period of notice at all. I entirely agree with the analysis to which my noble and learned friend, LORD MACDERMOTT, has subjected the arrangement of Aug. 22, 1945, made between the respondents and Linnit and Dunfee, Ltd., [under which Linnit and Dunfee, Ltd., produced at the theatre a play entitled "Young Mrs. Barrington"] from which it follows that this agreement was really a sub-licence entered into without the appellants' consent, thus constituting a breach of cl. 6 of the letter of June 10, 1942. Consequently, the respondents are precluded from relying on it in support of their plea that, if the licence were revocable, reasonable notice had not been given. The result is, as LORD MACDERMOTT points out, that the respondents failed to show that the time which the appellants were prepared to give them to withdraw was insufficient. The notice given by the appellants must be considered valid and effectual. I move that the appeal be allowed.

LORD PORTER: My Lords, on June 10, 1942, the appellants granted to the Countess de la Marr a licence of the Winter Garden Theatre for the purpose of producing stage plays, concerts or ballets. As I understand, the terms of this licence were meant to be a preliminary step towards establishing a contractual relationship between the appellants and the respondent company which had not then been registered. It was, however, formed shortly afterwards and on Oct. 1, 1942, a further agreement was entered into between the appellants, the countess and the respondents, whereby she was authorised to assign her licence to the respondents and they in their turn were permitted to grant a sub-licence to Messrs. Arnold and Hylton for a period which by a series of options granted to those gentlemen might extend for 7 years or even longer if a successful play were running at the expiry of the last optional period. Clause 4, however, contained a term that :

... the possession of the theatre and the effects is retained by the licensees' landlord, and whilst the same are being used by the licensees, no parting with the possession thereof shall be deemed to have taken place by the licensees' landlords.

The agreement of Oct. 1 modified the provisions of that of June 10 in some respects, but in terms provided by cl. 7 that, on the termination of the Arnold and Hylton sub-licence, the terms and conditions contained in it should cease to apply and the terms of the licence of June 10 should forthwith have full force and effect and be binding upon the parties. The sub-licence to Messrs. Arnold and Hylton, in fact, expired long before any date material for your Lordships' consideration and is, I think, only of importance as indicating that the appellants were at one time contemplating the possible continuance of the respondents' licence for 7 years and upwards. Two further documents are of importance, *viz.*, an assignment of the licence by the countess to the respondents on Oct. 1, 1942, and an agreement of Aug. 22, 1945, whereby the respondents purported to engage Linnit and Dunfee, Ltd., to produce a play entitled "Young Mrs. Barrington" at the theatre. A question whether this agreement constituted an unauthorised licence of the theatre to Linnit and Dunfee will have to be considered later, but cannot be solved until the terms of the original licence and the terms of the (alleged) unauthorised licence are examined.

Before these matters are considered, your Lordships must, I think, decide what are the principles in the light of which a licence to enter into and carry out activities on land has to be construed. On this subject there is a wide divergence of view, the appellants contending that *prima facie* a licence is revocable at will, though it may be that due notice of the date at which the revocation is to take place must be given and though the licensee must at least be given reasonable time to wind up his activities having regard to all the circumstances of the case. They add that this view is, of course, not inconsistent with the existence of a term in the licence, whether express or implicit, making it irrevocable altogether or for a named period. The Court of Appeal, however, has held, and the respondents maintain, that no such principle is to be applied, even *prima facie*, in construing a licence. That contract, they say, like many others must be construed in the light of its own terms and with no leaning towards revocability or irrevocability.

My Lords, there are very few, if any, contracts which can be construed without taking into consideration a long background of gradual development and the implication of customary provisions, and I do not think that the meaning of a licence can be reached by considering the matter, as it were, in the air. Its incidents have a long history behind them. What the effect of that history or, indeed, what it is, may well be in dispute, but, whatever it is, I do not think it can be neglected. The general proposition as to the rights conferred by a licence is to be found as early as 1673 in the judgment of VAUGHAN, C.J. (Vaugh. 351), in *Thomas v. Sorrel* (1), in the words :

A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. This statement was quoted in *Wood v. Leadbitter* (4) by ALDERSON, B., delivering the judgment of the court (13 M. & W. 844), and for the proposition that every licence is and must be revocable so long as it is a mere licence, he refers to BROOKE'S ABRIDGEMENT, sub. tit. "Licence," para. 15, to the judgment of DODDERIDGE, J. (2 Roll. Rep. 152), in *Webb v. Paternoster* (6), to *R. v. Horndon-on-the-Hill (Inhabitants)* (7), and to *Hewlins v. Shippam* (8). It has been suggested that the decision in *Wood v. Leadbitter* (4) turned merely on the pleadings and decided only that a right to enter and remain on land, though for no more than a limited period, required a deed to make it effective. I cannot think so. It is true that the decision ultimately turned on this point and equally true that the contention might not be good after the passing of the Supreme Court of Judicature Act, 1873, enjoining common law courts to take into consideration the doctrines of equity, but, as I read the case, it is assumed that a licence is *prima facie* revocable. Throughout the whole of the judgment this point is stressed. Indeed, ALDERSON, B., said (13 M. & W. 845) :

It may further be observed, that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol . . .

It was said on behalf of the respondents that this principle applied only to licences given without consideration, and that the phrase "mere licence" was used to exclude licences given for a consideration. If this contention were confined to a limited licence to do a particular act or series of acts, I do not think I should disagree, provided the performance of a particular act had been actually begun. So limited, the proposition does not conflict with the view that, normally, a licence is revocable, but, if applied generally, it does, as I think, conflict with the principles laid down in *Wood v. Leadbitter* (4), and, in particular, with the statement that a licence under seal (which does not require consideration) is as revocable as a parol one. In *Wood v. Leadbitter* (4) the licence was for a limited purpose and for a limited time and for valuable consideration. It may well be that now that common law and Chancery remedies can be administered by any branch of the High Court, a different decision would be given, but, even if that be conceded, it does not seem to me to have any bearing on the case now presented to your Lordships. It is one thing to say that a limited and temporal licence remains in force until the particular object for which it is given is fulfilled or the definite period of time has elapsed ; it is quite a different matter to allege that a licence once given in general terms can never be terminated. To my mind the whole historical development of the law is against such a contention. *Cornish v. Stubbs* (9), *Mellor v. Watkins* (10),

Kerrison v. Smith (5), *Wilson v. Tavener* (11), *Canadian Pacific Ry. Co. v. R.* (12), *Minister of Health v. Bellotti* (13) are all against it, and even *Hurst v. Picture Theatres, Ltd.* (3) is not antagonistic.

A The respondents, however, relied in particular on *Llanelly Ry. & Docks Co. v. London & North Western Ry. Co.* (2). Undoubtedly, in that case, running powers over their line given by one railway company to another were held to be irrevocable, but they formed part of a general agreement, under which a large sum was lent, and formed part of the consideration for the loan. In any case running powers are in a class by themselves, involving special arrangements, preparations and expenditure, which may well influence the construction of an agreement under which they are granted. The actual decision was that all the provisions of the agreement showed that it was a permanent and not a terminable one. It is true that LORD SELBORNE said (L.R. 7 H.L. 567) that :

B . . . an agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, must (in general) throw upon anyone alleging that it is not perpetual, the burden of proving that allegation, either from the nature of the subject, or from some rule of law applicable thereto.

Whether such a proposition is too widely stated, though in general it may be true, is not a matter which, in my opinion, it is material to decide. The other members of the House gave their decision upon the construction of the document itself, and, in any case, qualified it by bringing to the inquiry a consideration of the nature of the subject-matter involved.

C The rule of law applicable to the licence granted to the respondents in the present case is, I think, that *prima facie* licences are revocable. This was a licence to use a theatre and the particular circumstances are to be found in the terms of the document itself. Judging from the terms of the document alone, I should think it revocable. The licence is for the purpose of producing stage plays, concerts and ballets, and starts with two rights of option to retain the licence for six months each. These provisions are succeeded by an option of further continuing the licence. Speaking for myself, I should not, unless compelled, construe such a document as granting a perpetual licence. If it were a tenancy, I should interpret it as requiring no more than reasonable notice, and, indeed, as rent is payable weekly, it might require only a week's notice. I cannot think that the rights acquired by means of a licence exceed those which a tenancy would give.

E It is, however, said (i) that the licensees were put to considerable expense in war time in providing black-out material, and (ii) that the licensees have to give a month's notice to terminate the licence, whereas no provision for its termination by the licensors is to be found. As to the first objection, the answer, as I think, is that the respondents were granted at least a year certain and a possibility of seven years enjoyment, and, as to the second, that, if my view of the law be right, the licensees are entitled to a reasonable time after notice to put an end to their commitments, whereas the licensors would have no protection against the licensees walking out at any moment, and, therefore, require some notice of an intention to do so. Primarily, of course, the question whether the respondents' licence is revocable or irrevocable must depend on the language of the document of June 10, 1942, and from that contract I cannot find grounds for supposing it to be irrevocable. Apart from the circumstances already mentioned, the retention of the bars and cloak rooms, the right on the part of the appellants to sell programmes, etc., their retention of the possession of the theatre and their acceptance of responsibility for payment of all rates, taxes, assessments and theatre and excise licenses are not obligations which one would expect the grantors of a perpetual licence to undertake. Much less would they render themselves liable for external and structural repairs, external painting and decoration and repairs to roof and main drainage. I have not forgotten that the licence was granted and accepted in war time and at a substantial and increasing rent. Such a consideration may have some weight in a case where the construction of a document is doubtful. In the circumstances of the present case, it cannot, I think, influence the decision.

H There remains the subordinate question whether the appellants did not bring their action too soon. On this issue the respondents put forward two contentions (i) that the month's notice given by the letter of Sept. 11, 1945, is too short ; (ii) that, in the case of a licence, they are entitled to a reasonable time to wind

up their commitments after the termination of the time given by the notice for surrender of the premises. My Lords, speaking for myself on an occasion when I do not think it necessary to come to a final conclusion on the matter, I take the provisional view that a licence is *prima facie* terminable at once after notice to determine has been given, but that the licensee must be given a reasonable time to vacate the licensed premises, and what is a reasonable time must depend on all the circumstances of the case. In the case of a theatre, it might even extend to the run of a play, if no suitable alternative premises could be found, but in the present instance I do not think a question of this kind, which may give rise to a marked difference of view, calls for decision. Whether the submission be that notice to determine a licence is required and a month was too short in the circumstances, or that, a month's notice having been given, the respondents were entitled to a reasonable time to dispose of their commitments and that no sufficient time had been given when the appellants delivered their counter-claim for a declaration and injunction on Nov. 27, the issue is still the same: Was a month's notice sufficient and was a reasonable time for vacating the theatre given, whether that time is to count from the date of giving the notice or from the time at which possession was demanded? In either case the respondents sought to rely on the agreement which they had entered into with Linnit and Dunfee, and on it alone, as a circumstance to be taken into consideration in determining the time which should be given for vacating the premises. If that agreement was permissible under the terms of the licence of June 10, the time given was, undoubtedly, too short. For the appellants, however, it is said, and ROXBURGH, J., who alone dealt with the matter, decided, that it was a sub-licence, and void under cl. 6 of that document, as it had not been authorised by the grantors. The material portion of that clause reads as follows:

You are not to enter into a sub-licence of the theatre without consent of the company, but this consent would not be unreasonably withheld provided a mutual arrangement is made between us for our company to participate in any profit on any sub-licence to be entered into by you.

In fact, no permission to sub-licence was asked, nor was any agreement made for participation in the profit arising from the agreement between the respondents and Linnit and Dunfee. That agreement had not been authorised and, if it was a sub-licence, was entered into in defiance of cl. 6 and cannot be relied upon as prolonging the time to which the respondents were entitled before vacating the premises. Is it then a sub-licence? I think it is. The judge who tried the case has gone through the agreement clause by clause and it is not necessary for me to repeat his analysis. I think it is sufficient to say that the original licence of June 10 authorised the use of so much of the theatre as was required for the production of stage plays, concerts or ballets, reserving only an office, the right to bars and cloakrooms and some general control. Similarly, Linnit and Dunfee obtained the right to use so much of the theatre as they required to produce a particular play with not dissimilar reservations. As the judge observed, there is only one thing in the latter agreement which supports the contention of the respondents, *viz.*, the phrase: "The theatre company agrees to engage the production company to produce," and, in his opinion, those words could not prevail against the substance of the agreement as a whole. With this view I concur. I also take the same view as ROXBURGH, J., in thinking that there is no sufficient evidence to prove that the appellants knew of and acquiesced in the impugned agreement. A knowledge that the programmes contained the words "By arrangement with Mala de la Marr, Linnit and Dunfee present 'Young Mrs. Barrington'" seems to me quite insufficient for that purpose. On all points, therefore, I find myself in agreement with the judge who tried the case and would allow the appeal and restore his judgment.

LORD UTHWATT: My Lords, the letter of June 10, 1942, gave to the licensees the option, which they duly exercised:

... of further continuing the licence of the theatre on the payment each week of a flat rental of £300 per week and you [*i.e.*, the licensees] will give us one month's notice of your intention of then terminating the licence.

The letter did not contain any other provision in terms directed to the period

for which the extended licence was to continue. In my opinion, a right to continue, without more, does not mean anything except a right to continue for a period which is left at large. The language of the letter is consistent with the implication of the term for which the licensees contend, namely, that the licence was to continue for ever subject only to the right of determination given to them, but unless that term can be implied—it is, in effect, a stipulation that the licensors will not revoke the licence—it is, to my mind, an inevitable consequence that the licensors might determine the licence by notice given at any time.

- A The question whether any such term can be properly implied is purely a question of the construction of the contract. On that (a) the subject-matter of the bargain (*viz.*, the right to the exclusive use for defined purposes of practically the whole theatre, possession being retained by the licensors), (b) the presence in the contract of obligations incumbent on the licensees the non-performance of which might subject the licensors to serious loss, coupled with the absence of any power of determination in the licensors in the event of breaches by the licensees of their obligations, and (c) the personal relation between licensors and licensee arising out of the retention of parts of the theatre for use by the licensors appear to me to negative the propriety of making the implication suggested. If the implication is to be made, it can only be made by stressing the contrast between the presence in the licence of a power to determine given to the licensees and the absence of any such power in favour of the licensors. Is it a proper inference from this contrast that the true intendment of the bargain was that the licence was to be determinable only at the wish of the licensees? In my opinion, it is not. If the provision giving the licensees power to determine were absent, it might be inferred from the reservation of a weekly rent that the licensees could determine the licence by a week's notice. I read the provision requiring a month's notice as in substance only a proviso directed to securing a notice longer than that thought to be inherent in a transaction essentially determinable, the choice of a month marching with the stipulation, contained in the accompanying letter of even date, as to maintenance in the hands of the licensors of 4 weeks' rent. I cannot read the provision as marking out the only way in which, consistently with performance of the bargain, the licence might be brought to an end. I am unable, therefore, to imply a term providing for continuance of the licence for ever. The consequence is, in my opinion, that the licensors might determine by notice given at any time.

- E The next question is whether the notice given must be a reasonable notice, or whether it may be a notice operating at once to determine the licence, the licensees in that event having a reasonable time within which to vacate the theatre. In my opinion, it is the former. I cannot think that any other notice would reflect the intention of reasonable men in the position of the licensors and licensees in the present case. No reasonable man would in that connection deny the relevance of the general proposition that he who sows should be allowed to reap. To my mind, working effect to that proposition is best given in the present case by requiring that the licence should determine when the fruits have been reaped *i.e.*, at the expiration of a notice the length of which is determined by the commitments of the licensees as they stood under the contract at the date of the notice, rather than by permitting an immediate determination of the licence on the giving of the notice coupled with a right in the licensees to work out the position that existed at the date of the notice. The latter alternative would resemble the exceptional position of a tenant of land expressed to hold at will whose tenancy has been determined by an immediate notice. Under the law relating to emblements he is entitled, paying no rent after his tenancy has determined, to enter and gather his crops. Presumably in the present case, were notice other than a reasonable notice sufficient and given, the licensees working out their position would not in respect of the period after the determination of the licence be under any obligation to pay rent. That is not a commercial proposition. The former alternative that a reasonable notice is necessary accords with the law that a reasonable notice is necessary to determine a tenancy of land held under a general occupation at a rent, where the tenancy is not expressly a tenancy at will: *Doe d. Martin v. Watts* (14). Where rent is reserved by the year, the rule has long ago been rigidly fixed that a reasonable notice is a half year's notice expiring on the last day of the

year of the tenancy (*cf.*, 13 H. VIII, 15 *b*) and similar rules refining the application of the principle have been laid down as respects general occupation of land at a monthly or weekly rent. But these are rules only. The assertion of the principle and an example of its application will be found in *Lowe v. Adams* (15). The licence here very closely resembles a tenancy under a general occupation and I would, as respects the nature of right of the licensors to determine it, apply the principle which governs the right to determine such a tenancy. In my opinion, therefore, a reasonable notice was necessary in order to determine the licence. A

In a case such as the present, the question what is or is not a reasonable notice to quit cannot be determined by reference only to the nature of the user authorised by the licence. It is necessary to take into account the actual user. Those commitments of the licensees which exist at the date of the notice, and which are consistent with legitimate user of the rights granted by the licence, must be taken into consideration. That may be thought to subject the licensors to practical difficulties in determining the proper length of the notice to be given by them, but, in my opinion, the licensors are entitled to require from the licensees—who alone may be assumed to know all the relevant facts—such information as is necessary to enable them to form an opinion as to the proper length of a reasonable notice. A correct analysis of the licensors' position is that they have the right to give notice, but are subject to the obligation to give a reasonable notice. On that footing the licensees are, in my opinion, under an implied obligation upon request to give the licensors such information as is requisite for the proper performance of the licensors' obligation (*cf.*, *Mackay v. Dick* (16) (6 App. Cas. 263)). The requirement of a reasonable notice does not, therefore, create an impracticable position. B C

The remaining question is whether the notice given by the licensors was, in fact, a reasonable notice. The notice given was a calendar month's notice. D It was, therefore, notice for a date later than the expiry of the period for which the licensors had rent in hand. No difficulty, therefore, arises on that head. The only point taken was that, consistently with the licence, "Young Mrs. Barrington" was being produced at the theatre by the licensees and that the arrangements for its production could not be terminated before the calendar month expired. The month was, on that ground, said to be too short. The contention of the licensors was that the play was not being produced by the licensees, but was being produced by Linnitt and Dunfee, Ltd. (the production company) under an agreement which involved a sub-licence of the theatre, E and that the agreement so made was a breach of the provision contained in the licence "not to enter into a sub-licence of the theatre" without the consent of the licensors. If this construction of the agreement with Linnitt and Dunfee, Ltd., is correct, there is no doubt that the demands on the theatre for the purposes of the play should be disregarded. The agreement opens with a provision that the licensees agree "with the production company to produce the play 'Young Mrs. Barrington'" for a specified term. The form of words used to describe the arrangements made does not determine its character. F The terms of the whole agreement must be taken into account. Under those terms the licensees had no control over the casting of their play, the salaries paid, or the production of the play. They were given no voice in fixing the tariff. G Employees, other than the acting manager and box office employees, were taken over by the production company, but the salaries of the excepted employees were to be recouped to the licensees. The production company were to pay the running charges for light and gas and heat. Not even the electric globes were forgotten. Broken globes were to be paid for and a fixed payment per unit of electricity consumed was to be made in respect of the maintenance of electric globes. H On the other hand, the licensees remained in charge of the box office, but they were bound to account to the production company for the gross receipts less the sums properly retainable by them. That provision is only machinery. The licensees were to be responsible for the rent payable to the licensors, and certain small accommodation and a few boxes and seats were reserved to the licensees. The financial arrangement was a division of gross receipts under which the licensees received the first £330 weekly and 17½ per cent. of the gross receipts in excess of £1,750. The production company received the balance of the gross receipts. The outstanding features are that the licensees had no

control over production or expenses and had no interest in net profits. In these circumstances, it is to my mind merely toying with words to say that the play was being produced for the licensees. The control of the theatre was for all the purposes of a particular play handed over to the production company and there was, therefore, in truth a sub-licence of the theatre. The exceptions from the subject-matter handed over are immaterial.

A My view as to the construction of the agreement renders it unnecessary to consider whether *Hurst v. Picture Theatres, Ltd.* (3) was rightly decided, or to express any concluded opinion on the question of the remedies now open in every court to a bare licensee who claims that the licensor has in breach of his bargain affected to revoke it. I merely confess my present inability to see any answer to the propositions of law stated by LORD GREENE, M.R., in his judgment in the case under appeal. The settled practice of the courts of equity is to do what they can by an injunction to preserve the sanctity of a bargain. To my B mind, as at present advised, a licensee who has refused to accept the wrongful repudiation of the bargain which is involved in an unauthorised revocation of the licence is as much entitled to the protection of an injunction as a licensee who has not received any notice of revocation, and, if the remedy of injunction is properly available in the latter case against unauthorised interference by the licensor, it is also available in the former case. In a court of equity, wrongful acts are no passport to favour. I would allow the appeal.

C LORD MACDERMOTT: My Lords, the first question in this appeal is whether the licence granted by the appellants was, according to the contract creating it, revocable when the present dispute arose. The answer depends, in my view solely, on the true construction of the letters of June 10, 1942, as ascertained in conformity with the ordinary principles applicable to the interpretation of written instruments.

D On this aspect of the case the respondents relied on the decision of this House in *Llanelly Ry. & Dock Co. v. London & North Western Ry. Co.* (2), and, in particular, on the passage in LORD SELBORNE'S speech (L.R. 7 H. L. 567) which reads:

E . . . an agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, must (in general) throw upon any one alleging that it is not perpetual, the burden of proving that allegation, either from the nature of the subject, or from some rule of law applicable thereto.

F My Lords, when the facts of that case are examined, it is plain that the contract for running powers which was there held to be permanent in character had little in common with the contract between the parties to this appeal, save that in neither instance was express provision made for revocation by the licensors. In the *Llanelly* case (2) the agreement not only contained terms which indicated the construction adopted, but, as a perpetual arrangement, it conferred rights of a kind contemplated by the railway legislation then in force—a circumstance which LORD CAIRNS, L.C., obviously regarded as important for he observed (*ibid.*, 559):

G As those other terms, secured by Act of Parliament, would have been continuing, so this agreement, carrying more favourable terms, appears to me in its nature to be a continuing agreement.

H In the present case there is no such statutory background and a close scrutiny of what the parties have agreed has failed to reveal any stipulation which I can regard as manifesting an intention that the licence was to go on for ever if the licensees so desired. No doubt, the *dictum* of LORD SELBORNE, which I have quoted above, is in wide terms, but it is not expressed as a universal rule of construction (as the cautionary words "in general" show), and I doubt very much if it was intended to have any applicability to circumstances such as those now under consideration. If it has, I would, for my part, be prepared to arrive at the same conclusion as if it had not, for, even if an *onus* rests on the appellants in this matter, the whole tenor of the letters of June 10, 1942, and the nature of their subject-matter, seem to me to negative, quite definitely, the idea of irrevocability so strongly urged on behalf of the respondents. The expressed purpose of the licence, the periodic payments, the complete retention of possession by the appellants, the various stipulations which give each of the parties a close and lively interest in the conduct and integrity of the other while the

licence lasts, and, not least, the provisions of para. (c) of cl. 6 of the letter agreement as to the maintenance of the premises and the state and condition in which they are to be left on the termination of the licence, all point to this conclusion and away from the notion that the permission of the appellants was perpetual. For these reasons, which I need not elaborate, I am of opinion that, on the construction of this contract, the licence was revocable during the period material to this appeal.

But if so, how could revocation be effected? Like the first, this question involves the construction of the contract and it also requires consideration as to what term, if any, should be implied therein to give effect to the intention of the parties. My Lords, the profusion and diversity of licences and the freedom of contract regarding them are such as to discourage any unnecessary formulation of general propositions on the subject, but it is, I think, safe, as well as desirable for the decision of this case, to say that one who remains on the land of another after his licence to use it has terminated will not be considered a trespasser before he has had a reasonable time in which to vacate the premises. That is well settled, though the assessment of what is reasonable may depend on a great variety of factors and cause considerable difficulty in particular instances. This period of grace can, of course, be the subject of agreement, but it exists for gratuitous as well as for contractual licensees and, on that account, must, I think, be generally ascribed to a rule of law rather than to an implied stipulation. For that reason it need not be read into this contract. It has, however, a bearing on the question which I am now discussing. It supervenes *after* the licence has terminated. Its purpose is to enable the former licensee to adjust himself to the new situation by vacating the premises. Measured reasonably and fairly, it will often provide sufficiently for the consequences of the licensor's change of will, but its object is not to prolong the user sanctioned by the licence merely for the benefit and convenience of the licensee for, *ex hypothesi*, the licence has ceased, and where, as, for example, in cases of a specialised user involving obligations to third parties or the public, the circumstances of the contract are such as to show that an immediate cessation of the authorised use or activity was not contemplated or intended, the rule of law to which I have referred may well, and notwithstanding a liberal measurement of its reasonable period, fall short of meeting the just requirements of the position.

Turning to the present case, the question then arises whether the true intention of the contract was such as to permit an immediate withdrawal of the licence. My Lords, on that I think it is as clear that the parties did not contemplate an immediate, out-of-hand revocation as it is that they did not intend a perpetual arrangement. What was granted was a licence to use the theatre "for the purpose of producing stage plays, concerts or ballets." That purpose as everyone knows, connotes a wide range of activity and a highly specialised user of the premises. It involves considerable expenditure and a host of contractual relationships with those who provide and those who seek the entertainment offered. Whatever the legal attributes of a bare and unqualified licence may be, the expressed object of this licence makes it hard to believe that either of the parties ever intended that it could be withdrawn *instantly*, regardless of the respondents' commitments and leaving them only such time as they might require to remove themselves and their possessions from the theatre. This view must, of course, be subject to the terms which the parties have agreed. I cannot, however, find anything in the contract to modify it. On the contrary, the provisions as to (a) the payment of rent in advance, (b) the continuation of the licence after the first year, and (c) the granting of sub-licences, though insufficient to raise an implication of permanence, all go, in my opinion, to support the conclusion which the nature of the subject-matter suggests.

If this be the position, it is clear that the right to revoke must necessarily be the subject of an implied term. It is, perhaps, not so clear what, precisely, the term should be. My Lords, in approaching that question I think it well to recall the warning given by LORD WRIGHT in *Luxor (Eastbourne) Ltd. v. Cooper* (17) ([1941] 1 All E.R. 52, 53), when he said:

The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. It is well recognised, however, that there may be cases where obviously some term must

be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying," some term not expressed, but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties.

- A With that caution in mind, and leaving what I may call the packing-up period to the general rule of law already mentioned, the conclusion I reach is that in this contract there should be implied a stipulation to the effect that, after the expiration of the first year, the licence might be terminated by the licensors on the expiration of a reasonable notice period duly communicated to the licensees. That, to my mind, is what accords best with the express terms of the contract and the nature of the transaction. Whatever the results of disregarding such a stipulation as to notice may be (and on that I express no opinion, as it does not call for decision on the view I take), it is, I think, beyond question that the parties were at liberty so to agree if they chose. I am not unmindful that an implication of this nature makes it incumbent upon the licensors to specify a reasonable period and that they may not be fully versed concerning all the relevant circumstances when they have to do so. I do not think the appellants can well complain on this score, however, when their own document is silent on the point, and, apart from that consideration, I see no practicable alternative which would not leave both parties in a state of even greater uncertainty.
- B
- C

It remains to be determined whether the licence has been revoked in accordance with this implied term. The precise meaning of the notice given by the appellants on Sept. 11, 1945, is not beyond debate, but, taken in conjunction with its covering letter of the same date, I have little doubt that it should be read as intimating

- D that the licence would be terminated on Oct. 13, 1945, and it is clear that this was what it conveyed to the respondents, for their reply of Sept. 14 inquires concerning the appellants' authority "to give a month's notice terminating the said licence." But was this a reasonable period? Apart from the term providing for payment of four weeks' rent in advance, the only evidence adduced on this issue was the agreement dated Aug. 22, 1945, between the respondents and Linnit and Dunfee, Ltd., which the respondents pleaded and proved and under
- E which Linnit and Dunfee, Ltd., produced a play at the appellants' theatre entitled "Young Mrs. Barrington." It was admitted that the respondents were unable to terminate this agreement sooner than they did (which was on Jan. 5, 1946), but the appellants contended that it constituted a breach of cl. 6 of the agreement of June 10, 1942, which provided that the respondents were "not to enter into a sub-licence of the theatre" without the appellants' consent, and that the respondents were, accordingly, precluded from relying on it in support
- F of their plea that, if the licence were revocable, reasonable notice had not been given. The respondents argued that this agreement was not a sub-licence and, further, that the appellants knew of the agreement and had acquiesced in the production of "Young Mrs. Barrington" so as to waive the alleged breach of cl. 6. This last point the respondents entirely failed to establish and it need not be further noticed. Nor need very much be said on the question whether
- G the agreement of Aug. 22, 1945, was a sub-licence of the theatre. It is true that it denied Linnit and Dunfee, Ltd., the use of certain relatively small portions of the premises which were the subject of the agreement of June 10, 1942, and this, it was said, avoided a breach of cl. 6 just as a sub-lease of part only of demised premises avoids contravention of a covenant against sub-letting. My Lords, whatever the virtues of that analogy may be in abstract, I do not consider that this contention had substance in the present case. When cl. 6 speaks of a sub-
- H licence "of the theatre," I think that, as a matter both of good sense and sound construction, it refers to the theatre premises or so much thereof as will enable the purpose of the licence, the production of "stage plays, concerts or ballets," to be achieved by the sub-licensees. Clause 6 proceeds to stipulate that the appellants' consent to a sub-licence will not be unreasonably withheld if a mutual arrangement is made between them and the respondents for sharing the profits. It is difficult to conceive that the true meaning of this clause was such as to enable this financial provision to be circumvented to the loss of the appellants and the advantage of the respondents by the reservation of a few seats in the auditorium

or some unessential office accommodation. It is also difficult not to feel that this profit-sharing term of the contract may explain why the agreement of Aug. 22, 1945, was cast in the form of an engagement. It is now admitted that Linnit and Dunfec, Ltd., were not the respondents' agents or employees. They made the agreement on their own account and by its terms were given the use of the theatre for a production, the financial risks of which they were to bear. My Lords, I find it unnecessary to detail the various clauses of this somewhat peculiar document. Whatever its guise, I am satisfied that, as ROXBURGH, J., has held, it was in its substance a sub-licence and amounted to a breach of clause 6.

It must, therefore, be left out of account. This means that there is virtually no evidence before your Lordships as to what would, in the circumstances, have been a reasonable period of notice. But having regard to the course of the proceedings and the issues which are raised, the onus in this matter rested, in my opinion, upon the plaintiffs and present respondents. They have not discharged that onus and the result, in my view, is that the notice given by the appellants must be considered valid and effectual. On similar, if not identical, grounds I think the time between Oct. 13 and Nov. 27, 1945—the date of the counterclaim—must be taken as a sufficient period of grace to enable the respondents to vacate the theatre. For these reasons I would allow this appeal.

My Lords, my noble and learned friend, LORD SIMONDS, authorises me to say that, having read this opinion, he concurs in its reasoning and conclusion, and wishes to add nothing to it.

Appeal allowed.

Solicitors: *Richards, Butler & Co.* (for the appellants); *Herbert Oppenheimer, Nathan & Vandyk* (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Applied. LANCASTER v. L.P.T.B.
[1948] 2 All E.R. 976.

GLASGOW CORPORATION v. NEILSON.

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Porter, Lord Oaksey and Lord MacDermott), June 5, 6, July 28, 1947.]

Master and Servant—Common employment—“Common work”—“Special risk”—Omnibus collision on highway—Injury to conductress.

A motor bus owned by the appellant corporation, on which the respondent in the course of her employment by the corporation was acting as a conductress, was run into from behind by another of the corporation's buses which was negligently driven by one of the corporation's drivers, and the respondent was injured. The buses were on different services, but a substantial portion of the routes followed in those services was common to both and they were timed to travel along the street where the accident happened at an interval of a minute. The street in question was one of the main thoroughfares of the city for traffic of all sorts:—

HELD: the respondent had no “special interest” in the skill and caution of the negligent driver arising out of their relationship as fellow servants, but was the victim of a risk of the road which might equally well have arisen from the negligent conduct of any driver of any vehicle moving close behind the bus on which she was, and, consequently, the doctrine of common employment did not apply and the corporation were liable.

Miller v. Glasgow Corporation ([1947] 1 All E.R. 1) distinguished.

[AS TO THE DOCTRINE OF COMMON EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328; and FOR CASES, see DIGEST, Vol. 34, pp. 207-220, Nos. 1697-1824.]

Cases referred to:

- (1) *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] 1 All E.R. 637; [1939] A.C. 215; 108 L.J.K.B. 320; 160 L.T. 420; Digest Supp.
- (2) *Graham (or Miller) v. Glasgow Corpn.*, [1947] 1 All E.R. 1; [1947] L.J.R. 239; 176 L.T. 142, H.L.; affg. 1946 S.C. 109.
- (3) *Kerr v. Glasgow Corpn.*, 1946 S.C. 335; Digest Supp.
- (4) *Metcalfe v. London Passenger Transport Board*, [1939] 2 All E.R. 542; 108 L.J.K.B. 733; 160 L.T. 599; 103 J.P. 246; Digest Supp.
- (5) *The Petrel*, [1893] P. 320; 62 L.J.P. 92; 70 L.T. 417; 34 Digest 213, 1747.

APPEAL from a decision of the Second Division of the Court of Session, dated July 19, 1946, and reported 1946 Sc.L.T. 356. In the action the respondent claimed damages from the appellant corporation and the negligent driver of the other omnibus for the injuries suffered by her as the result of that driver's negligence. The LORD ORDINARY (LORD SORN), before whom the case came at first instance, held that the doctrine of common employment applied and gave judgment for the corporation, but the Second Division of the Court of Session (the LORD JUSTICE-CLERK (COOPER) and LORD STEVENSON, LORD MACLEAN dissenting) reversed his decision. The corporation appealed to the House of Lords.

The House took time for consideration, and now affirmed the majority decision of the Second Division. The facts appear in the opinion of VISCOUNT SIMON.

Clyde, K.C., Sherwood Calver, K.C., and R. Smith Johnston (all of the Scottish Bar) for the appellants.

M'Kechnie, K.C., and J. H. Shearer (both of the Scottish Bar) for the respondent.

VISCOUNT SIMON: My Lords, the respondent was employed by the appellant corporation as a bus-conductress, and on Dec. 7, 1944, was on duty in such employment on a motor-bus engaged on service No. 19. At about 11.40 a.m. this bus was run into from behind by another of the corporation's motor-buses, which was being driven by a servant of the corporation named Pantrini. This bus was engaged on service No. 2. A substantial portion of the routes followed in these two services is common to both. The accident occurred while both buses were travelling westwards along Great Western Road, Glasgow, which is one of the main arteries of the city for traffic of all sorts. The time-tables of the two services show that the buses operating thereon run at frequent intervals, and it must often happen that such buses travel in close proximity to each other, though, if the prescribed timing could always be strictly observed, there would be a larger space between successive vehicles than there was in this instance. The cause of the collision was that the leading bus had to apply its brakes to avoid a pedestrian, and that the following bus, which happened to be close behind, skidded into the former on the ice-bound road, thus injuring the respondent. The respondent brought her action against both Pantrini and the corporation, alleging that Pantrini had caused her injuries by driving negligently and that the corporation was answerable as his employer. Pantrini put in no defence, and the corporation admitted that the collision and consequent damage were caused by the negligence of Pantrini, but they went on to plead that Pantrini and the respondent were fellow-employees engaged in a common work, and that, consequently, the corporation were not liable to the respondent. This defence raised the sole issue in the appeal. The LORD ORDINARY (LORD SORN) held that this defence succeeded, and considered that, in so deciding, he was applying the principle of *Radcliffe v. Ribble Motor Services* (1), as further expounded by the Inner House in *Miller v. Glasgow Corporation* (2). These authorities certainly justify the conclusion that the defence of common employment does not necessarily fail because two vehicles belonging to the same employer collide in a public thoroughfare, but it remains true that to exonerate the employer in such instances the risk must be more than the ordinary risk of colliding traffic and must arise out of some special relation between the injured and the negligent fellow-servants. The Second Division (the LORD JUSTICE-CLERK (COOPER) and LORD STEVENSON, LORD MACKAY dissenting) reversed the LORD ORDINARY's decision, holding that the risk to which the respondent was exposed was not due to any special relation, but was an ordinary traffic risk. The respondent's contract of employment with the corporation could not be regarded as containing an implied term that she would in no case hold the corporation liable for the negligence of their bus-drivers in the public road.

After the hearing of the present case in the Court of Session, this House had occasion, in deciding the appeal of *Miller v. Glasgow Corporation* (2), to expound afresh the limits of the doctrine of common employment as a defence to the employer of two fellow-servants, one of which negligently injures the other in the course of service, and in the opinions delivered in that case the nature of the test of "common work" was explained. In that appeal, this House,

in effect, adopted the judgment of the LORD JUSTICE-CLERK (COOPER). I venture to quote from my own opinion in *Miller v. Glasgow Corporation* (2), with which the other members of the House agreed, as being the most convenient way of setting out the principles to be applied. I said ([1947] 1 All E.R. 4) :

"Common work" is not limited to the sharing of the same task, like the task of two sawyers in a saw-pit, or of engine-driver and stoker on the footplate of a locomotive. The phrase covers the case where the work of one is so related to the work of the other that the risk of injury to the one, due to the carelessness of the other, is not merely fortuitous, but is a special risk involved in the relationship itself, so that that risk must be deemed to have been in contemplation of the injured servant when he entered into his contract of service.

By "fortuitous" in traffic cases is meant "the ordinary risk of contiguous traffic." I continued :

Radcliffe's case (1), therefore, does not support the broad proposition that the defence of common employment is never available when two vehicles driven by fellow-servants of the same employer collide in the high road. If the risk of collision between them is merely the ordinary risk arising from contiguity in traffic, *i.e.*, the risk of being run into by another vehicle, whoever is its driver, then the injured party has no special interest in the skill and caution of a driver who is his fellow-servant. The risk he runs is a mere risk of the road in the sense that he might equally well be run into by anyone else driving in his vicinity, but, if the relation between the work of the two fellow-servants is such that one of them depends for his safety from harm in a special degree on the care and skill of the other, then they are engaged in a "common work" and the term in the contract of employment exonerating the common employer from liability has to be implied.

In *Miller's* case (2) the collision occurred between two of the corporation's tramcars engaged in the same service and following the same uphill route on the same pair of rails. The significant circumstance was that, if danger of collision between them arose, neither car could avoid it by lateral movement, for each car could move only along the same fixed grooves. It was this circumstance which led the House to take the view, affirming the Court of Session, that the risk of collision was not merely the ordinary risk arising from contiguity in traffic of two vehicles, but that the injured party serving on one car had a special interest in the skill and caution of the driver of the other car who was his fellow-servant.

Every case in this branch of the law depends on its own facts, and fine distinctions are inevitably involved, but in the present case it appears to me that the majority of the judges dealing with the matter in the Court of Session are right, for the risk which the respondent was running from the careless driving of another vehicle which was moving close behind her own bus did not in the least depend on the fact that the vehicle in connection with which the risk arose was another bus of the corporation. I may point out (without expressing any view whether the difference would be material) that the two buses were not drawing up one behind the other at an appointed stopping-place, but were both using the road in course of ordinary transit. The decision in *Kerr v. Glasgow Corporation* (3) (where the colliding buses were within the precincts of a large garage) indicates that such refinements may be important, but the collision here was a risk of the road which might equally well have arisen if the vehicle which ran into the respondent's bus had belonged to somebody else and was not a corporation bus at all. In other words, the respondent had no "special interest" in the skill and caution of Pantrini arising out of the relationship between them, but was the victim of a risk of the road which might equally well have arisen from the negligent conduct of any driver of any vehicle moving close behind her. I move that the appeal be dismissed, with costs.

My Lords, LORD THANKERTON authorises me to say that he concurs in the opinion I have just delivered.

LORD PORTER : My Lords, the doctrine of common employment is common to the law of England and of Scotland. It has often been considered and sometimes criticized, but it is firmly established and its principles must be followed where they are applicable. Its tenets were formulated by counsel for the corporation in the circumstances of the present case in the phrase : "Was the nature of the employment such as to bring the two buses into association with one another at the time and place of the accident." If this means :

Was the nature of the employment such that there was some particular risk beyond that to which all traffic on the roads is exposed?, I should not dissent, but it is not enough that the risk was of a type to which all those carried in a vehicle in a public thoroughfare are exposed. It must arise out of the special relationship between the injured person and the negligent servant of the same employer. The corporation contended that in the present case there was such a peculiar relationship. Two buses, they said, following one another along the same route at an interval of a minute, were at least likely to pass and repass one another from time to time, and, therefore, exposed their drivers and conductors to a risk which traffic in general did not share, and they relied on *Miller v. Glasgow Corporation* (2) in support of their argument. *Miller's* case (2), however, involved different considerations. There two trams were timed to follow one another immediately, and, being trams, could advance or turn back only on the same line. Inevitably, the risk of injury of tram by tram was greater than that of bus or car by another such vehicle. The difference has been analysed by the LORD JUSTICE-CLERK (COOPER) and I need not repeat it.

In the present case there was no greater likelihood of injury of bus by bus than there was of damage by any passing vehicle to another. Even if it be accepted that, owing to the interval between their prescribed times being no more than a minute, there was a likelihood of the two buses passing and repassing, I should still think the risk that to which all traffic in general is exposed, but, indeed, it is possible to take the view that the time-table which seeks to keep the buses apart lessens rather than increases the risk of collision as compared with that to which other traffic is exposed. In my view, the nature of the employment of the respondent was not such as to expose her to any greater risk of injury from a collision between the bus in which she was acting as conductress and the bus which collided with it than from a collision with any other vehicle. There was no especial association, juxtaposition, or proximity—call it what you will—between the one and the other. For these reasons, which but repeat what has been said by the LORD JUSTICE-CLERK, with whose judgment I agree on all points, I would dismiss the appeal.

LORD OAKSEY (read by LORD MACDERMOTT): My Lords, I agree with the motion proposed by VISCOUNT SIMON. The question, in my opinion, is whether there was any "special risk" involved in the relationship between the respondent and Pantrini, to use the words of VISCOUNT SIMON in *Miller v. Glasgow Corporation* (2) ([1947] 1 All E.R. 4). It is argued that the respondent and Pantrini were in common employment because the corporation's bus, on which the respondent was conductress, and the corporation's bus driven by Pantrini were due, according to their respective time boards, to pass the same point at an interval of one minute. It is said that it was inevitable that these two buses should pass each other and so come within what may be called colliding distance. I cannot agree that it was inevitable that they should pass each other, though, no doubt, it was probable, but, if the fact of two vehicles of one owner passing each other according to some definite route or some definite time-table involves a special risk which gives rise to the doctrine of common employment, then, whenever two vehicles belonging to one owner pass each other in that way, however seldom, the risk is a special one which the servants travelling in the vehicles must be held to contemplate. I entirely agree with the LORD JUSTICE-CLERK in the present case and with LORD GREENE, M.R., in *Metcalfe v. London Passenger Transport Board* (4) ([1939] 2 All E.R. 546), that the risk is not in any sense a special risk and is no more within the contemplation of the servants of a single master than any other traffic risk and that to sustain the plea of common employment in this case would give an incalculable extension to the operation of the doctrine of common employment.

LORD MACDERMOTT: My Lords, much of the corporation's argument was directed to showing that the servants in question were employed on "common work" by reason of the degree of juxtaposition demanded by the character of their duties. Where an employment is such as to render those engaged therein liable to injury by the negligence of others who are their fellow servants I am not certain that this test of "common work" will always suffice, in itself, to decide the applicability of the doctrine now in question, and I incline to the view that on occasion it may be necessary to treat the principle enunciated in

The Petrel (5), and approved by this House in *Radcliffe's* case (1), as a distinct criterion. However that may be, it is clear that the doctrine cannot constitute a defence if that principle applies, and, on the conclusion I have reached, it, therefore, becomes unnecessary to consider further what the attributes of "common work" are according to the authorities. My Lords, expressed in general terms, the principle of *The Petrel* (5) appears to be that a risk must be treated as a general risk, and not a special risk of the employment, and must, therefore, be regarded as outside the implied stipulation on which the doctrine of common employment rests, if it may spring as readily from the fault of those who are not fellow servants of the injured person as from the fault of those who are. The decision of your Lordships' House in *Miller's* case (2) affords a good example of a special risk, for there, owing to the nature of the service, what occurred was much more likely to happen through the negligence of a fellow servant of the injured person than through the negligence of anyone else. Here, the case falls, in my opinion, as clearly on the other side of the line. Despite the proved frequency of the corporation's bus services along the Great Western Road, the risk exemplified by this accident might, on the evidence, have arisen as readily from the fault of some other driver on that busy thoroughfare who was not in the employment of the corporation. I, therefore, agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Martin & Co.*, agents for *Simpson & Marwick, W.S.*, Edinburgh (for the appellants); *Herbert Smith & Co.*, agents for *J. & R. A. Robertson, W.S.*, Edinburgh (for the respondent).

[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

Applied. GRANT v. SUN SHIPPING Co., LTD. [1948] 2 All E.R. 238.

ADMIRALTY COMMISSIONERS v. NORTH OF SCOTLAND AND ORKNEY AND SHETLAND STEAM NAVIGATION CO., LTD.

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Porter, Lord Oaksey, Lord MacDermott), June 2, 3, 5, July 28, 1947.]

Negligence—Contributory negligence—Collision at sea—Vessel overtaking in swept channel—Narrow berth given—Overtaken vessel changing course.

On Nov. 9, 1941, at 9.35 a.m., in broad daylight with good visibility, the drifter "Boy Andrew" was proceeding eastward in a swept channel in the Firth of Forth, followed, in parallel course, by the "St. Rognvald." The "St. Rognvald" approached on the starboard quarter of the "Boy Andrew" whose course was 300 ft. from the southern edge of the channel, and made to pass her at about 100 ft. When the stem of the "St. Rognvald" was almost level with the stern of the "Boy Andrew," the "Boy Andrew," negligently and in contravention of the Regulations for Preventing Collisions at Sea, moved, and then swerved hard, to starboard. The two ships collided and the "Boy Andrew" was lost with all hands. Nautical assessors advised that in the circumstances to attempt to pass at 100ft. was negligent.

HELD: the negligence of both ships continued right up to the moment of the collision, and, LORD MACDERMOTT *dissentiente*, each was to blame for the damage which was the result of the continued negligence of both.

Davies v. Mann, (1842), 10 M. & W. 546 *distinguished*.

The Eurymedon, [1938] 1 All E.R. 122 *applied*.

[AS TO CONTRIBUTORY NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 679-684, paras. 963-967; and FOR CASES, see DIGEST, Vol. 36, pp. 109-118, Nos. 726-790.]

Cases referred to:

- (1) *Davies v. Mann*, (1842), 10 M. & W. 546; 12 L.J.Ex. 10; 7 J.P. 53; 36 Digest 113, 751.
- (2) *Radley v. L. & N.W. Railway Co.*, (1876), 1 App. Cas. 754; 46 L.J.Q.B. 573; 35 L.T. 637; 41 J.P. 484; 36 Digest 109, 729.
- (3) *The Eurymedon*, [1938] P. 41; 107 L.J.P. 81; 158 L.T. 445; *sub nom. Corstar Owners v. Eurymedon Owners, The Eurymedon*, [1938] 1 All E.R. 122; Digest Supp.

- (4) *Admiralty Comrs. v. S.S. Volute*, [1922] 1 A.C. 129; 91 L.J.P. 38; 126 L.T. 425; 41 Digest 780, 6417.
- (5) *British Columbia Electric Ry. Co., Ltd. v. Loach*, [1916] 1 A.C. 719; 85 L.J.P.C. 23; 113 L.T. 946; 36 Digest 117, 781.
- (6) *British Fame (Owners) v. Macgregor (Owners), The Macgregor*, [1943] 1 All E.R. 33; [1943] A.C. 197; 112 L.J.P. 6; 168 L.T. 193; Digest Supp.
- (7) *S.S. "Courtfield" (Owners) v. S.S. "Atlantis" (Owners)*, (1919), 1 LL.L.R. 328.
- (8) *Orduna (Owners) v. Shipping Controller, The Orduna*, 90 L.J.P. 67; 41 Digest 741, 5925.
- A (9) *The Highgate*, (1890), 62 L.T. 841; 6 Asp. M.L.C. 512; 41 Digest 749, 6010.
- (10) *Spraight v. Tedcastle*, (1881), 6 App. Cas. 217; 44 L.T. 589; 36 Digest 113, 758.
- (11) *The Margaret*, (1884), 9 P.D. 47; 53 L.J.P. 17; 50 L.T. 447; *on appeal*, *sub nom. Cayzer v. Carron Co.*, 9 App. Cas. 873; 41 Digest 764, 6170.
- (12) *Anglo-Newfoundland Development Co., Ltd. v. Pacific Steam Navigation Co.*, [1924] A.C. 406; 93 L.J.P.C. 182; 131 L.T. 258; 36 Digest 115, 768.
- (13) *The Bywell Castle*, (1879), 4 P.D. 219; 41 L.T. 747; 36 Digest 118, 791.
- B (14) *M'Lean v. Bell*, 1932 S.C. (H.L.) 21.
- (15) *Cork Steamship Co., Ltd. v. Kiddle*, (1920), 2 LL.L.R. 505.

APPEAL from a decision of the First Division of the Court of Session, reported at 1946 S.C. 223.

THE LORD ORDINARY (KEITH), who tried the case, found that the collision was due to the negligence of both vessels and apportioned the blame between them. On appeal, the First Division held that the "St. Rognvald," though at fault in steering a course so close to that of the "Boy Andrew," was not to be regarded as partly responsible for the collision, and that the "Boy Andrew" was wholly to blame. The House of Lords now restored by a majority the interlocutor of the LORD ORDINARY (KEITH).

The facts appear in the opinions of VISCOUNT SIMON and LORD PORTER.

Carpmael, K.C., and *W. Ross McLean* for the appellants.

D *Hill Watson, K.C.*, *Porges* and *C. J. D. Shaw* for the respondents.

The House took time for consideration.

VISCOUNT SIMON: My Lords, the collision between these two vessels occurred in the Firth of Forth at about 9.35 a.m., on Nov. 9, 1941. The "Boy Andrew" was a herring drifter converted for naval service, flying the white ensign, and employed by the Admiralty in anti-submarine work. She was 90 ft. long with 20 ft. beam and approximately 10 ft. draught. The "St. Rognvald" is a British commercial vessel 230 ft. long, 31 ft. beam, and her draught at the time of the collision was 12 ft. forward and 17ft. 8 ins. aft. Both vessels were proceeding on an easterly course in a swept channel running east and west which was two cables wide and was marked by a line of buoys placed in the centre line of the channel at intervals of about a mile. The wind was from the south-east, of a strength of about 5 on the beaufort scale, and there was an ebb tide running out at about one and a half or two knots. Visibility was reasonably good. When the "St. Rognvald" entered the buoyed channel from Leith harbour, there were three vessels proceeding eastward along the channel ahead of her—a Ben Line ship immediately ahead, the "Boy Andrew" ahead of the Ben Line ship, and ahead of that again a Norwegian vessel, the "Sverre Nergaard," the pilot of which was called as a witness by the owners of the "St. Rognvald" and gave important evidence. The Ben Line ship overtook both the "Boy Andrew" and the "Sverre Nergaard" before the collision, passing the "Boy Andrew" on the latter's port side, and so disappears from the case. The "Boy Andrew" was doing 8 knots before the collision, and the "St. Rognvald" 9 knots. When the "St. Rognvald" had proceeded about three miles down the swept channel and was approaching number 7 buoy, she had the "Boy Andrew" on her port bow. At that time both vessels were pursuing the same compass course, the "Boy Andrew" being slightly to the north of the middle line of the southern half of the swept channel, thus leaving rather more than 300 ft. of swept water on her starboard side. The "St. Rognvald" was pursuing a parallel course about 100 ft. in lateral distance to the south of the course of the "Boy Andrew," and she held to this course after passing number 7 buoy and while making to overtake the "Boy Andrew." The relation between the "St. Rognvald" and the "Boy Andrew" was, therefore, that of overtaking and overtaken vessels, and by art. 24 of the Regulations for Preventing Collisions at Sea the

overtaking vessel was under a duty to keep out of the way of the overtaken vessel, while, by art. 21, the overtaken vessel was under a duty to "keep her course and speed." It may be useful to point out that these articles prescribing what is to be done when one ship overtakes another do not exactly correspond with the rules of the road. An overtaking motor is, of course, under the duty so to steer as to keep out of the way of the motor in front, but the motor in front is not bound, when about to be overtaken, to maintain its course. If there is room, it may prudently provide more space for the overtaking car to pass by turning in towards the near kerb. The reason is that on land an overtaking car should overtake by passing on the right side of the vehicle in front, whereas at sea cases may arise when the overtaking ship will pass to port of the vessel it is overtaking and not to starboard. Hence at sea the overtaken vessel is required to maintain its previous course, at any rate, until a collision is imminent, for to do otherwise might produce confusion and help to cause a collision.

While the "St. Rognvald" was approaching the "Boy Andrew" to pass her as described, and when the stem of the former was nearly, but not quite, level with the stern of the "Boy Andrew," the latter made a move to starboard, which suddenly developed into a swerve hard astarboard. Counsel for the appellants before us endeavoured to convince us that what happened was merely a "yaw" of the "Boy Andrew" of the sort which was caused to this comparatively small vessel of slight draught owing to the opposition of wind and tide. In such circumstances the bows of the drifter would naturally "yaw" from side to side, and the course she was pursuing could only be maintained by constant helm action to neutralise such "yaws." The House was advised by the two nautical assessors who were assisting us in matters of navigation that if the "Boy Andrew," having regard to her draught, size and speed, was being properly kept as far as could be on her course, with the then state of wind, sea and tide, her bows would not be diverted by "yawing" from either side of the course she was endeavouring to steer by more than 25 ft. from the middle line. It is quite evident from the evidence in the case that what occurred to the drifter immediately before the collision was a much more serious change of direction. The captain of the "St. Rognvald" said that he noticed a slight movement to starboard on the part of the "Boy Andrew" and at first thought she might be getting nearer in order to hail his ship or deliver some message, but he went on to say that this slight manoeuvre "developed very suddenly into a sudden swerve or hard astarboard, and as soon as that happened I gave the order to the helmsman: 'Hard astarboard,' and rang to stop the engines." The pilot on board the Norwegian vessel entirely confirms this, for, looking back, he had seen the "Boy Andrew" (which was then fine on his starboard quarter) "pitching and sheering about a little," as a small craft in such circumstances might be expected to do, when he observed her taking this sudden turn to starboard, and formed the conclusion (which he expressed to the captain of the "Sverre Nergaard") that "this little fellow is going out of the channel." The cause of this sudden and unexpected move of the "Boy Andrew" remains a mystery, for when the "St. Rognvald" collided with her the lamentable consequence was that every one of the 13 men on board the drifter was drowned. There was evidence that the steering gear of the drifter had been inspected and overhauled a month before the collision and there is no material in the evidence to show whether this fatal movement by the "Boy Andrew" was intentional or accidental. It was, of course, on the face of it, a breach of art. 21, and in the absence of any evidence pointing to any other conclusion, must be regarded as a negligent breach of the ordinary rules of proper navigation which caused, in whole or in part, the damage resulting from the collision. Both LORD KEITH, who tried the case, and the First Division of the Court of Session (the LORD PRESIDENT (NORMAND), with LORDS MONCREIFF, CARMONT, and RUSSELL) have held the "Boy Andrew" to blame for causing the disaster, and I agree with LORD NORMAND in his view (1946 S.C. 232) that:

... in the absence of any reasonable explanation, I have no doubt that the LORD ORDINARY was correct in finding that the navigation of those in authority on the "Boy Andrew" was grossly in fault.

The matter on which LORD KEITH and the Court of Session differed was

whether the action of the "St. Rognvald" should also be regarded as a cause of the collision, so that both ships were to blame. LORD KEITH thought this was the case, but LORD NORMAND and his colleagues took a different view. The point is a fine one, because both the courts in Scotland adopted the advice of their nautical expert that the course steered by the "St. Rognvald" was faulty in that she was aiming to pass the "Boy Andrew" too close. Our own nautical advisers take the same view. The House put to them the following question:—

A Please put out of your minds that an accident did happen in this case and advise us whether, when the "Boy Andrew" was following its course in the south band of the swept channel and the "St. Rognvald" was on a parallel course to the south of her, it was good seamanship in the circumstances for the latter to steer to pass the former at 100 feet.

The answer was :

B We are agreed that it was not good seamanship in the circumstances.

I understand this to mean that, before attempting to pass, the "St. Rognvald" should have starboarded so as to leave a wider berth between herself and the drifter, both in order to reduce the risk if the "Boy Andrew" happened to move somewhat nearer, and also to give the "St. Rognvald" more time to avoid a collision if a danger of this sort presented itself. The master of the "St. Rognvald" admitted in his evidence that there would have been no accident if the lateral distance had been 200 ft.

C The ground on which the LORD PRESIDENT (NORMAND) and his colleagues held that the "St. Rognvald," though at fault in steering a course so close to that of the "Boy Andrew," was not to be regarded as partly responsible for the collision was that they considered this fault as being merely a *causa sine qua non*, and not as contributing to the disaster. If, indeed, the navigation of the "St. Rognvald" did not operate as a cause of the collision, then, of course, the owners of that vessel are free from liability, however faulty the conduct of their vessel may have been. Negligence, whether on land or at sea, does not constitute a good cause of action unless it is a cause of the damage that occurs as the result of it. LORD NORMAND considered that the situation was analogous to that dealt with in *Davies v. Mann* (1). In that famous case, the defendant's servant, by driving his waggon negligently along a highway, ran over and injured a donkey belonging to the plaintiff, which the latter had negligently left on the road, so hobbled that it could not get out of the way. The Court of Exchequer held that the injury was caused by the negligent driving of the waggon, and that the plaintiff could recover, notwithstanding that he, at an earlier stage, had been negligent in leaving the animal in this condition on the road. The principle in *Davies v. Mann* (1), has been approved and applied by this House in *Radley v. L. & N.W. Railway* (2), and in cases where it is relevant the principle can be applied to collisions at sea, no less than to road accidents. The principle of *Davies v. Mann* (1), has often been explained as amounting to a rule that when both parties are careless, the party which has the last opportunity of avoiding the results of the other's carelessness is alone liable. The suggested test of "last opportunity" seems to me inaptly phrased and likely in some cases to lead to error, as the Law Revision Committee said in their report (Cmd. 6032, p. 16) :

In truth, there is no such rule—the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong ?

H In *Davies v. Mann* (1), the negligence of the absent donkey-owner, serious as it was, created a static position where nothing that he could do when collision threatened would have avoided the result, whereas the negligence of the driver of the vehicle continued right up to the moment when the collision became inevitable. As by driving more carefully he could have avoided hitting the donkey, his negligence was the sole cause. The negligence of the donkey-owner was, therefore, a fault not contributing to the collision. It was merely a *causa sine qua non*. With the greatest respect, I am unable to see how the doctrine of *Davies v. Mann* (1), is applicable here. One may well ask—which of these two vessels corresponds to the hobbled donkey ? Both ships were moving and answering their helms, though the rule imposed on the "Boy Andrew" the

duty of maintaining her course and speed. The LORD PRESIDENT considered that the "St. Rognvald" was in the donkey-owner's situation. He said (1946 S.C. 233):

Although the "St. Rognvald" was in motion, her position was just as clearly defined and as calculable [by those on the "Boy Andrew" who should have looked astern] in relation to the "Boy Andrew" as was the tethered donkey in relation to the driver who drove over it in *Davies v. Mann*.

Surely this is treating the "St. Rognvald" as though she was moving along tramlines at a pre-destined speed, whereas she was able, if she chose, to starboard and to reduce her speed. The House put to its nautical advisers the question whether as a matter of seamanship a small vessel like the "Boy Andrew," with a bigger ship coming up behind her at a lateral distance of 100 ft., would be entitled to expect the latter ship to steer so as to give her a wider berth when passing her, and we were advised that this might well be expected in the circumstances and would be the proper navigation. The truth is that the "St. Rognvald's" course was not stabilised in fact or in law. She could have given the "Boy Andrew" a wider clearance without leaving the swept channel.

The application of *Davies v. Mann* (1), when two vessels are about to collide was carefully discussed in the English Court of Appeal in *The Eurymedon* (3). This case was not referred to in the argument before the House, nor, I think, in the proceedings in Scotland, but it is much in point. The *Eurymedon* was a large vessel coming up the Thames at night, and was held to blame for not reducing speed, owing to her failure to appreciate in time that the plaintiff's ship was lying at anchor in an improper position nearly athwart the river. The latter ship was also negligent in continuing to lie where she was, but it was contended that, on the principle of *Davies v. Mann* (1), the *Eurymedon* should be held solely to blame. The contention failed. GREER, L.J., analyses the *Davies v. Mann* (1), principle in a series of propositions of which the fourth is ([1938] P. 50):

... if the negligence of both parties to the litigation continues right up to the moment of collision, whether on land or on sea, each party is to blame for the collision and for the damage which is the result of the continued negligence of both. —

This exactly applies here. I cannot agree with LORD NORMAND that the "negligence of the 'St. Rognvald' was in every practical sense antecedent." The case seems to me to fall within the class described ([1922] 1 A.C. 144) by LORD BIRKENHEAD, L.C., in *Admiralty Comrs. v. S.S. Volute* (4), where the proper conclusion is, as the LORD ORDINARY (KEITH) found, that both vessels by faulty navigation contributed to the disaster.

Reference was made to the decision of the Judicial Committee in *British Columbia Electric Ry. Co. v. Loach* (5). There a waggon was negligently driven on to a gateless level-crossing without considering that a train might be just coming, and the collision occurred because the train approached the crossing at an excessive speed and owing to faulty brakes was unable to pull up in time. The Board, through the mouth of LORD SUMNER, held that the railway company's negligence was the sole cause of the accident, and that this remained true even though the train's inability to stop was due to faulty driving and equipment originating before but continuing after the negligence attributed to Loach. The decision supports the view I take, that the "St. Rognvald" cannot escape liability.

The apportionment of blame decreed by the LORD ORDINARY (KEITH) must stand. As indicated in the decision of this House in *British Fame (Owners) v. Macgregor (Owners)* (6), an appellate court should not undertake to alter the proportions fixed by the judge who tried the case save in exceptional circumstances such as were there indicated, and no such exceptional circumstances are shown to exist here. I move that the interlocutor of LORD KEITH be restored, and that the appeal be allowed with costs.

My Lords, my noble and learned friend, LORD THANKERTON, who is unable to be here, wishes me to say that he concurs in this opinion.

LORD PORTER: My Lords, the sole question for your Lordships decision is who was to blame for a collision which took place between the steam drifter "Boy Andrew" and the "St. Rognvald" on Nov. 9, 1941, in the swept channel

of the Firth of Forth at 9.35 a.m. in broad daylight. The "Boy Andrew" was a herring drifter, 90 ft. long by 20 ft. beam and drawing about 10 ft. The "St. Rognvald" is a steel screw steamship of 1,069 tons gross register, 230 ft. long, 31 ft. beam, drawing at the material time about 12 ft. forward and 17 ft. aft. At the material time both vessels were proceeding eastward on parallel courses down the swept channel, the "St. Rognvald" at about 9 knots and the "Boy Andrew" at about 8 knots through the water. Both were overtaking a third ship the "Sverre Nergaard," but though her pilot was able to see and testify as to the events I do not think she was near enough to have any effect on the manoeuvres of the two vessels involved in the collision. The swept channel down which the ships were proceeding was marked by a line of buoys and extended to a cable's length on each side of them. The "Boy Andrew" was steaming in the middle of the southern half of the channel, *i.e.*, about 300 ft. or a little more from the edge of the swept channel: the "St. Rognvald" was on her starboard quarter a little to the south of the drifter's line of advance. The "St. Rognvald" continued to gain and made to pass the "Boy Andrew" at about 100 ft. When her stem was nearly but not quite level with the stern of the "Boy Andrew" the latter vessel made a move to starboard which suddenly developed into a swerve hard to starboard. The master of the "St. Rognvald" thereupon gave the order hard-a-starboard and rang the engine room to stop, but the "Boy Andrew" ran across his bows, was struck aft about 15 ft. from her stern, pushed bodily under water and lost with all hands. The sudden swerve of the drifter is unexplained.

In the circumstances the duty of each vessel is clearly shown in arts. 21 and 24 of the Regulations for Preventing Collisions at Sea, the material portions being :

Article 21 : Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. Article 24 : Notwithstanding anything contained in these rules, every vessel overtaking any other, shall keep out of the way of the overtaken vessel . . .

Both rules are, of course, subject to the general provisions of art. 27 :

In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Article 21 itself contains the note :

When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

These qualifications, however, do not entitle the overtaken vessel to alter her course or speed except in the face of immediate danger of a collision or excuse her if she takes premature action.

In *S.S. "Courtfield" (Owners) v. S.S. "Atlantis" (Owners)* (7), SCRUTTON, L.J., said (1 LL.L.R. 330) :

The safe thing for the stand-on ship is to keep her course and speed until it is clear that a collision cannot be avoided.

See also *Orduna (Owners) v. Shipping Controller* (8).

The obligation of the stand-on vessel is, I think, accurately stated in the article in *SHIPPING AND NAVIGATION* by the late LANGTON, J., Vol. XXX, art. 983, p. 760, in the words :

The stand-on vessel is not justified in altering her course because the other vessel is cutting it fine, since the other vessel's action is guided on the assumption that the stand-on vessel will keep her course,

a statement in support of which the decision in *The Highgate* (9), is quoted, which seems to me none the less applicable though the stand-on vessel in that case was a sailing ship.

In these circumstances the LORD ORDINARY (KEITH) held both vessels to blame, the "Boy Andrew" in two thirds and the "St. Rognvald" in one third, but the First Division of the Court of Session reversed his judgment and found the "Boy Andrew" alone to blame. All nautical assessors in both courts below and in your Lordships' House have advised that, in the circumstances, to attempt to pass at 100 ft. was negligent, since there was ample

room to starboard and the space given did not make sufficient allowance for an accidental deviation, whether negligent or involuntary, which ought to have been envisaged as possible and which would bring the "Boy Andrew" across the course of the "St. Rognvald," and this view was strengthened by the fact that wind and tide were meeting and causing a confused sea and resulting in a "yawing" of the drifter which ought to have been and was not seen from the "St. Rognvald." The master of the latter vessel was not asked whether he saw this "yawing," but he denied that he saw any sheering. It was suggested on his behalf that he might by that word mean something more pronounced than "yawing" and despite the "yawing" deemed it safe to pass at 100 ft. I do not so read his evidence, but I think his meaning immaterial since all the nautical assessors are agreed that as a matter of good seamanship he ought to have given a wider berth.

Each ship accepted the finding that she was to blame, but maintained that her negligence was not the cause or even a cause of the collision. On behalf of the "Boy Andrew" it was said that notwithstanding her sheer the sole cause of the collision was the fact that the "St. Rognvald," by attempting to pass too close had put herself in such a position that she was unable to avoid an accident, or, at any rate, that accident. That negligence, it was submitted, was prior in point of time to the negligence of the "Boy Andrew," and, accordingly, it was said, that, under the ruling in *Loach's* case (5), the "St. Rognvald" was alone to blame, since she had herself put it out of her power to avoid the accident by reason of her prior negligence. I cannot accept this contention. That the "Boy Andrew" was negligent is plain: it was her duty to keep her course and speed yet she starboarded right across the course of the "St. Rognvald." Her fault had not ended before the collision took place: she was always in action and her wrong-doing persisted right up to the moment of this accident: she was always an active party in the final result: her negligence and that of the "St. Rognvald" were at least contemporaneous and some blame—perhaps the major portion though not necessarily the whole—must be attributed to her.

The "St. Rognvald," however, argued that, whatever might be her fault, the "Boy Andrew" alone caused the accident by a manoeuvre which no one could have anticipated, and in any case could have avoided the collision by porting when she realised that the "St. Rognvald" was committed to passing at so short a distance. That the accident was unpredictable and unforeseeable is not, in my view, material. The very reason for which it is undesirable to pass so close is that accidents will happen. Seamen like everyone else may be negligent and a prudent ship master ought to envisage an aberration of course, even beyond that which a more skilful or more careful captain would avoid. Neither, as I think, is it to the point that the particular accident was such as no seaman would expect. It is enough that the second ship should have foreseen the possibility that some occurrence, which was not abnormal, might bring the first vessel across her bows even though that event would not happen save for the negligence of the first. But, it is said, such a view is merely to prove negligence, and not to establish that negligence as the cause or a cause of the collision. The argument is, perhaps, most forcibly and attractively put in the judgments of the Inner House. The "Boy Andrew," it is suggested, could see the course of the "St. Rognvald" throughout and finding her approaching negligently close should have gone to port so as to allow the sea room which that vessel failed to give. She could, therefore, have avoided the accident in the end and was solely to blame.

In my opinion, there are two answers to this argument, one of fact and one of law. As to the facts, your Lordships' House asked the assessors who advised it up to what moment those navigating the "Boy Andrew" might reasonably expect the "St. Rognvald" to move to starboard so as to give her more room when passing. Their answer, as seamen, was "up to the last minute." Even if no such answer had been given, the fact cannot be neglected that it was the duty of the "Boy Andrew" to keep her course and speed and to take no other step unless and until an accident appeared inevitable unless she took some step. It has not been suggested, so far as I understood, nor do I think it could rightfully be contended, that any such stage had been reached. Of course, if it could be shown that the "Boy Andrew" deliberately

took the risk of starboarding across the course of the "St. Rognvald" it might be said that she caused the collision by a deliberate act taken in defiance of all rules of prudence. I do not take the view that such a deduction should be drawn. The true inference is, I think, that, by an incorrect order or a correct order wrongly interpreted, or by a "yaw" which the master or helmsman negligently failed to correct in time, the drifter took the unexpected sheer. Until then it was her duty to keep and she did keep her course and speed.

A There are, undoubtedly, cases in which one vessel involved in a collision having been negligent is yet not the cause or one of its causes in the sense in which that word is legally interpreted because the other vessel involved failed by a subsequent and independent fault to avoid the consequences of that negligence. *Spaight v. Tedcastle* (10), *The Margaret* (11), and *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* (12), are examples of cases in which this principle has been followed in your Lordships' House, but B to make it applicable the negligence of the second ship, must in truth be subsequent and severable or independent. The approach to the decision in this class of case has, in my opinion, never been more accurately stated than in the speech of LORD BIRKENHEAD, L.C., in *The Volute* (4), ([1922] 1 A.C. 136) :

C In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B had not been subsequently and severably negligent. A recovers in full . . . At the other end of the chain, A's negligence makes collision so threatening that though by the appropriate measure B could avoid it, B has not really time to think and by mistake takes the wrong measure. B is not held to be guilty of any negligence and A wholly fails . . . In between these two termini come the cases where the negligence is deemed contributory, and the plaintiff in common law recovers nothing, while in Admiralty damages are divided in some proportion or other.

D Again (at p. 144) :

E Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* (13), rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. And the Maritime Conventions Act with its provisions for nice qualifications as to the quantum of blame and the proportions in which contribution is to be made may be taken as to some extent declaratory of the Admiralty rule in this respect.

F My Lords, in *The Margaret* (11), LORD BLACKBURN expressed the opinion that the rule was the same in Admiralty as in common law, and, whatever may have been the position before the common law was altered, I think it clearly is the same today when the common law rule has been brought into line with that obtaining in Admiralty, and in each the problem should be approached broadly avoiding those fine distinctions which were apt to be drawn when some slight act of negligence on the part of the plaintiff might defeat his claim altogether. In the present case there seems to me to be no clear dividing line G between the operation of one act of negligence and the other. Both were, I think, in operation at the same time and both seem to me to have contributed to the accident.

The only further act of negligence on the part of the "St. Rognvald" seriously relied on by the drifter was a failure to reverse her engines. I cannot think that such an omission had any real effect. The LORD ORDINARY (KEITH) H found that it had not and he has the support of his assessor and the Inner House found that they had no sufficient material before them to give effect to such an argument. In these circumstances I do not think it is incumbent upon your Lordships to determine how far a ship partially to blame can rely upon the rule that a navigator is excused for a wrong action if that action is brought upon by a sudden emergency arising from the action of another ship. I would allow the appeal, restore the judgment of the LORD ORDINARY (KEITH), and, in accordance with your Lordships' general practice, would leave the proportion of blame unchanged.

LORD OAKSEY : My Lords, I agree. The sheering of the "Boy Andrew" to starboard is in the unhappy circumstances of this case unexplained, and she must, therefore, be held to blame. The judgment of the First Division of the Inner House proceeds, I think, on the view that she was also to blame for not keeping a proper look-out aft and that she, therefore, had a last opportunity of avoiding the fault of the "St. Rognvald" in overtaking the "Boy Andrew" without giving her sufficient clearance. In my opinion, the inference that there was no proper look-out in the "Boy Andrew" cannot properly be drawn, for at any moment the "St. Rognvald" might have steered to starboard and so given the "Boy Andrew" adequate clearance. The "Boy Andrew's" duty was to keep her course and speed and she was entitled to assume that the "St. Rognvald" would keep out of the way. That the "St. Rognvald" was in fault has been held by both courts and by all the nautical assessors, including those who have advised your Lordships, and, in my opinion, that fault continued up to and at the very moment that the "Boy Andrew" committed her fault in sheering to starboard. The two faults were, in my opinion, contemporaneous and I can see no ground for holding that the fault of the "St. Rognvald" was not synchronous or had become a stabilised factor like the tethered donkey in *Davies v. Mann*. (1).

LORD MACDERMOTT : My Lords, all the nautical assessors who have advised, during the course of this litigation are agreed that the lateral clearance of approximately 100 ft. which the "St. Rognvald" gave the "Boy Andrew" in overtaking on her starboard side was insufficient and out of keeping with the standards of good seamanship. Both the LORD ORDINARY (KEITH) and the First Division accepted this view and held the "St. Rognvald" at fault in this respect. They also held that the "Boy Andrew," in making the sudden and unexpected swerve to starboard which brought her across the bows of the overtaking vessel was at fault in a manner which directly contributed to the accident. Further, they found, that the "St. Rognvald" was not at fault in the efforts she made to avoid collision after the "Boy Andrew's" change of course. My Lords, there was ample material on which to reach these findings and it is clear they must stand.

In these circumstances the first question to be determined is whether the fault found against the "St. Rognvald" in fact contributed to the collision. This must depend on whether a clearance sufficient to satisfy the requirements of good seamanship would have enabled her to avoid the "Boy Andrew" when the latter made her strange turn to starboard. The material available to found a conclusion on the point is scant, but there was evidence that a lateral distance of 200 ft. would have allowed the "St. Rognvald" to keep clear, and it is plain that this could have been given without bringing that vessel too close to the unmarked southern edge of the swept channel and the perils which might reasonably be supposed to lurk beyond it. I do not think the advice of the assessors can be interpreted as meaning that a prudent mariner, overtaking in these narrow waters, would have anticipated the "Boy Andrew's" sudden move and have regulated his distance accordingly, but on the whole evidence and in all the circumstances I think there is enough (though perhaps not much more) to sustain the conclusion that good seamanship would have left the "St. Rognvald" in a position to keep clear and, accordingly, that her fault must be regarded as contributing in some degree to the accident. It should, however, be added that there was neither finding nor evidence that this fault would, in itself, have caused a collision under the conditions then prevailing. It must rank as a factor because, and only because, it left the "St. Rognvald" in a position which made collision inevitable when the drifter swung across the channel.

The next question is whether, notwithstanding this conclusion, the fault of the "Boy Andrew" should be regarded in law as the sole cause of the collision; or, to put it another way, whether the fault of the "St. Rognvald" was but a *causa sine qua non*. My Lords, notwithstanding the provisions of the Maritime Conventions Act, 1911, this question has still to be settled according to common law rules. The apt test in the present case may be taken from the well-known illustration by LORD BIRKENHEAD, L.C., in *The Volute* (4), ([1922] 1 A.C. 136). Was the "Boy Andrew" subsequently and severably negligent? The same decision gives important guidance on the manner of

applying this test. The answer should not rest on over-fine distinctions or on the sort of analysis which makes various actions and reactions appear to stand apart when, in fact, they were mixed up or pressed together. A line is not to be drawn between the negligent acts unless it can be drawn clearly. "The question of contributory negligence must be dealt with somewhat broadly and upon common sense principles as a jury would probably deal with it," (per LORD BIRKENHEAD, L.C., [1922] 1 A.C. 144).

- A There is another matter to which I would refer before returning to the facts. Once started, the negligence of each ship continued up to the moment of impact. It was said that in law this precluded any finding other than one of joint responsibility. There is, indeed, support for this proposition in certain dicta of the Court of Appeal in *The Eurymedon* (3), but, in my opinion, it is too absolute to be sound and more likely to hinder than help the broad treatment enjoined in *The Volute* (4). It appears to be in conflict with the view of this House as expressed by LORD WRIGHT in *M'Lean v. Bell* (14) (1932 S.C. (H.L.) 30), and, apart from *Davies v. Mann* (1) itself and the instances given by PARKE, B., in the concluding paragraph of his judgment in that case (10 M. and W. 549), there is, I apprehend, ample authority in decisions of your Lordships' House for the view that the continuance of the negligent acts concurrently for some period ending with the accident is not necessarily incompatible with one of such acts being subsequent to the other and the sole cause in law of the damage: see, for example, *The Margaret* (11) and *Cork Steamship Co. v. Kiddle* (15), (both cited in *The Volute*), and *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* (12).

- C In the present case both vessels were pursuing parallel courses before the emergency arose. The "Boy Andrew" was proceeding in a manner which gave no indication of fault on her part. The "St. Rognvald" was coming up too close. The rapid change in this situation is best described in the words of the LORD ORDINARY (1946 S.C. 225):

- D After passing buoy 7 the "St. Rognvald" made to overtake the drifter on her starboard side at a lateral distance between the vessels of about 100 ft. At this point the drifter made a move to starboard which suddenly developed into a sudden swerve hard to starboard. The "St. Rognvald" was then on the starboard quarter of the "Boy Andrew," and her stem must have been nearly, but not quite, level with the stern of the "Boy Andrew."

- E Now at that time it was daylight, visibility was reasonably good and the position of the overtaking vessel plain to be seen. As the LORD ORDINARY further remarked (*ibid.* p. 226):

- F Any observation aft from the "Boy Andrew" must have disclosed the proximity of the "St. Rognvald" and shown that any movement to starboard by the "Boy Andrew" at the time the movement was made was fraught with the gravest peril.

- G Yet, without warning the drifter swerved across the "St. Rognvald's" bows and made inevitable the collision which occurred but a minute or less afterwards. If, as has been found, this movement was negligent, it must, I think, follow that the "Boy Andrew" failed to take due care for her own safety. She knew, or ought to have known, that she was being overtaken. That is the basis of the fault of not maintaining course found against her. And she knew, or ought to have known, when she starboarded that the "St. Rognvald," then committed to passing too closely, was in a position which made any reduction in the lateral interval highly dangerous. The reason for the drifter's swerve is unknown, but in that situation the explanation does not seem material once her action has been held negligent.

- H Was this negligence subsequent? On the facts I regard it as clear that it was, for the "Boy Andrew" did nothing to contribute to the accident until the fault of the "St. Rognvald" had brought her to a position which should have warned the drifter that a move to starboard "was fraught with the gravest peril." The time which the "Boy Andrew" had to realise the risks of not maintaining course may not have been lengthy, but it must have been appreciable, and it was, to my mind, sufficient to mark her fault as subsequent without resort to any fine distinctions. This matter of time has to be considered in relation to all the material circumstances, and, in particular, to what the demands of reasonable skill and care on the part of the "Boy Andrew" were. If she had been forced

to manoeuvre, an appropriate allowance would have to be made, but, in fact, all she had to do was to do nothing but keep her course and speed.

If, then, as I would hold, the "Boy Andrew's" negligence was subsequent, was it also severable? I think it was. The negligent acts were distinct and independent. There is nothing in the available material to show that the fault of the "St. Rognvald" in any way hampered the due navigation of the drifter or induced a single false step on her part. Indeed, it may well be said that this tragic event occurred not because the conduct of the "St. Rognvald" affected the navigation of the "Boy Andrew" but because it did not. I am not unmindful that your Lordships' assessors expressed the view that the "Boy Andrew" could reasonably have expected the "St. Rognvald" to sheer off and give more room as she came up to pass. This might be important if the fault charged against the overtaken ship was that she did not seek safety by going to port. As things are, it cannot account for what happened and has, in my view, no real significance.

For these reasons I am of opinion that the fault of the "Boy Andrew" was both subsequent and severable and that she alone was to blame. I would, accordingly, affirm the interlocutor of the First Division and dismiss the appeal.

Appeal allowed.

Solicitors: *the Treasury Solicitor*, agent for *Boyd, Jameson & Young*, W.S., Edinburgh (for the appellants); *Ince and Co.*, agents for *Beveridge, Sutherland and Smith*, W.S., Leith, and *Morice and Wilson*, Aberdeen (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

MUNRO v. DAW.

[COURT OF APPEAL (Tucker, Somervell and Evershed, L.JJ.), July 18, 1947.]

Landlord and Tenant—Rent restriction—Recovery of possession—Dwelling-house required by landlord as residence for employee—Dwelling-house let to tenant "in consequence of employment" by landlord—Relationship of landlord and tenant—No evidence that house let in consequence of particular employment—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I (g) (i).

The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I (g) (i), gives the court power to make an order for the possession of a dwelling-house within the Rent Restrictions Acts if the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment, and the tenant was in the employment of the landlord or a former landlord and the dwelling-house was let to him "in consequence of that employment" and he has ceased to be in that employment. The words "in consequence of that employment" refer solely to the relationship of employer and employee, and do not require that the letting should have been in consequence of the particular employment of the tenant.

Where, therefore, it was found as a fact that it was reasonable to make an order for possession, that the dwelling-house was reasonably required by the landlord for occupation as a residence for a person engaged in his whole-time employment, and that the tenant was in the employment of the landlord, and it was submitted that, although there was evidence on which the judge could come to the conclusion that the house was let to the tenant in consequence of the fact that she was the landlord's servant, there was no evidence that the house was let to her in consequence of the particular capacity in which she was employed by him, *viz.*, as an office-cleaner.

Held: it was only necessary for the landlord to prove a letting in consequence of the relationship of employer and employee between the landlord and the tenant, and the court had power to make an order for possession.

[AS TO POSSESSION REQUIRED FOR LANDLORD'S EMPLOYEE, see HALSBURY, *Hailsham Edn.*, Vol. 20, p. 331, para. 395; and FOR CASES, see DIGEST, Vol. 31, pp. 576-578, 580-581, 583, Nos. 7256-7269, 7292-7295, 7318-7320.]

Cases referred to :

- (1) *Braby (Frederick) & Co. v. Bedwell*, [1926] 1 K.B. 456; 95 L.J.K.B. 412; 134 L.T. 320; 31 Digest 583, 7320.
- (2) *Braithwaite & Co., Ltd. v. Elliott*, [1946] 2 All E.R. 537; [1947] K.B. 177; [1947] L.J.R. 172; 176 L.T. 62.

APPEAL by the tenant from an order of HIS HONOUR JUDGE CAREY EVANS at King's Lynn County Court, dated Apr. 17, 1947.

A In an action by the landlord against the tenant for possession, the county court judge found that the dwelling-house was let to the tenant in consequence of her employment, within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I (g) (i). The tenant appealed on the ground that there was no evidence on which the judge could so find. The Court of Appeal now dismissed the appeal.

T. F. Southall for the tenant.

B Ackner for the landlord.

TUCKER, L.J. : This is an appeal by the defendant to an action which was brought against her claiming possession of certain premises of which she was the tenant. In 1944, the landlord, who was a house agent, had bought the house for his managing clerk. The managing clerk left his service in July or Aug., 1945, and in September of that year the landlord let the premises to the tenant who had been in his employment since Apr., 1945, as a domestic help, and from June or July, 1945, also as an office cleaner. The tenant left the landlord's employment in Dec., 1946, and at the time of the issue of the summons in these proceedings he required possession of the premises for his new managing clerk.

The claim for possession was made under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, and sched. I (g). Section 3 provides :

D (1) No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and . . . (a) the court has power so to do under the provisions set out in sched. I to this Act . . .

Schedule I provides :

E A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) . . . (g) the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment or in the whole-time employment of some tenant from him or with whom, conditional on housing accommodation being provided, a contract for such employment has been entered into, and . . . (i) the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment . . .

In the present case the judge found as facts that it was reasonable to make the order for possession, that the dwelling-house was reasonably required by the landlord for occupation as a residence for some person engaged in his whole time employment, that the tenant was in the employment of the landlord, that the dwelling-house was let to her in consequence of that employment, and that she has ceased to be in that employment. None of those findings is disputed except the finding that the dwelling-house was let to the tenant in consequence of her employment, it being said that there was no evidence on which the judge could arrive at that finding. It is submitted (and, I understand, it is not disputed) that there was evidence on which the judge could come to the conclusion that the dwelling-house was let to her in consequence of the fact that she was the landlord's servant, but it is said that there is no evidence that the house was let to her in consequence of the fact that she was employed by him as an office cleaner.

H The question, therefore, arises whether or not the judge has properly interpreted the meaning of the words "in consequence of that employment." In that connection two authorities have been cited to us, but, speaking for myself, I can derive very little assistance from them in the solution of the particular problem which has been put before us. The first of them is *Frederick Braby*

& Co., Ltd. v. Bedwell (1). The headnote of that case reads ([1926] 1 K.B. 456) :

By s. 5 (1) (i) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the existence of alternative accommodation shall not be a condition of an order for the possession of a dwelling-house where the tenant was in the employment of the landlord, and the dwelling-house was let to him "in consequence of that employment," and he has ceased to be in that employment:—*Held*, that it must be shown not only that the landlords let but also that the tenant took the premises in consequence of the employment.

In his judgment SHEARMAN, J., who was one of the members of the Divisional Court which decided that case, having pointed out that this was a question of fact, said (*ibid.* p. 459) :

Counsel for the plaintiffs contended that it is sufficient to establish that the plaintiffs would not have let the house to the defendant had he not been in their employment. I do not think that that is sufficient. The words "in consequence of" imply causation, and mean that the tenancy was created in consequence of the employment. The court must be satisfied not only that the landlords let the premises to the defendant in consequence of his being in their employment, but also that the defendant took the premises in consequence of his being in their employment.

In *Braithwaite & Co., Ltd. v. Elliott* (2), which was before this court in the autumn of last year, the court overruled *Braby's* case (1), and held that it was not essential to the causation that the tenant should have taken the premises in consequence of having been in the landlords' employment, that is to say, knowledge on the part of the tenant was immaterial. Dealing with this matter, MORTON, L.J., said ([1946] 2 All E.R. 539) :

In my view, the material question is: What was the reason which actuated the landlord in letting the cottage to the defendant? The wording of the Act is: "and the dwelling-house was let to him in consequence of that employment." When there is an agreement of letting, the landlord agrees to let and the tenant agrees to take, and, in my view, under the section one has to inquire only: What was in the mind of the person who let? Was the house let to the defendant in consequence of his employment or was it let to him for some other reason?

ASQUITH, L.J., who was the only other member of the court who referred to this point, said (*ibid.*, 541) :

Who let this cottage? Obviously the plaintiffs. Why did they let it to the defendant? Because he was employed by them. That is what the county court judge has found, and it seems to me to conclude the matter.

In that case the point which is now taken before us was not taken and it was not material in that case to take it, namely, that "employment" means, not the relationship of master and servant, but the nature of the particular employment for which the particular tenant was employed.

It is sufficient for me to say that I think the natural meaning of the words in sched. I is the relationship of employer and employed, and that there is nothing in the language of the schedule to suggest that what was intended was a requirement in consequence of the nature of the particular employment of the tenant. I think it would be straining the language used to put such an interpretation on the words. Therefore, as I think, the judge applied the proper test, and, his finding being one of fact, there is no material upon which this court can interfere with his finding.

SOMERVELL, L.J. : I agree.

EVERSHED, L.J. : I agree.

Appeal dismissed.

Solicitors :—*Pritchard, Sons, Partington & Holland*, agents for *Alan G. Hawkins & Co.*, King's Lynn (for the tenant); *Field, Roscoe & Co.*, agents for *Sadler, Lemmon & Gethin*, King's Lynn (for the landlord).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

TYNE IMPROVEMENT COMMISSIONERS *v.* ARMEMENT
ANVERSOIS SOCIETE ANONYME AND OTHERS.

THE BRABO.

[COURT OF APPEAL (Scott, Bucknill and Wrottesley, L.JJ.), June 9, 10, 11, 12, 13, July 16, 1947.]

Constitutional Law—Action against Minister of Crown—Competency—Minister of Supply—Privileges and immunities inherent in Crown—Action by conservancy authority against Minister as cargo owner to recover expenditure incurred in removing wrecked ship—War Department Stores Act, 1867 (c. 128), s. 20—Ministry of Supply Act, 1939 (c. 38), s. 2 (3)—Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939 (S.R. & O., 1939, No. 877).

Practice—Writ—Service—Service out of the jurisdiction—Action “properly brought” against defendants within jurisdiction—Action by conservancy authority against shipowners and Minister of Supply as cargo owner to recover expenditure incurred in removing wreck—Shipowners outside jurisdiction—R.S.C., Ord. 11, r. 1 (g).

Before allowing service out of the jurisdiction of a writ of summons or notice of a writ of summons, under R.S.C., Ord. 11, r. 1 (g), it is the duty of the court to see not only whether the person to be served is a necessary or proper party to the action, but also whether the action is properly brought against the defendants within the jurisdiction. Where it is apparent on the admitted facts (and no question of foreign law is involved) that the plaintiff cannot succeed against the defendants served within the jurisdiction, the action is not properly brought within the meaning of R.S.C., Ord. 11, r. 1 (g), and service out of the jurisdiction on another defendant cannot be allowed.

A conservancy authority incurred heavy expenditure in clearing the obstruction caused by the wreck of a Belgian ship and its cargo consisting of ordnance stores which were the property of the Crown. Under the War Department Stores Act, 1867, as adapted by the Ministry of Supply Act, 1939, and the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939, the Minister of Supply was empowered to institute or defend any action in regard to these stores. By the conservancy authority's special Act, (the Tyne Improvement Act, 1890, s. 42), the authority could recover from the shipowners and cargo owners the expenses incurred in removing a wreck. In an action against the shipowners and the Minister of Supply to recover the expenditure incurred, the conservancy authority asked for leave to serve notice of a concurrent writ out of the jurisdiction on the shipowners, who were a Belgian company, registered and resident in Belgium:—

Held: (i) the War Department Stores Act, 1867, s. 20 (as adapted by the Ministry of Supply Act, 1939, and the order made thereunder), which gave the Minister power to defend an action, did not deprive the Crown of any defences otherwise open to it, and the proviso to the section made it clear that, though the party sued was not the Crown but the Minister, the Minister had all the privileges and immunities inherent in the Crown, with the result that the Minister was not liable under the Act for any expenditure incurred by the authority in clearing the wreck.

Minister of Supply v. British Thomson-Houston Co., Ltd. ([1943] 1 All E.R. 615) distinguished.

(ii) the conservancy authority had no right of action against the Crown under the Tyne Improvement Act, 1890, s. 42, because, under the Tyne Improvement Act, 1934, the rights of the Crown had been expressly reserved.

(iii) since the Minister of Supply was not liable to the conservancy authority, the action against him was not “properly brought,” within the meaning of R.S.C., Ord. 11, r. 1 (g), and service out of the jurisdiction on the ship owners could not be allowed.

The law relating to liability for the cost of wreck-removal criticised by SCOTT, L.J.

[AS TO SERVICE OUT OF THE JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 26, pp. 31-33, para. 44; and FOR CASES, see DIGEST, Practice, pp. 355-362, Nos. 690-741.]

AS TO LEGAL PROCEEDINGS AGAINST THE CROWN AND ITS SERVANTS, see HALS-

BURY, Hailsham Edn., Vol. 6, pp. 486-491, paras. 599-603, and supplement; and FOR CASES, see DIGEST, Vol. 11, pp. 523, 524, Nos. 284-293.]

Cases referred to:

- (1) *The Hagen*, [1908] P. 189; 77 L.J.P. 124; 98 L.T. 891; Digest Practice 340, 579.
- (2) *Russell (John) & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.*, [1916] 2 A.C. 298; 85 L.J.K.B. 1152; 115 L.T. 86; Digest Practice 362, 739.
- (3) *Massey v. Heynes*, (1888), 21 Q.B.D. 330; 57 L.J.Q.B. 468; 59 L.T. 470; Digest Practice 356, 701.
- (4) *Minister of Supply v. British Thomson-Houston Co., Ltd.*, [1943] 1 All E.R. 615; [1943] K.B. 478; 112 L.J.K.B. 520; 168 L.T. 389; Digest Supp.
- (5) *Young v. The Scotia*, [1903] A.C. 501; 72 L.J.P.C. 115; 89 L.T. 374; 1 Digest 109, 130.
- (6) *Pearson v. Holborn Union Assessment Committee*, [1893] 1 Q.B. 389; 62 L.J.M.C. 77; 68 L.T. 351; 57 J.P. 169; 38 Digest 486, 444.

INTERLOCUTORY APPEAL by the first defendants, Armement Anversoise Societe Anonyme, owners of S.S. Brabo, from an order of PILCHER, J., dated Jan. 27, 1947.

To recover expenditure incurred by them in clearing the wreckage of the Brabo, the plaintiffs, the Tyne Improvement Commissioners, a conservancy authority, brought an action against the shipowners (the first defendants), the Minister of Supply (the second defendant) as cargo owner on behalf of the Crown (since the cargo consisted of ordnance stores), and the British Iron and Steel Corporation, Ltd. (the third defendants), as agents of the cargo owner. On learning that the first defendants were a Belgian company, registered and resident in Belgium, the plaintiffs, on June 6, 1946, obtained *ex parte* leave from PILCHER, J., to serve notice of a concurrent writ out of the jurisdiction on these defendants. On an application by the first defendants to set aside service of notice out of the jurisdiction, PILCHER, J., held, by his order of Jan. 27, 1947, that they were a "necessary or proper party" within the meaning of R.S.C., Ord. 11, r. 1 (g), as co-defendants to the action brought against the Minister and the Steel Corporation, and that the action was "properly brought" against the last two defendants, and he refused to set aside the notice.

The Court of Appeal now held that the action against the Minister and the corporation could not be regarded as one that was "properly brought," within the meaning of R.S.C., Ord. 11, r. 1 (g), because, on the correct view of the law as applied to the submitted facts, the Minister and corporation were not liable to the plaintiffs, and they allowed the appeal. The facts appear in the judgment of SCOTT, L.J.

Carpmael, K.C., and *A. J. Hodgson* for the conservancy authority.
Willink, K.C., and *Mocatta* for the Belgian company.

Cur. adv. vult.

July 16. SCOTT, L.J., read the following judgment. I am about to read the judgment of the court, with the caution that towards the end of it I say some things on my own behalf to which I do not feel justified in committing my brethren. They will say what they think right with regard to that matter.

This is the agreed judgment of the court. The plaintiffs' claim in this action is for the net expenditure incurred by them as the conservancy authority for the River Tyne and the Port of Newcastle-upon-Tyne, in exercise of their statutory powers of clearing the obstruction caused by the wreck of S.S. Brabo and its cargo, consisting partly of steel billets and slabs and partly of wood pulp. At all material times the Brabo was owned by a Belgian company registered in Belgium and resident there. By order, dated Jan. 27, 1947, PILCHER, J., refused to set aside service of notice of a concurrent writ out of the jurisdiction on the owners of the Brabo, for which *ex parte* leave had been refused by the assistant registrar, but granted by himself on June 6, 1946. By his order of Jan. 27, 1947, he held (i) that the appellants (to whom we shall refer as the Belgian company) were a "necessary or proper party" within the meaning of R.S.C., Ord. 11, r. 1 (g), as co-defendants to the action brought on Mar. 20, 1946, by the plaintiffs, the Tyne Commissioners, against the Minister of Supply and the British & Iron Steel Corpn., Ltd. (to whom we shall refer as "the Minister" and "the corporation" respectively), and (ii) that that action was "properly brought" against those two defendants within the meaning of that rule. In the exercise of the discretion given to the judge by R.S.C.,

Ord. 11, he held that it was right that the Belgian company should be called on to appear as a defendant in that action. That company had, in fact, been made the first defendant on the writ for service within the jurisdiction issued on Mar. 20, 1946, because the plaintiffs then believed that the Belgian company was at that time carrying on business in England. It was only when the judge held that belief to be mistaken that the plaintiffs had to resort to R.S.C., Ord. 11, r. 1 (g), for leave to serve the Belgian company in Belgium. The present appeal is against the order of PILCHER, J.

A The various circumstances in which the courts of this country will compel a person resident in a foreign country to come over here and answer in proceedings are to be found in R.S.C., Ord. 11. For the most part the cases set out in the rule are self explanatory, for instance where the subject-matter is land in this country, but sub-r. (g) varies in kind from the other cases since the test is whether the person sought to be served and so made amenable to process in this country, although resident abroad, is a necessary or a proper party to an action properly brought against a person duly served in this country. To all cases alike, however, the three rules laid down by FARWELL, L.J. ([1908] P. 201) in *The Hagen* (1) apply. The first of these rules is that the court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction. The second is that, if there is any doubt whether the case comes within the order, the doubt must be resolved in favour of the foreigner. The third is that full and fair disclosure must be made by the party making the original *ex parte* application, and failure to make it is a reason for discharging the order, while leaving the party free to apply again subsequently. While the courts of this country have made it clear that they will not try the action when called on to decide whether or not to grant leave to serve the writ, yet they never refuse to hear what the defendant proposed to be served has to say when he enters, as in this case, a conditional appearance and moves to set aside the service of the writ on the ground that the facts do not bring the case within the terms of R.S.C., Ord. 11. As LORD SUMNER said ([1916] 2 A.C. 304) in *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.* (2) :

The words "properly brought" enure to the protection of the person out of the jurisdiction whom it is proposed to serve with process.

E In the case now before us, it was argued by counsel for the plaintiffs that the second and third defendants might waive any defence that was open to them. To permit the possibility of such a waiver to influence our decision in this case would be contrary to the spirit of the decision of the House of Lords in *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.* (2), where the fact that one of the defendants resident abroad had submitted to the jurisdiction of the English court was held not to establish that the action had been properly brought so as to enable a foreign defendant to be served with the writ. It seems to us that the duty is always on the court to see whether the action is properly brought, and that an action is not properly brought when the facts are all admitted and there is no question of foreign law, and on those facts it is apparent that the plaintiffs cannot succeed against the defendants served within the jurisdiction. In this particular case we think that it is clear that the court should be specially careful before allowing the writ to be served on the foreign defendant. We were informed that the ship was about 3,700 tons gross register, and it appears from the judgment of PILCHER, J., that the expense involved in salving what could be salvaged and in removing the obstruction will amount to some £250,000. Service of the writ on the foreign defendant may result in a tremendous financial liability on an entirely innocent shipowner. Inasmuch as the plaintiffs' claims against ship and cargo interests arise out of the same set of circumstances, viz., the sinking of the ship in a position where she and her cargo constituted an obstruction to the harbour, necessitating the removal operations of the plaintiffs, it seems clear to us that the owners of the ship and cargo would have been properly joined as co-defendants under R.S.C., Ord. 16, r. 4. The test laid down by LORD ESHER, M.R., (21 Q.B.D. 338), in *Massey v. Heynes* (3) applies, and we agree with the judge that the Belgian company would have been a "proper" party, and, therefore, that the first condition precedent of the rule under consideration is satisfied. Whether the Belgian company would have been a "necessary" party is another question. *Prima facie*, that condition means that without the addition of the foreign party the defendant within the juris-

diction is not or may not be liable, but that with that defendant also before the court his liability may be established.

The only issue for decision by us is, therefore, that which arises on the second condition, *viz.*: Can the action for the purpose of service out of the jurisdiction be regarded as one that was "properly brought?" Counsel for the Belgian company conceded that, if the plaintiffs' claim were based on allegations of fact which, although disputed by the defendants, would, if established, entitle them to succeed in the action, the action ought to be treated as properly brought. In such a case the issues of fact would have to be decided at the trial, but he argued that, when all the relevant facts are admitted and none is in dispute, and on the correct view of the law those facts do not entitle the plaintiffs to succeed in their action, then the second condition is not satisfied, the action is not "properly brought," and service out of the jurisdiction on another defendant cannot be allowed. Counsel for the plaintiffs contended that, if there is an arguable question of law which has to be solved before judgment can be given against the existing defendants on the record, it is sufficient to make the action one "properly brought." We agree with the submissions of counsel for the Belgian company as to the principles applicable. The judge, though disposed to think that in the end the Minister and the corporation would be held free from liability, held that the difficulty of solving that legal problem was enough to allow him in his general discretion to treat the great convenience of having the owners of the ship, as well as the owners of cargo, before the court as a sufficient reason for allowing service of the writ on the foreign defendant.

We proceed, therefore, to consider the question whether on the submitted facts it can be reasonably argued that the Minister or the corporation are liable to the plaintiffs in this action. First, we will discuss the legal liability of the Minister. Under the Ministry of Supply Act, 1939, the Minister, thereby created, is given power by s. 2 (1) (a) "to buy or otherwise acquire . . . articles required for the public service," which, by s. 19, are defined as including such things as made up the cargo of the Brabo. Section 2 (3) is as follows :—

His Majesty may by Order in Council apply in relation to the Minister or property for the time being vested in or under the control of the Minister, with any necessary modifications or adaptations, any of the provisions of the enactments set out in pt. II of the schedule to this Act.

Part II of the schedule includes the War Department Stores Act, 1867, s. 20, which contains the following provisions :

The Secretary of State for War may institute and prosecute any action, suit, or proceeding, civil or criminal, concerning military or ordnance stores, or other Her Majesty's stores under the charge or control of the Secretary of State for War, or any stores sold or contracted to be delivered to or by the Secretary of State for War for the use or on account of Her Majesty . . . and may defend any action, suit, or proceeding concerning any such stores, matter or thing as aforesaid . . . Provided always as follows : (1) Nothing herein shall take away or abridge in or in relation to any such action, suit, or proceeding any legal right, privilege, or prerogative of the Crown ; and in all such actions, suits, and proceedings, and in all matters and proceedings connected therewith, the Secretary of State for War may exercise and enjoy all such rights, privileges, and prerogatives as are for the time being exercised and enjoyed in any proceeding in any court of law or equity by the Crown, as if the Crown were actually a party to such action, suit, or proceeding : (2) It shall be lawful for Her Majesty, if and when it seems fit, to proceed by information in the Court of Exchequer, or by any other Crown process, legal or equitable, in any case in which it would have been competent for Her Majesty so to proceed if no provisions respecting procedure had been inserted in this Act.

The power of delegated legislation conferred by the Ministry of Supply Act, 1939, s. 2 (3), was duly exercised by the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939, art. 6 and sched. II, so as to put the Minister of Supply in the same statutory position in regard to s. 20 of the War Department Stores Act, 1867, as is occupied by the Secretary of State for War. The adaptation in sched. II to the order is in these words :

In s. 20 [of the War Department Stores Act, 1867] references to "the Secretary of State for War" shall be construed as including references to the Minister of Supply and the reference to "military or ordnance stores" as including a reference to any

article belonging to or supplied by or for the purposes of the Minister of Supply.

Prima facie, no Minister is owner of Crown or government property. He is a mere agent of the Crown. He may be given by statute a right of action as if he were owner of such property—whether real or personal—but that does not make him an owner in fact or put on him the liabilities attaching to an owner in fact, and we cannot read into the Ministry of Supply Act, 1939, an intention to do more in the case of that Minister. Both parts of the Brabo's cargo would have come within the expression "military or ordnance stores," even if the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939, had never been passed, but the order makes that interpretation doubly clear. Steel bought at that time for war purposes by the British Purchasing Commission on behalf of the government and consigned to the corporation as agent of the Minister (as is stated in the affidavit of Mr. Fenwick, and not controverted by any evidence of the plaintiff authority) obviously was so acquired in the war as "ordnance stores," and the court can have no doubt that the wood-pulp also was. That brings the whole cargo within the terms of s. 20 of the Act of 1867, which in express terms treats all ordnance stores as the property of the Crown, and not of the Minister.

In so far as the question of ownership in the present case is one of fact, it was conceded by the plaintiffs both below and before us that the whole cargo was "government owned," and the judge so held in express terms. His findings on this cardinal point of fact are so definite that they should be quoted :

It was not disputed that the cargo on board the Brabo in respect of which some of the plaintiffs' expenses were incurred, was what is known as "government owned" and in that sense the property of the Crown. I had before me an affidavit sworn by Mr. Fenwick on behalf of the first defendants in which he states that the Minister of Supply was dealing with the cargo under the powers conferred upon him by the Ministry of Supply Act, 1939, and that the British Iron & Steel Corporation were the consignees named in the bill of lading covering certain steel billets, the shippers being the British Purchasing Commission. Mr. Fenwick also said that the third defendants were acting as agents for the Minister of Supply and were not themselves the owners of the goods. There is really no dispute in fact in the present case. Whilst the second defendant is a Minister of State and the third defendant a limited liability company, there is no doubt that the cargo was, to use once again the popular, but technically incorrect, expression, "government owned." It was conceded by Mr. Carmichael, who appeared for the plaintiffs, that the property in the Brabo's cargo was in the Crown subject to any qualification or limitation upon the Crown's proprietary rights which might properly be inferred from the provisions of the Ministry of Supply Act, 1939.

It is thus clear beyond doubt that the corporation also was a mere agent acting for the convenience of the Crown in performing ministerial duties such as customs entries in respect of imported steel. It is equally clear that the position of the Minister was not that of "owner" in the natural sense of the word, although the Ministry of Supply Act, 1939, must be scrutinised to see whether its terms require the court to hold that he is thereby made a statutory "owner" in some artificial sense for the purpose of the Acts under which the plaintiff authority was entitled to recover its wreck removal expenses from the "owner." Whether that is so is a question of interpretation of (a) the Ministry of Supply Act, 1939, and (b) the Acts containing the special powers on which the plaintiffs rely.

First, it is necessary to bear in mind the nature of the plaintiffs' claim. That claim is in respect neither of a contract, express or implied, nor of a tort. The indorsement on the writ is not so precise as we could wish in such a case, but it became clear in the course of the hearing here and below that it is based on a section in one of the plaintiffs' special Acts (the Tyne Improvement Act, 1890, s. 42). The first question that arises, once it is clear that the defendants within the jurisdiction are mere agents of the Crown in respect of goods which were the property of the Crown, is whether the Crown can be regarded as affected by a section which does not either expressly or by necessary implication mention the Crown. The only words which could be relied on for this purpose in the War Department Stores Act, 1867, [as adapted by the Ministry of Supply Act, 1939, and the order made thereunder] are the words in s. 20 :

... and [the Minister] may defend any action, suit, or proceeding concerning any such stores, matter or thing as aforesaid.

In view of the decision of this court in *Minister of Supply v. British Thomson-Houston Co., Ltd.* (4), it may be that the effect of these words is to confer on the subject, and so on the plaintiffs in this case, the right to bring an action as distinct from a petition of right against the Minister in respect of the cargo of the Brabo, and that it is no longer necessary for the plaintiffs to claim against the Crown by name nor to proceed by petition of right, but beyond this that section does not go, nor does it, apart from the proviso, deprive the Crown of any defences which otherwise would be open to it, and the proviso to the section makes it doubly clear that, though the party sued is not the Crown, but the Minister, yet the Minister has all the privileges and immunity which inherein the Crown.

Unless, therefore, something can be found in the special Acts of the plaintiffs, or the clauses incorporated with them, to negative what has been said above, the Minister of Supply is no more liable to a claim under the statute on which the plaintiffs sue than he would be for a claim in salvage. There it is well established that salvors of Crown property have no right to claim salvage even by a proceeding *in rem*. KENNEDY ON THE LAW OF CIVIL SALVAGE, 3rd ed., p. 77, states :

No salvage action *in rem* can be prosecuted against such ships [*i.e.*, ships belonging to our own or to a foreign Sovereign State] or against stores on board of them, even though the ship is engaged in trade.

There is a reference to the speech of the EARL OF HALSBURY, L.C. ([1903] A.C. 504, 505) in *Young v. The Scotia* (5) :

Where you are dealing with an action *in rem* for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the owner, and if the owner is the King the action cannot be maintained, since it is impossible to contend that the King can be impleaded in his own courts.

We turn, therefore, to the plaintiffs' special Acts. The Tyne Improvement Act, 1890, s. 42, on which the plaintiffs rely, is as follows :

In addition to the powers conferred upon the commissioners and the harbour master by the Harbours, Docks and Piers Clauses Act, 1847, s. 57, and to the powers conferred upon the commissioners by the Removal of Wrecks Act, 1877, and by the Tyne Improvement Act, 1886, s. 10, or any other Act the commissioners may on giving notice of their intention by advertisement inserted three times in each of two local newspapers circulated in the Tyne district sell break up or otherwise dispose of or may cause to be sold broken up or otherwise disposed of any wreck or any vessel or thing sunk stranded or abandoned or any obstruction within the port and may recover and receive the moneys (if any) arising therefrom and may retain out of such moneys any expenses incurred by them in lighting watching advertising buoying raising removing breaking up or selling such wreck vessel thing or obstruction or any part thereof or otherwise in any manner or for any purpose whatsoever in respect or on account of such wreck vessel thing or obstruction or any part thereof and also any charges or expenses incurred by the commissioners or the harbour master under the Harbours, Docks, and Piers Clauses Act, 1847, s. 57, or the Removal of Wrecks Act, 1877, s. 4, rendering the balance (if any) to the person who was the owner of such wreck vessel thing or obstruction immediately before it became a wreck or obstruction or was sunk stranded or abandoned and if there be no such moneys or if any such moneys be insufficient to cover all of such expenses and charges the commissioners may recover such expenses and charges or the unsatisfied balance thereof from such person or from any person who was the owner of such wreck vessel thing or obstruction at any time after it became a wreck or obstruction or was sunk stranded or abandoned and before it was sold by the commissioners by proceeding or action in any court of summary or competent jurisdiction. Provided always that for the purposes of this clause the word "vessel" shall include and extend to everything included in the same word in the Removal of Wrecks Act, 1877, under or by virtue of s. 6 of that Act.

The Removal of Wrecks Act, 1877, s. 6, defines "vessel" as including everything on board the vessel including the cargo.

So far as the second and third defendants in this case are concerned, we have seen that their "ownership" of what was on board this vessel was as agents of the Crown. Thus, here again, since the Crown is not expressly or by necessary implication touched by the section, the defendants are as free from liability as was, for instance, Lt.-Col. Pearson in *Pearson v. Holborn Union Assessment Committee* (6), (the case of lands purchased for a depot and training ground for a volunteer corps), but the careful analysis made by counsel for the Belgian company of the plaintiffs' special Acts relied on by counsel for

the plaintiffs disclosed this further difficulty for the plaintiffs. Section 3 (1) of their Act of 1934 [Tyne Improvement Act, 1934] incorporates into each of their Acts from 1850 onwards various sections of the Harbours, Docks, and Piers Clauses Act, 1847. Of these sections, s. 99 is as follows :—

Nothing in this or the special Act, or any Act incorporated therewith contained, shall extend to alienate, defeat, vary, lessen, abrogate, or prejudice any estate, right, title, interest, prerogative, royalty, jurisdiction, or authority, of or appertaining to the Queen's most excellent Majesty, nor to abridge, vary, or abrogate any of the powers or authorities by law vested in the Admiralty, or in the Commissioners of Her Majesty's Customs, or in the Commissioners of Woods, in relation to the possessions and land revenues of Her Majesty in right of her Crown, or otherwise howsoever.

This section may be compared with s. 28 of the same Act (also incorporated in the Act of 1934), exempting vessels in Her Majesty's or the public service from rates. As though s. 99 of the Act of 1847 were not a sufficient assertion of the Crown's reserved rights, we find s. 81 of the Act of 1934, which is as follows :

Nothing in this Act affects prejudicially any estate right power privilege or exemption of the Crown and in particular nothing herein authorises the commissioners to take use or in any manner interfere with any portion of the shore or bed of the sea or of any river channel creek bay or estuary or any land hereditament subjects or rights of whatsoever description belonging to His Majesty in right of His Crown and under the management of the commissioners of Crown lands or of the Board of Trade respectively without the consent in writing of the commissioners of Crown lands or the Board of Trade (as the case may be) on behalf of His Majesty first had and obtained for that purpose.

It was not, therefore, necessary for the Belgian company to go further and establish, as, nevertheless, they did to our satisfaction, that, even if the reservation of all Crown rights had not prevented any cause of action accruing against the second and third defendants, those defendants could have shown that the word "owner" in the Tyne Improvement Act, 1890, s. 42, carries no statutory extension of its meaning, except as regards a ship, where it includes "any charterer to whom the vessel is demised," the expanded meaning given to the word by s. 2 (2) of the plaintiffs' Act of 1934. The artificial meaning given to the words "'owner' in relation to goods" by s. 3 of the Act of 1890, viz., so as to include consignor, consignee, importer, shipper, exporter, receiver, broker or agent for sale or custody, is, in our opinion, there inserted only for the purposes of the collection of "harbour rates." It does not apply to claims under s. 42 against owners of wrecked vessels or their cargoes. The fact, therefore, that the corporation is said to have been consignee of some of this cargo is irrelevant, and affords no ground of liability under the section.

The judge in the court below appears to have read into the judgments of this court in *Minister of Supply v. British Thomson-Houston Co., Ltd.* (4), a wider scope than was intended by the Lords Justices or was germane to their decision. Had the claim in the present action against the Minister of Supply been based on contract to which he was a party, made within the powers conferred on him by statute, different considerations might apply, but, in respect of a claim of the kind made here, nothing in the Ministry of Supply Act, 1939, nor in the special Acts of the plaintiffs deprives the Crown (or the Crown's agents) of any of the legal rights, privileges or prerogatives of the Crown, except that, by reason of the Ministry of Supply Act, 1939, the Minister (we say nothing of the third defendant) cannot object to a proceeding against him taking the form of an action commenced by a writ, or to a counterclaim against him in an action in which he is plaintiff. It follows that, in our opinion, the appeal must be allowed.

That is the end of our joint judgment, but before we state the resultant orders of the court, I desire for myself only, and without committing my brethren, to call public attention to certain aspects of our British legislation about wreck removal. Whether the rights of action conferred on the Tyne Commissioners are identical with, or wider or narrower than, the statutory rights conferred on other harbour authorities in the United Kingdom I have not examined, but I assume that they are similar. If they are, the position revealed by the litigation before us gives ground for thought. Both the judge and we were informed that the total expenditure incurred by the plaintiffs in the "wreck removal" of the Brabo and her cargo was about £250,000. Of the Brabo we

know little, except that she was a small steamer owned in Belgium and flying the Belgian flag, and at the time was under charter to the British government. Whether, under the plaintiffs' statutory powers of wreck-removal, owners of ship and cargo are jointly and severally liable, or each only in respect of his own interest on some basis of proportionate adjustment, has, of course, not been argued before us, but the plain fact stares us in the face that the sinking of the Brabo in the plaintiffs' harbour was not caused by any tortious act of her owners, the Belgian company, towards the harbour authority. She was towed into the harbour, instead of being beached outside in some innocuous position, in all probability for some reason of war expediency, and without consultation with her owners. And if the owners of the ship were not guilty of any tort towards the plaintiffs, *a fortiori* the owners of her cargo were not. It is equally true that the harbour authority have done nothing wrong and that, because of their duty to clear the port of obstructions, they had to meet an unexpected and tremendous expense, and, if they cannot recover it from any third party, that means a great hardship for them. These plain facts seem to demand reconsideration by Parliament of the whole question of statutory liability for wreck-removal. It may be that the national interest of keeping our harbours clear of obstructions would justify a financial policy of treating that type of expenditure as one to be borne by the national exchequer.

There is a further principle of legislative policy regarding maritime commerce, to which also this appeal invites public attention, that of limitation of shipowners' liability. That principle has been applied in the western world for two centuries or more, the basic rule on the continent making the value of the ship at the end of the voyage the limit of her owner's liability, whereas the United Kingdom in the middle of last century converted that measure into a sterling limit per ton of registered tonnage, based on the then average value of ships. On the continent the cost of wreck-removal, when recoverable from the owner of the ship, has always been treated as one of the marine liabilities of the voyage and, as such, has been brought within the continental system of limitation of shipowners' liability. In the United Kingdom that has never been the case. The right of recovery was only obtained from Parliament by the harbour authorities gradually, and the shipowners were never given the right to limit that liability. Under the continental system, if there was a total loss before the end of the voyage, its owner's liabilities were at an end. In 1926, as the result of the efforts of the Comité Maritime International (the unofficial international body which prepared the draft conventions on collisions and salvage which were, after diplomatic ratification, passed into law by our Parliament in 1911 [the Maritime Conventions Act, 1911]), an international convention on the limitation of shipowners' liability was passed at Brussels by a diplomatic conference—as I know because I signed it on behalf of H.M.'s Government (*ad referendum*). Its object was to bring about a world-wide uniformity in the law of the sea relating to limitation of shipowners' liability. That convention included wreck removal as one of the heads of liability to be limited. Our government was then prepared to ratify the convention subject only to two exceptions. One was about damage to the property of docks and harbour authorities (for which Parliament had in 1906 granted a certain limitation); and the other was a reservation of the right to exclude liability for wreck-removal altogether, or, alternatively, only to ratify on condition of reciprocity on that head. On the other hand, Belgium, in 1929, passed the whole convention into law, thus including limitation for wreck-removal, and under the convention the limit of liability was still the value of the ship at the end of the voyage, although the British limit of £8 per ton was added as a maximum with another £8 in case of life claims. It follows that in Belgian law the owners of the Brabo would be under no liability at all for the costs of removing her wreck, if she had sunk in a Belgian port, or if the present proceedings were taken in Belgium.

There is an additional reason for immediate consideration being given to the above aspects of public policy by all the interests affected. The Comité Maritime International is holding an international conference in Antwerp on Sept. 24, 1947, to re-consider the Limitation Convention with a view to its more general legislative adoption, together with two other conventions already passed by diplomatic conferences, ratified by many countries and passed into law by some—one on maritime mortgages and liens (the latter subject affecting

the Limitation Convention), and the other on the present immunity of state-owned ships from legal proceedings (see Cmd. Papers of 1938, 5672-3). It will be very helpful to the attainment of uniformity in maritime law, if the conference then has the benefit of the views of those interests in this country which are affected by the aspects to which I have drawn attention, as arising out of the present appeal.

A **BUCKNILL, L.J. :** I have had an opportunity of reading my Lord's rider to the judgment of the court. I agree with him in thinking that the statute which imposes an unlimited liability on the innocent owner of a sunken ship to repay the cost of raising her deserves the consideration of Parliament with a view to amendment. By "an innocent owner" I mean an owner who is not to blame for the sinking of the ship. I also agree with my Lord that international unification of law as to the liability of a shipowner for the cost of raising his ship is very desirable, and that efforts should be made to arrange agreement about that among all maritime countries or such as are worthy of the support of our government.

B **WROTIESLEY, L.J. :** I lay no claim to the knowledge or experience which enables SCOTT, L.J., to speak with authority concerning the international convention on the limitation of shipowners' liability, but every lawyer must, I think, agree on the desirability of the law relating to such a claim as is dealt with in our judgment being uniform in all countries with shipping interests. In particular, I cannot but notice that the section under which the claim in this case is framed is not even the general law of this country, but is a section in a private Act relating to this particular harbour. There are fields, such as public health, a domestic matter, in which private Acts granting new and special powers are most beneficial, heralding important reforms which only later find their way into the country's general law, but the law which is going to govern the shipping of the world at large should not, in my judgment, come under such a heading.

Appeal allowed with costs.

Solicitors: *Bentleys, Stokes & Lowless* (for the conservancy authority); *Holman, Fenwick & Willan* (for the Belgian company).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

E **NOTE.**

W. DAVIS (SPITALFIELDS), LTD. v. HUNTLEY AND OTHERS.

[COURT OF APPEAL (Tucker, Somervell and Evershed, L.J.J.), June 26, 27, 1947.]

Landlord and Tenant—Notice to quit—Validity of notice—Lease determinable by 3 months' notice at any time—No date for possession specified in notice.

APPEAL by the tenants from a decision of HENN COLLINS, J., dated Jan. 13, 1947 ([1947] 1 All E.R. 246).

F A lease made on May 14, 1935, was determinable by 3 calendar months' notice at any time. By a written notice dated Apr. 21, 1945, and delivered by post on Apr. 23, 1945, the landlords gave to the tenants 3 months' notice terminating the lease, but without specifying the date on which possession was to be given. The tenants served a notice on the landlords under the Landlord and Tenant Act, 1927, s. 5 (1), requiring a new lease of the premises in lieu of compensation. At the same time they claimed that the notice to quit was not a valid notice and that the lease of 1935 was still subsisting. **G** HENN COLLINS, J., held (i) that the notice to quit was valid and the period of 3 months commenced to run from the date of its receipt by the tenants; (ii) that a tenant who asks for a new tenancy under the Landlord and Tenant Act, 1927, s. 5 (1), cannot be heard to say that the old tenancy is still subsisting, even if he fails to obtain a new tenancy and eventually claims compensation. The tenants appealed.

Kennedy Kisch for the tenants.

Gerald Upjohn, K.C., and Squibb for the landlords.

H THE COURT OF APPEAL rejected the argument of counsel for the tenants that the notice to quit was invalid for uncertainty, holding that the terms of the notice to quit did not leave the tenants in any doubt as to its intended effect and that the notice was valid. As the notice to quit was valid and the tenancy thereby terminated, the court did not decide the point whether a tenant who asks for a new tenancy under the Landlord and Tenant Act, 1927, s. 5 (1), thereby admits that the original tenancy has been terminated.

Appeal dismissed.

Solicitors: *James H. Fellowes* (for the appellants); *Lucien A. Isaacs* (for the respondents).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

MILLER v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), July 2, 25, 1947.]

Royal Forces—Pension—Burden of proof—Medical evidence—Death from cancer—Royal Warrant Concerning Retired Pay, Pensions, etc., 1943 (Cmd. 1943, No. 6489), art. 4 (2) (3) (4).

The applicant's husband served in the army from 1915 until his death in 1944. He served in the Middle East from 1940 until 1944, when he became hoarse and found difficulty in eating. He reported sick and his disease was diagnosed as cancer of the gullet. He died within a month of reporting sick. The tribunal rejected the applicant's claim for the higher pension granted to widows of soldiers whose death was due to war service :—

HELD : the tribunal had properly directed itself as to the burden of proof, and the conclusion of fact drawn by the tribunal—that the whole of the probabilities were that war service played no part—could reasonably be drawn from the primary facts having regard to the burden of proof.

Per curiam : In cases falling under art. 4 (2) and art. 4 (3) of the Royal Warrant Concerning Retired Pay, Pensions, etc., 1943 (which are generally cases where the man was passed fit at the commencement of his service but is later afflicted by a disease which leads to his death or discharge) there is a compelling presumption in the man's favour which must prevail unless the evidence proves beyond reasonable doubt that the disease was not attributable to or aggravated by war service, and for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.

In cases falling under art. 4 (2) and art. 4 (4) (which are generally cases where the man was fit on his discharge, but incapacitated later by a disease) there is no compelling presumption in his favour, and the case must be decided according to the preponderance of probability. If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged but, if the probabilities are equal, it is not.

It is useless for a medical man to give an opinion that a disease is or is not attributable to, or aggravated by, war service without giving his reasons. Such an opinion should be disregarded by a tribunal because it involves not only his scientific knowledge, but also his views on causation, the meaning of "attributable," "war service," and so forth, all of which are matters for the tribunal and not for him. Such an opinion is merely his view as to the way the tribunal ought to decide, and is an opinion which, if rightly formed, could only be drawn from the same premises as those from which the tribunal are to determine the matter. To be of value, a medical opinion should not be in general terms such as to usurp the function of the tribunal, but should point out the probable or possible causes of the disease and of any aggravation of it, giving the degree of probability, and then leaving it to the tribunal to decide whether or not on the facts of the particular case the claim should be allowed. In cases where the

aetiology, *i.e.*, the scientific origin of the disease is known, there is or should be little difficulty in stating the causes of the disease and of any aggravation of it, but the cases where the aetiology is unknown or imperfectly known present great difficulty. If nothing else appears except that the cause is unknown, the only proper conclusion is that the Minister cannot discharge the burden of proof because the unknown cause may be a cause incidental to war service.

A [AS TO WAR PENSIONS, GENERALLY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 777 *et seq.*, paras. 1094 *et seq.*; and FOR CASES, see DIGEST Supp.]

Cases referred to :

- (1) *Bracegirdle v. Oxley*, [1947] 1 All E.R. 126; [1947] K.B. 349; 176 L.T. 187.
- (2) *Donovan v. Minister of Pensions*, (1946), not reported.
- (3) *Starr v. Minister of Pensions*, *Nuttall v. Minister of Pensions*, *Bourne v. Minister of Pensions*, [1946] 1 All E.R. 400; [1946] K.B. 345; 115 L.J.K.B. 449; 175 L.T. 1; Reports of Selected War Pensions Appeals, Vol. 1, p. 125.
- B (4) *Williams v. Minister of Pensions*, (1947), Reports of Selected War Pensions Appeals, Vol. 1, p. 503.
- (5) *Briggs v. Minister of Pensions*, (1946), Reports of Selected War Pensions Appeals, Vol. 1, p. 211.
- (6) *Burbridge v. Minister of Pensions*, (1947), Reports of Selected War Pensions Appeals, Vol. 1, p. 307.
- C (7) *Forster v. Minister of Pensions*, (1946), Reports of Selected War Pensions Appeals, Vol. 1, p. 145.
- (8) *Wedderspoon v. Minister of Pensions*, [1947] K.B. 562; 177 L.T. 8; Reports of Selected War Pensions Appeals, Vol. 1, p. 347.

APPEAL by the widow of a regular army officer, who had died during war service of cancer of the gullet. The tribunal rejected her claim for the higher pension granted to widows of soldiers whose death is due to war service, and

D DENNING, J., now dismissed her appeal from that decision.

G. H. Crispin for the appellant.

H. L. Parker for the Minister.

Cur. adv. vult.

July 25. DENNING, J., read the following judgment. Captain Miller joined the army in 1915 at the age of 18 and served for 30 years until his death in 1944 at the age of 48. During the recent war he went out to the Middle East in Aug., 1940, and was there continuously until his fatal illness. In the middle of 1944 he became hoarse and could not eat much. He reported sick and was taken to hospital where his illness was diagnosed as cancer of the gullet, or, in medical language, carcinoma of the oesophagus. He was flown back to this country, but he died soon after he arrived here, less than one month after he reported sick. His widow is entitled to a pension on account of his long service, but she claims the higher pension granted to widows of soldiers whose death is due to war service. The tribunal rejected the claim. The question is whether they erred in point of law in so doing.

The first point of law in the present appeal is whether the tribunal properly directed itself as to the burden of proof. The proper direction is covered by decisions of this court. It is as follows.

- G 1. In cases falling under art. 4 (2) and art. 4 (3) of the Royal Warrant Concerning Retired Pay, Pensions, etc., 1943 (which are generally cases where the man was passed fit at the commencement of his service, but is later afflicted by a disease which leads to his death or discharge) there is a compelling presumption in the man's favour which must prevail unless the evidence proves beyond reasonable doubt that the disease was not attributable to or aggravated by war service, and for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.
- H

2. In cases falling under art. 4 (2) and art. 4 (4) (which are generally cases where the man was fit on his discharge, but incapacitated later by a disease) there is no compelling presumption in his favour, and the case must be decided according to the preponderance of probability. If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not.

The present case falls under the first category. There are passages in the transcript of the proceedings before the tribunal, which, taken by themselves, look as if the tribunal were not properly directing themselves as to the degree of probability required to discharge the burden of proof, but, when the transcript is read as a whole, I think the tribunal had the proper test in mind.

The second point of law is whether the conclusion of fact drawn by the tribunal could reasonably be drawn from the primary facts, having regard to the burden of proof: see *Bracegirdle v. Oxley* (1), ([1947] 1 All E.R. 130). This involves an assessment of the medical evidence. It is useless for a medical man to give an opinion that a disease is or is not attributable to, or aggravated by, war service without giving his reasons. Such an opinion should be disregarded by a tribunal because it involves not only his scientific knowledge, but also his views on causation, the meaning of "attributable," "war service," and so forth, all of which are matters for the tribunal and not for him. Such an opinion is merely his view as to the way the tribunal ought to decide, and is an opinion which, if rightly formed, could only be drawn from the same premises as those from which the tribunal are to determine the matter. To be of value, a medical opinion should not be in general terms such as to usurp the function of the tribunal, but should point out the probable or possible causes of the disease and of any aggravation of it, giving the degree of probability, and then leaving it to the tribunal to decide whether or not on the facts of the particular case the claim should be allowed. In cases where the aetiology, *i.e.*, the scientific origin of the disease is known, there is or should be little difficulty in stating the causes of the disease and of any aggravation of it, but the cases where the aetiology is unknown or imperfectly known present great difficulty. If nothing else appears except that the cause is unknown, the only proper conclusion is that the Minister cannot discharge the burden of proof because the unknown cause may be a cause incidental to war service. That was the position in *Donovan's* case (2), concerning the rare disease called lymphadenoma or Hodgkin's disease. In many cases, however, although the aetiology is unknown, experience and statistics are able to throw light on the circumstances in which the disease arises or develops. Thus, in disseminated sclerosis the aetiology is unknown, but experience shows that external factors may influence its onset or development, and claims have been allowed accordingly: see *Nuttall* (3), and *Williams* (4); whereas in schizophrenia, although the precise cause is unknown, experience shows that in the great majority of cases it is essentially independent of external circumstances. That makes it highly probable that in the ordinary way schizophrenia is not attributable to or aggravated by war service, and claims have been rejected accordingly: see *Briggs* (5), and *Burbridge* (6); but the weight of this evidence may be counter-balanced if there is anything reasonably to suggest in the particular case that any incident of war service may have played a part, such as exceptional stress or strain immediately preceding the onset of symptoms. Medical men cannot exclude that as a precipitating cause, because statistics show that in a minority of cases schizophrenia has been preceded by severe stress. In such cases, therefore, claims have been allowed: see *Forster* (7).

I turn now to the evidence in the present case. It is regarded as a test case of cancer of the oesophagus and was referred to an independent medical expert, Sir Ernest Rock Carling. His opinion was adverse to the claim, but

- there were other opinions in evidence favourable to it. One thing is clear, and that is that the aetiology of cancer is unknown. That means that, despite all the research that has been done, medical men have not been able to find out the origin of the disease so as to demonstrate, as a matter of science, how it arises. Such knowledge as they have of its cause, and it is very little, is based, not on science, but on experience and statistics. For instance, the percentage of chimney sweeps who suffer from carcinoma of the scrotum is sufficiently high to warrant the inference that the irritation of soot has something to do with it, and there are cancers in other parts of the body which on statistical grounds can be associated with irritation of one kind or another. On this account Dr. Beaumont thought that carcinoma of the oesophagus might have resulted in this case from an irritant in food, swallowed in the Middle East, such as sand. This suggestion was rejected, however, by other doctors because of the rarity of cancer of the oesophagus in men serving in the desert. Sir Ernest Rock Carling said the suggestion was highly speculative, and Dr. Dixon dismissed it as quite outside the bounds of probability. Another suggestion given by a text book in reference to carcinoma of the oesophagus was that "there is often an apparent connection with irritants in the form of spirit drinking and the habitual consumption of excessively hot liquids." This was rejected by Sir Ernest Rock Carling who pointed out that cancer of the oesophagus is predominantly a male disorder, and the habits there mentioned are not confined to men. Even if the suggestion is well founded, however, those habits are habits in the man's personal sphere and not attributable to war service: see *Wedderspoon's* case (8). No other external factor was mentioned by any doctor, but many were negatived. There was evidence, based, no doubt, on experience and statistics, that for all practical purposes cancer is not looked on as contagious or infectious, and that cancer of the oesophagus is unrelated to employment or environment. There was also the striking fact that there have been, apparently, 45 cases only of cancer of the oesophagus among men in the services from all theatres of war, including the United Kingdom, between 1939 and 1946, or roughly 7 cases a year, which is a minute fraction of the total number of cases reported in the United Kingdom every year, *viz.*, 1,700. The very fact that, despite the close attention that has been given to the problem, experience and statistics can point to no external factor, seems to support Dr. Kirby's view that:

... in general cancer pursues its inevitable and inexorable course without being influenced by the intervention of external factors or agencies.

There remains the doubt, however, due to its unknown aetiology, that it is possible that war service played some part. On that account Mr. Horace Evans said:

- I am unable to state with any degree of certainty that service factors have played no part.

Sir Ernest Rock Carling said:

It is impossible to assert that nothing whatever in the environment had an influence in causation.

- The question is: What degree of doubt do those opinions impart? Do they give rise to a reasonable doubt or not? That was essentially a matter for the tribunal.

- The weight to be attached to the various opinions and the assessment of the degree of probability were essentially matters for the tribunal. They came to the conclusion that the whole of the probabilities were that war service played no part. They recognised the existence of a possibility the other way, but dismissed it as too remote saying, in effect: "Of course, it is possible, but not in the least probable." I cannot say they could not reasonably come to that conclusion. The appeal, is, therefore, dismissed.

Appeal dismissed.

Solicitors: *Culross & Trelawney* (for the appellant); *Treasury Solicitor* (for the respondent).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

TERRITORIAL FORCES ASSOCIATION v. PHILPOT.

[KING'S BENCH DIVISION (Denning, J.), July 24, 1947.]

Landlord and Tenant—Rent restriction—Crown property—Flat owned by county Territorial Association—Whether exempt from Rent Restrictions Acts.

In 1908, on the formation of the Territorial Army, a county Territorial and Auxiliary Forces Association took a transfer of a lease of premises consisting of gun sheds on the ground floor, with flats above used by instructors of the Territorial Army. In 1930 the association acquired the freehold. About 1941, the flats became vacant and were let to various people unconnected with the Territorial Army, including the defendant. The premises were later required by the association for a permanent staff of instructors, and they, therefore, sought possession of them.

Held: premises acquired in this way and held by the association were held for the public purposes of the country, for the purposes of government, and for the defence of the realm, and were, therefore, within the exemption of the Crown from the operation of the Rent Restrictions Acts.

[AS TO PREMISES WITHIN THE RENT RESTRICTIONS ACTS, see HALSBURY, Halsam Edn., Vol. 20, pp. 312-316, paras. 368-373; and FOR CASES, see DIGEST, Vol. 31, pp. 557-559, Nos. 7042-7067; and DIGEST SUPP., title Landlord and Tenant, No. 7028a *et seq.*]

Cases referred to:

- (1) *Clark v. Downes*, *Clark v. Mawby*, (1931), 145 L.T. 20; Digest Supp.
- (2) *Mersey Docks & Harbour Board v. Cameron*, *Jones v. Mersey Docks*, (1865), 11 H.L. Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 38 Digest 466, 286.
- (3) *Wixon v. Thomas*, *Lambert v. Thomas*, *Burrows v. Thomas*, [1911] 1 K.B. 43; 80 L.J.K.B. 104; 103 L.T. 731; 75 J.P. 58; 38 Digest 487, 447.
- (4) *Derby (Territorial Army Association) v. Derby (South Eastern Area) Assessment Committee*, [1935] 2 K.B. 373; 104 L.J.K.B. 611; 153 L.T. 340; 99 J.P. 260; Digest Supp.

Action for possession of a flat. The facts appear in the headnote and the judgment.

R. M. Wilson for the landlords.

Aarvold for the tenant.

DENNING, J.: In this case the Territorial and Auxiliary Forces Association of the County of London, seek possession of flat No. 14, Territorial House, Reedworth Street, Lambeth, which was let to Mr. Philpot, the defendant, in Oct., 1942, at a weekly rent of £1 7s. 6d. Notice to quit has been given, and the association claim possession.

The case falls within the Rent Restrictions Acts, and *prima facie*, therefore, the tenant is protected by those Acts, but it is said that this dwelling-house is exempted from the operation of the Acts as being Crown property. It has been settled, ever since *Clark v. Downes* (1), that Crown property is outside the Rent Restrictions Acts. The question is whether this flat is Crown property within the meaning of the exemption. That depends on the purposes for which the property was, and is, held by the association.

The facts, as I find them, are that before 1908 this property was in the occupation of a volunteer force. In 1908, when the Territorial Army was formed, the lease of the property was transferred to the Territorial Association, who eventually acquired the freehold in 1930. On the ground floor gun sheds were erected, and the upper part consisted of flats for the use of instructors of the Territorial Army, other parts of the premises being used as drill grounds. The whole was one curtilage, intended for the exclusive use of the Territorial Army, and that was its condition up to the outbreak of war. On the outbreak of war, when the Territorial Force merged into the regular army, the association did not have so many administrative functions to fulfil, and in 1941 or 1942 these flats became vacant. With the bombing, there was a great shortage of accommodation, and the association let the flats to individuals who were in need of accommodation. One of the people to whom one of the flats was let was the tenant, Mr. Philpot, and he has continued to occupy it until the present day. The Territorial Army has now become active again, and the association

need the premises for the accommodation of permanent staff instructors. A number of instructors of the Territorial Army are working in London for the association, and they are sorely in need of accommodation. Therefore, the association have brought this action to test the position whether or no the tenant is protected by the Rent Restrictions Acts.

A A number of cases have been cited to me dealing with rating, and it is plain that, if premises are occupied for public purposes and are, therefore, deemed part of the use and service of the Crown, they are exempted from rating. The true principle, and the only one, of exemption in the old days from the Statute of Elizabeth [43 Eliz. c. 2] in regard to rating is that which is furnished by the rule that the sovereign is not bound by statute unless there is express intention to that effect. This appears from the judgment of LORD WESTBURY in *Mersey Docks & Harbour Board v. Cameron* (2), approving, as he was, the opinion of BLACKBURN, J., in that case and giving the opinion of the majority. That B exemption in rating cases has been granted to premises acquired by county associations under the Territorial Forces Act, 1907, e.g., in *Wixon v. Thomas* (3).

So much for common law and where the exemption is by statute in rating, where a hereditament is occupied by or on behalf of public services: see *Derby (Territorial Army Association) v. Derby (South Eastern Area) Assessment Committee* (4). I have read the statutes in relation to these associations and I have read the regulations made under the Territorial and Reserve Forces C Act, 1907, s. 4. It is plain that these associations are incorporated bodies acting for the public purposes of this country in relation to the training of the Territorial Army, and that their expenses come out of the Army funds which are voted each year by Parliament, and, further, that in all their doings, not only in relation to the instructors and staff, but in their properties and their D lettings, they are all subject to the direct control of the War Office and the Army Council. I have no doubt that properties acquired in this way and held by these associations are held for the public purposes of the country, for the purposes of government, and, indeed for the defence of the realm. I, therefore, hold that this property is within the exemption in favour of the Crown and does not fall within the Rent Restrictions Acts, and, therefore, the plaintiffs are entitled to possession.

Judgment for plaintiffs.

E Solicitors: *Fladgate & Co.* (for the landlords); *Neil McLean & Co.* (for the tenant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

MORRIS v. MORRIS, MORRIS AND MANNING (KING'S PROCTOR SHOWING CAUSE).

F [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), July 17, 18, 24, 1947.]

Divorce—Evidence—Non-access—Bastardization of issue—Evidence directed solely to issue of condonation.

Evidence by a husband denying intercourse, even though it be directed solely to the issue of condonation, is inadmissible if the effect of such evidence is to bastardize a child born in wedlock.

G *Observations of LORD MERRIMAN, P., and PILCHER, J., in Glenister v. Glenister* ([1945] 1 All E.R. 514) *disagreed with.*

Observations of LORD DUNEDIN in Russell v. Russell ([1924] A.C. 687 at pp. 728, 729) *considered and explained.*

[AS TO THE RULE IN *Russell v. Russell*, see HALSBURY, Vol. 10, p. 663, para. 976; and FOR CASES, see DIGEST, Vol. 27, pp. 297-298, Nos. 2743-2753.]

H Cases referred to:

- (1) *Russell v. Russell*, [1924] A.C. 687; 93 L.J.P. 97; 131 L.T. 482; 27 Digest 297, 2743.
- (2) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; Digest Supp.
- (3) *Goodright d. Stevens v. Moss*, (1777), 2 Cowp. 591; 98 E.R. 1257; 3 Digest 365, 58.
- (4) *Rowell v. Rowell*, [1900] 1 Q.B. 9; 69 L.J.Q.B. 55; 81 L.T. 429; C.A.; 27 Digest 246, 2172.
- (5) *Gaskill v. Gaskill*, [1921] P. 425; 90 L.J.P. 339; 126 L.T. 115; 27 Digest 298, 2753.

INTERVENTION by the King's Proctor to set aside a decree *nisi* of divorce obtained on the ground of adultery. The learned judge held that the adultery alleged in the petition had been condoned by the husband with full knowledge of the facts and rescinded the decree.

John Syms for the King's Proctor.

Petrie for the husband.

The wife was not represented.

Cur. adv. vult.

July 24. WILLMER, J., read the following judgment. This case arises out of an intervention by the King's Proctor to show cause why a decree *nisi* pronounced in favour of the husband on Oct. 31, 1946, should not be made absolute. The petition was based on the alleged adultery of the wife with two named co-respondents. The case, which was undefended, came before MR. COMMISSIONER WETHERED, when the adultery was proved by confessions voluntarily made by the wife and both co-respondents. It is now alleged by the King's Proctor that the husband presented a false case, in that he omitted to inform the court that he had condoned the alleged adultery by living with the wife and having intercourse with her, with full knowledge of the facts after learning of the alleged adultery.

The adultery complained of took place while the husband was away from home on military service during 1943 and 1944, and again in 1945, after the husband's discharge, during a period of some four months when he was living away from home. It is common ground that from then onwards the husband lived with the wife until some time in June, 1946. It is also common ground that on June 15, 1946, the husband and the wife attended together at the office of the husband's solicitors, when the wife voluntarily made and signed a full confession of her adultery. From that time onwards, therefore, on everybody's case, the husband had full knowledge of the wife's adultery. The case for the King's Proctor is that some time previously, early in June, the wife had confessed her adultery privately to the husband. Notwithstanding this it is alleged that the husband continued to live with the wife at the home of the wife's mother, share the same bed with her, and have sexual intercourse with her, until about June 29, when it is said that he went away to live with his own parents. It is further alleged that even after that date the husband continued to visit the wife, and to spend odd nights with her, enjoying sexual intercourse, about twice a week, until the night of August Bank Holiday, 1946. During the material period—i.e., from early June to early August, 1946—there is no evidence to show that the wife committed adultery with any man. The case is complicated by the fact that on Apr. 3, 1947—i.e., some five months' after the decree *nisi* was pronounced, and some considerable time after the King's Proctor's intervention—the wife gave birth to a child, who is, of course, *prima facie* a child of the marriage. The evidence of the midwife who was present at the birth is that the child was a full time, normal baby. The child is alive to-day.

In these circumstances the question arises whether, having regard to the rule in *Russell v. Russell* (1), it is competent for the husband, in order to rebut the allegation that he condoned his wife's previous adultery, to give evidence denying that he had intercourse with her after learning of the adultery. This point was quite properly brought to my attention by counsel on behalf of the King's Proctor, who at the same time disclaimed any desire to succeed on a mere technical rule of evidence or to prevent the husband from having the fullest and most free opportunity of presenting by his own evidence his own version of the facts. Since the parties were present in court, and had travelled a considerable distance to London for the hearing of the case, I deemed it expedient, rather than keep them waiting about while the technical question of the admissibility of the evidence was determined, to take the evidence, not only of the other witnesses but also of the husband and the wife. *de bene esse*, but, the question having been raised, I must still determine how much, if any, of the husband's evidence was admissible.

In *Glenister v. Glenister* (2) ([1945] 1 All E.R. 514) LORD MERRIMAN, P., is reported to have said that evidence by a husband denying intercourse was clearly admissible to rebut any question of condonation, notwithstanding the subsequent birth of a child. A similar view was expressed by PILCHER, J., in the same case (*ibid.*, 521). These expressions of view, if they are binding on me,

are, of course, completely decisive of the point raised in this case, but it is, I think, to be noted that the actual question which arose for decision in *Glenister v. Glenister* (2) was whether a reasonable, though mistaken, belief by a husband that his wife had been guilty of adultery was sufficient cause to justify the husband in leaving the wife, so as to afford a good defence to a charge of desertion. The observations made by the learned President and PILCHER, J., were in no wise necessary for the decision of that question, and I think, therefore, that I must

A clearly treat them as *obiter*. While fully conscious of the respect which is due to such expressions of opinion by two such experienced judges, I conceive it to be my duty, now that the point has arisen directly for decision in the present case, to examine the grounds on which their opinion was based and to form my own conclusions on the point. LORD MERRIMAN, P., cites as his authority for saying that evidence by a husband denying intercourse with his wife must be admissible on the question of condonation a passage in the speech of LORD DUNEDIN in *Russell v. Russell* (1) ([1924] A.C. 728, 729). What LORD DUNEDIN there said was as follows :

B But then it is said that the testimony of the spouses has been admitted in many other cases—in nullity, condonation, cruelty, and, lastly, in adultery, in the Divorce Court of recent years. Now as regards nullity, cruelty and condonation I do not feel the slightest difficulty ; the whole point of LORD MANSFIELD'S *dictum* rests on the concluding words : “ and to make the issue spurious,” in other words, it is when conjugal conduct is used, not as a thing in itself, but as leading to other inferences that the harm comes in. No proof of conduct or want of conduct which shows nullity, no proof of cruelty, such as communicating venereal disease, no proof of connection such as in itself is condonation, has the remotest reference to the point of legitimacy of issue. The evidence of the spouses in these cases is the only evidence available to the direct fact in issue, and has in the giving of it no evil consequences.

C This passage has been interpreted to mean that whenever it may be necessary D for the purpose of rebutting any suggestion of condonation a husband is at liberty to give evidence denying intercourse, notwithstanding that the effect of such evidence may be to bastardize a child subsequently born. If this is what LORD DUNEDIN meant, his view is clearly opposed to that of LORD FINLAY, who in terms expressed the contrary opinion (*ibid.*, 719). It is also, in my judgment, equally clearly opposed to the view of LORD BIRKENHEAD, who expressed his conclusion in the following words (*ibid.*, 704) :

E . . . the rule as laid down by LORD MANSFIELD, and other great judges, is a general rule to be applied, in the full generality of its scope, to all cases which it is wide enough to cover.

The rule as laid down by LORD MANSFIELD was laid down in 1777 in *Goodright's case* (3), in two passages which are quoted by LORD BIRKENHEAD in *Russell v. Russell* (1) ([1924] A.C. 697). The first of these passages is as follows F (2 Cowp. 592) :

The law of England is clear, that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage.

In the second passage LORD MANSFIELD said (2 Cowp. 594) :

G As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule founded on decency, morality and policy that they shall not be permitted to say after marriage, that they had had no connection, and therefore that the offspring is spurious . . .

H If the rule as so stated is to be applied, in the full generality of its scope, to all cases which it is wide enough to cover, how can an exception be made in cases where it is sought to adduce evidence of the kind in question to rebut a suggestion of condonation ? With the greatest respect for the view expressed by LORD MERRIMAN, P., and PILCHER, J., I do not believe that the words used by LORD DUNEDIN, in the passage from his speech which I have quoted, bear the meaning which has been imputed to them.

Earlier in his speech LORD DUNEDIN himself had expressed his general conclusion with regard to the case before him, in the following terms ([1924] A.C. 727, 728) :

I am therefore of opinion that the words of LORD MANSFIELD are directly applicable to this case, and that it is against the interests of decency and public policy that the spouses should be allowed to give evidence of non-access, and thus *de facto*, even if not *de jure*, to bastardize their issue, when conception and birth alike fell within the time of wedlock.

I think it is clear that when, in the later passage in his speech, he deals with the question of condonation, he did not have in mind the possibility that evidence by a spouse denying intercourse could possibly have the effect of bastardizing a child subsequently born in wedlock. Indeed, he says that no such evidence has the remotest reference to the point of legitimacy of issue. It seems to me that the clue to what was meant by LORD DUNEDIN in this passage of his speech is to be found in the argument for the respondent (*ibid.*, 695). What had been argued was that evidence of intercourse, or the absence of it, was commonly admitted in the Divorce Court without any suggestion that such evidence constituted a violation of the sanctity of married relations—and by way of illustration the cases of nullity, cruelty and condonation were instanced. With regard to condonation, *Rowell v. Rowell* (4) was cited—a case in which no question of the legitimacy of a child arose. This part of the argument was not directed to the question whether the admission of the evidence might tend to bastardize a child, but only to the question whether it violated the sanctity of married intercourse. LORD FINLAY and LORD DUNEDIN, as I understand them, dealt with this argument by saying, in effect, that it had nothing to do with the question then before the House—LORD FINLAY going on to say that in cases of condonation the evidence of non-access would nevertheless be inadmissible in the event, as he thought unlikely, of any question arising as to the paternity of a child. I feel sure that equally LORD DUNEDIN would have qualified his remarks in the same way if the possibility of the evidence tending to bastardize a child had been present to his mind. With all respect, I find myself unable to agree with the views expressed by the Divisional Court in *Glenister v. Glenister* (2), and my conclusion is that evidence by a husband denying intercourse, even though it be directed solely to the issue of condonation, is inadmissible if the effect of such evidence is to bastardize a child born within the time of wedlock.

This being so, the question arises whether the evidence of the husband in this case is such as would have the effect of bastardizing the child subsequently born. The husband's case is that there was no confession of adultery by his wife, or by either of the co-respondents, until the night of June 14, 1946. Until then the husband and the wife lived together as man and wife, and normal relations continued between them. It is only after the night of June 14, 1946, that the husband seeks to deny further intercourse. Would such denial, if he is allowed to give it, have the effect of bastardizing the child? In my judgment, quite clearly it would not. From June 14, 1946, to Apr. 3, 1947, if my reckoning is accurate, is 293 days. The normal period of gestation is, of course, only 275 days, but it is common knowledge that this period is frequently exceeded, sometimes by a considerable margin. Indeed, in *Gaskill v. Gaskill* (5) it was held in this court, by LORD BIRKENHEAD, L.C., that in the present state of medical knowledge a period of 331 days could not be said to be impossible, and it was, accordingly, decided in that case that evidence of non-access by a husband for that period was not sufficient to prove that the father of the child must have been someone other than the husband, so as to convict the wife of adultery. In the present case evidence that the husband ceased to have intercourse with the wife after the night of June 14, 1946, would clearly be insufficient to prove that the wife must have committed adultery after that date in order to bear a child on Apr. 3, 1947. The evidence of the husband, therefore, could not, in my judgment, have the effect of bastardizing the child, and for that reason I hold that it is admissible.

The issue, accordingly, falls to be determined on all the evidence that has been given, including that of the spouses. [HIS LORDSHIP reviewed the evidence and continued:] In all the circumstances I find as a fact that on frequent occasions up to the beginning of Aug., 1946, the husband lived with, and had intercourse with, the wife, thereby condoning her previous adultery, of which he had full knowledge at least after the middle of June. It follows that the King's Proctor is entitled to succeed on his plea, and to have the decree *nisi* rescinded and the petition dismissed.

Decree nisi rescinded with costs.

Solicitors: *Russell, Orme & Dykes*, Ledbury (for the husband); *Treasury Solicitor* (for the King's Proctor).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

KILFORD v. KILFORD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), May 15, June 23, July 22, 1947.]

Husband and Wife—Maintenance—Maintenance order made by justices—Wife granted divorce—Application to Divorce Court for maintenance order for nominal amount during currency of justices' order—Election by wife—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (2).

On Jan. 12, 1944, a wife obtained a maintenance order against her husband before the Colchester justices. On Jan. 13, 1947, she obtained a final decree of divorce against him and then she applied to the Divorce Court for an order under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2), for a nominal amount by way of maintenance in order to preserve her right to apply *in futuro* under the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 14, for an increase of the amount directed to be paid. On May 5, 1947, the application came before the registrar and he directed that it should stand adjourned *sine die*, to be restored for hearing if and when the order of the justices was discharged.

HELD: the wife must elect either to retain the order of the justices or to apply to the justices to have that order discharged under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, and seek an order in the Divorce Court, and, therefore, the registrar's order must be set aside.

R. v. Middlesex JJ., Ex parte Bond ([1933] 1 K.B. 72) applied.

[AS TO PERMANENT MAINTENANCE AFTER DECREE OF DISSOLUTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 785-795, paras. 1244-1262; and FOR CASES, see DIGEST, Vol. 27, pp. 500-502, Nos. 5355-5378.]

Cases referred to:

- (1) *Scott v. Scott*, [1921] P. 107; 90 L.J.P. 171; 124 L.T. 619; 27 Digest 510, 5486.
- (2) *Mills v. Mills*, [1940] 2 All E.R. 254; [1940] P. 124; 109 L.J.P. 86; 163 L.T. 272; Digest Supp.
- (3) *R. v. Middlesex JJ., Ex parte Bond*, [1933] 1 K.B. 72; 102 L.J.K.B. 40; 148 L.T. 134; 96 J.P. 487; Digest Supp.
- (4) *Higgs v. Higgs*, [1935] P. 28; 104 L.J.P. 1; 152 L.T. 24; 98 J.P. 443; Digest Supp.
- (5) *Kirk v. Kirk*, [1947] 2 All E.R. 118.

SUMMONS adjourned into open court.

The wife appealed against the order of a registrar by which her application for maintenance under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2), was adjourned *sine die*, to be restored for hearing if and when an order made in her favour by justices was discharged. BARNARD, J., now set aside the order of the registrar and permitted the wife to elect either to rely on the order of the justices or to have her present application adjourned to enable her to apply to the justices to discharge their order.

P. M. O'Connor for the wife.

Coplestone-Boughey for the husband.

Cur. adv. vult.

July 22. BARNARD, J., read the following judgment. This is an application by a wife petitioner for maintenance under the Judicature Act, 1925, s. 190, she having obtained a final decree of divorce against the respondent husband on Jan. 13, 1947. On Jan. 12, 1944, the wife obtained a maintenance order for £2 per week against the husband in a court of summary jurisdiction at Colchester and that order remains an effective order, notwithstanding the divorce, until it is varied or discharged by that court. The husband is now employed as a civil engineering assistant in the engineer's and surveyor's department of the borough of Middleton, Lancashire, at a salary of approximately £420 per annum, and the wife is a state registered nurse employed by the Essex County Hospital, Colchester, as a ward sister at a salary of about £160 per annum, together with free board and lodging. At the present time both parties are content that the payments under the order of the court of summary jurisdiction should continue, but the wife, in addition thereto, asks for an order of this court for payment by the husband to herself of a nominal amount by way of maintenance under the Judicature Act, 1925, s. 190 (2), in order to preserve her rights to apply, *in futuro*, under the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 14, for an increase of the amount

directed to be paid. This application for maintenance originally came before the registrar on May 5, 1947, and he directed that it should stand adjourned *sine die*, to be restored for hearing if and when the order of the court of summary jurisdiction was discharged. The wife appealed from this decision and the appeal came before me on May 15, 1947. I thought it right to call for a report from the registrar, and to adjourn the appeal into open court for argument. The matter was further argued before me in open court on June 23, 1947, when I had the registrar's report dated May 16, 1947, before me.

I have come to the conclusion that the registrar was wrong in adjourning the wife's application for maintenance *sine die*. By the Judicature Act, 1925, s. 190, the court is given power to award maintenance on any decree for divorce, and LORD STERNDALÉ, M.R., in his judgment in *Scott v. Scott* (1), said ([1921] P. 120), that the word "on" does not mean an unlimited time within the judge's discretion, but it means within a reasonable time having regard to all the circumstances of the case. Again, in *Mills v. Mills* (2) SIR WILFRID GREENE, M.R., in referring to the court's jurisdiction under s. 190, said ([1940] 2 All E.R. 257):

That jurisdiction can only be exercised on any decree for divorce or nullity of marriage. Accordingly, if an application is made by a wife of which it can fairly be said that an order made upon it would not be made "on" such a decree, the court has no power to accede to the application.

The registrar's order seems to me to offend both the letter and the spirit of the statute, and must therefore be set aside.

The only question, therefore, left for me to decide is whether or not the wife is entitled to a maintenance order from this court, even though it be for a nominal amount, in addition to the order made in her favour by the justices. I consider that it would be most undesirable that there should be two orders for maintenance in existence at the same time. In *R. v. Middlesex Justices, Ex parte Bond* (3) AVORY, J., said ([1933] 1 K.B. 80):

The inconvenience of holding that there is concurrent jurisdiction in the Divorce Court and in the justices is obvious, for if the justices may make an order as in this case, there is nothing to prevent the husband going to the Divorce Court the next day and asking, possibly successfully, for a contrary order. The question might see-saw between the two courts, producing an absolute scandal.

AVORY, J., was referring to an order for custody made by justices, but this passage was referred to with approval by both LORD MERRIMAN, P., and LANGTON, J., in *Higgs v. Higgs* (4), in which an order for maintenance made by a metropolitan magistrate was in issue. It might be suggested that, because the wife is only asking for what is called a nominal order in order to preserve her rights, that this could neither conflict with the order made by the justices nor embarrass the husband, but none the less a so-called nominal order is an order for maintenance made under the Judicature Act, 1925, s. 190 (2), and on principle I think that a successful wife petitioner, who has previously obtained a maintenance order from justices, must elect either to retain that order or obtain an order in the Divorce Court. I am fortified in this view of the matter by what LORD MERRIMAN, P., said ([1947] 2 All E.R. 119) in the course of his judgment in *Kirk v. Kirk* (5):

Assuming that the justices had jurisdiction, in their discretion, to keep the order alive, manifestly one of the matters which would guide them and this court in considering the exercise of that discretion notwithstanding the decree of divorce would be whether the wife had any alternative rights in Scotland where she had obtained her decree, . . .

In that sentence the use of the word "alternative" is to be noted. If, in the present case, the wife desires an order for maintenance from this court, I am prepared to adjourn her application to enable her to apply under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, to the Colchester justices to have their order discharged. If, on the other hand, she prefers to rely on that order, then her present application for maintenance to this court must be dismissed.

Solicitors: *Corbin, Greener & Cook*, agents for *Thompson, Smith & Puxon*, Colchester (for the wife); *C. Hampton Vick*, agent for *S. J. Peters*, Cambridge (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

BRITTLE v. BRITTLE (by his guardian).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), July 16, 1947].

Divorce—Cruelty—Legal responsibility—Onus of proof.

A Where a wife, who is seeking to divorce her husband on the ground of cruelty, proves acts which are *prima facie* acts of cruelty, the *onus* of showing that he was not legally responsible for his actions is on the husband, and he must discharge that *onus* in the same way and to the same extent as he would have to do in criminal proceedings.

Astle v. Astle ([1939] 3 All E.R. 967) *applied*.

[AS TO INSANITY AS A DEFENCE TO CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 652, 653, para. 958; and FOR CASES, see DIGEST, Vol. 27, p. 293, Nos. 2690-2692, and supplement.]

Case referred to :

B (1) *Astle v. Astle*, [1939] 3 All E.R. 967; [1939] P. 415; 109 L.J.P. 6; Digest Supp.

PETITION by the wife for divorce on the ground of cruelty. The defence was that the husband was not legally responsible for his actions so as to make acts of violence committed by him amount in law to cruelty. It was held that the *onus* was on the husband to show that he was not legally responsible and, since the *onus* had not been discharged, cruelty was proved. The facts appear in the judgment.

J. Montgomerie for the wife.*Stuart Horner* for the husband.

D WILLMER, J. : The question I have to determine is whether acts of violence committed in 1923 amounted in law to cruelty, and that, in turn, depends on whether or not, at the time when the husband was guilty of the alleged acts, he was (to put it in a single phrase) responsible for his actions. In 1923, following on one attack and preceding another, he was put into a mental home, where he remained for some months, and since 1939 he has been in a mental hospital.

E It is said on behalf of the wife that, once she proves acts which are *prima facie* acts of cruelty, the *onus* of showing that the husband was not responsible for his actions is on him and he must discharge that *onus* in the same way and to the same extent as he would have to in criminal proceedings, *i.e.*, he must show either that he did not know what he was doing, or that he did not know that what he was doing was wrong. The authority for applying that principle to proceedings for cruelty in this Division is *Astle v. Astle* (1). The wife's argument, therefore, is that, the acts of violence being *prima facie* cruelty, if I am left in doubt whether the husband had the necessary knowledge, F the wife is entitled to succeed. I have had very considerable doubt, because of the delay in bringing the proceedings, but they could not have been brought before the passing of the Matrimonial Causes Act, 1937, and by that time many years of delay had already gone by. One matter, however, which, in itself, is a source of doubt, but which, so far as it goes, is in favour of the wife, is the fact that, although acts of violence in 1923 are complained of by the wife, G who has not lived with the husband since that date, nobody certified the husband for another sixteen years, from which I can only draw the inference that, in the view of those qualified to judge, during that period he retained at least some measure of responsibility for his actions. I think that that consideration sways the balance in favour of the wife.

H I accept the argument put forward by counsel for the wife that the *onus* of displacing the *prima facie* case is on the husband. I do not see any answer to that argument and, the wife having proved the necessary acts of violence, I think the only conclusion to which I can come is that she has proved her case of cruelty.

Decree nisi.

Solicitors : L. H. Whitlam Smith, Law Society, Services Divorce Dept. (for the wife); Official Solicitor (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

G. C. & E. NUTHALL (1917), LTD. v. ENTERTAINMENTS
& GENERAL INVESTMENT CORPN., LTD., AND OTHERS.

[KING'S BENCH DIVISION (Hallett, J.), July 9, 10, 11, 14, 1947.]

Landlord and Tenant—New lease—Reasonableness of grant—Premises required for occupation by landlord—Relevant date—"Landlord"—Compensation—Landlord and Tenant Act, 1927 (c. 36), s. 5 (3).

Section 5 (3) of the Landlord and Tenant Act, 1927, provides: "Where the tenant is the applicant, the grant of a new lease under this section shall not be deemed to be reasonable—(a) unless the tenant proves that he is a suitable tenant and that he would be entitled to compensation under the last foregoing section, but that the sum which could be awarded to him under that section would not compensate him for the loss he would suffer if he removed to and carried on his trade or business in other premises; or (b) if the landlord proves—(i) that the premises are required for occupation by himself, or, where the landlord is an individual, for occupation by a son or daughter of his over eighteen years of age; or (ii) that he intends to pull down or remodel the premises; or (iii) that vacant possession of the premises is required in order to carry out a scheme of re-development; or (iv) that for any other reason the grant of such a lease of the premises would not be consistent with good estate management, and for this purpose regard shall be had to the development of any other property of the same landlord . . ." On an application by the tenant under s. 5 of the Act for a grant of a new tenancy:—

HELD: (i) although the tribunal may not be precluded by sub-s. (3) (a) or (b) it may still, in a proper case, come to the conclusion that the grant of a new lease is not reasonable.

(ii) By s. 5 (2) of the Act the tribunal, if precluded from granting a new lease on any of the grounds mentioned in s. 5 (3) (b), may award compensation to the tenant. It follows that, if the tribunal is precluded on any of the grounds mentioned in s. 5 (3) (a), or if, though not precluded from doing so, it considers it unreasonable to grant a new tenancy, it has no power to award compensation.

(iii) the material time for the purposes of sub-s. (3) (b) is the date of the expiration of the tenancy, or, possibly, the date when the tribunal comes to make its decision.

(iv) the "landlord" for the purposes of sub-s. (3) (b) is the person who is entitled to legal possession at the termination of the lease.

(v) that sub-s. (3) (b) (i) may apply, the landlord must prove that he "intends" to use the premises, when he obtains vacant possession of them, for occupation by himself.

[FOR THE LANDLORD AND TENANT ACT, 1927, s. 5 (3), see HALSBURY'S STATUTES, Vol. 10, p. 382.]

Cases referred to:

- (1) *Simpson v. Charrington & Co., Ltd.*, [1934] 1 K.B. 64; 103 L.J.K.B. 49; 150 L.T. 103; C.A.; on appeal, sub nom. *Charrington & Co., Ltd. v. Simpson*, [1935] A.C. 325; 104 L.J.K.B. 226; 152 L.T. 469; H.L.; Digest Supp.
- (2) *Smith v. Metropolitan Properties Co., Ltd.*, [1932] 1 K.B. 314; 101 L.J.K.B. 110; 146 L.T. 133; Digest Supp.
- (3) *Dartford Brewery Co., Ltd. v. Freeman* (No. 2), [1938] 4 All E.R. 78; Digest Supp.
- (4) *British & Argentine Meat Co., Ltd. v. Randall*, [1939] 4 All E.R. 293; 162 L.T. 91; Digest Supp.
- (5) *Dale v. Hatfield Chase Corpn.*, [1922] 2 K.B. 282; 92 L.J.K.B. 237; 128 L.T. 194; 87 J.P. 11; Digest Supp.
- (6) *Richards v. Pryse*, [1927] 2 K.B. 76; 96 L.J.K.B. 743; 137 L.T. 170; Digest Supp.
- (7) *R. v. St. Pancras Assessment Committee*, (1877), 2 Q.B.D. 581; 46 L.J.M.C. 243; sub nom. *Willing v. St. Pancras Assessment Committee*, 37 L.T. 126; 41 J.P. 662; 38 Digest 423, 5.
- (8) *Bruce v. McManus*, [1915] 3 K.B. 1; 84 L.J.K.B. 1860; 113 L.T. 332; 79 J.P. 294; 42 Digest 924, 188.
- (9) *Hurst v. Picture Theatres, Ltd.*, [1915] 1 K.B. 1; 83 L.J.K.B. 1836; 111 L.T. 972; 42 Digest 905, 23.

ORIGINATING SUMMONS under R.S.C. Ord. 53D, r. 17, for further consideration of the report of one of the panel of referees under the Landlord and Tenant Act, 1927. The tenants applied, under s. 5 (1) of the Act, for a new lease of premises known as the Regal Cinema, Colchester, in lieu of compensation for loss of goodwill. The referee found that the landlords had proved the matters specified under s. 5 (3) (b) (i) and (iv), *viz.*, that the premises were required for occupation by themselves and that the grant of a new lease would not be consistent with good estate management. The learned judge upheld the report of the referee and refused to grant a new lease.

Beney, K.C., and *Ricardo* for the applicants.

Sir Valentine Holmes, K.C., and *T. G. Roche* for the respondents.

HALLETT, J. : These proceedings are brought under s. 5 of the Landlord and Tenant Act, 1927, by the applicants, G. C. & E. Nuthall (1917), Ltd., against the respondents, Entertainments and General Investment Corporation Ltd., and Odeon Associated Theatres, Ltd., to obtain the compulsory grant of a new tenancy of certain premises demised to the applicants by the respondents' predecessors in title under a lease dated June 30, 1933. For convenience the names of the parties are referred to as Nuthalls, Entertainments and O.A.T.S. respectively, the name O.A.T.S. being used to avoid confusion with another Odeon company which it will be necessary to mention. The lease was for a term of 14 years running from Mar. 25, 1933, and had, therefore, expired by effluxion of time on Mar. 25, 1947.

To succeed in such proceedings the applicant must, first of all, give a notice requiring a new lease, as provided by s. 5 (1). That notice must be given not more than 26, nor less than 12, months before the termination of the tenancy where the tenancy will terminate by effluxion of time, and here the notice was duly given on Mar. 12, 1945. The time for giving a notice claiming compensation under s. 4 of the Act and the time for giving notice claiming a new lease under s. 5 is the same. It will be observed, indeed, that under s. 5 (2) the date when an application for a new lease can be made is not less than 9 months before the termination of the tenancy. The notice of Mar. 12, 1945, claims in the alternative a new lease in lieu of (what I will call for short) s. 4 compensation, or, alternatively, s. 4 compensation to the extent of £40,000. It is clear, having regard to the decision of the Court of Appeal in *Simpson v. Charrington & Co., Ltd.* (1), that such a notice in the alternative is permissible, and, indeed, as was pointed out in that case, at the time when the notice has to be given the tenant may very well not yet have decided which form his claim should take. *Simpson v. Charrington & Co., Ltd.* (1) subsequently went to the House of Lords, but not on the point which is material for the present purpose.

The notice required by s. 5 (1) having been given, the next step which the applicant must take is to apply to the tribunal as provided by s. 5 (2). The tribunal is normally the county court, but where the parties so agree, as they have done in this case, the tribunal is the High Court : see s. 21 (1), proviso (a). The application to the High Court was made within the prescribed time and was dated Dec. 31, 1945. That application, as originally framed, was merely for a new lease, but it was amended on Jan. 24, 1946, pursuant to leave granted by a master the previous day, so as to claim, in the alternative, a declaration that on the determination of the tenancy the then respondents, Entertainments, would become liable to pay s. 4 compensation. It is, perhaps, a pity that that application for leave was given because it led to a subsequent application, which came before me, to strike out, putting it shortly, that part of the application which asked in the alternative for a declaration as to the payment of compensation under s. 4. I took the view that the claim for a declaration in respect of s. 4 compensation was merely an attempt to get round the decision of the Divisional Court in *Smith v. Metropolitan Properties Co.* (2). That decision held that a tenant cannot commence an action to recover compensation for goodwill under s. 4 of the Act until the tenancy has terminated and the tenant has quitted the holding. That case was not, so far as I can see, referred to in *Simpson v. Charrington* (1).

I took, and still take, the view that there is nothing in *Simpson v. Charrington* (1) which was inconsistent with the decision in *Smith v. Metropolitan Properties Co.* (2), *Simpson v. Charrington* (1) dealing with the validity of the notice

of claim and *Smith v. Metropolitan Properties Co.* (2) dealing with the validity of the application to the tribunal, which comes at a later stage. However that may be, I gave leave to appeal against that part of my decision which directed the striking out of the alternative claim, the rest being consequential, but, so far as I am aware, no advantage was taken of that leave and my order stood. The present application, therefore, is solely for the grant of a new lease under the provisions of s. 5. That does not, however, prevent the award of compensation equivalent to the s. 4 compensation under the appropriate part of sub-s. (2) of s. 5.

The next step which was taken was the usual one of referring the matter to a referee. The order of reference was made on Nov. 6, 1946. On May 15, 1947, the referee made his report, but in the meantime, on Jan. 27, 1947, Entertainments agreed to assign to O.A.T.S. a large number of properties. Among the freehold and leasehold properties with their plant, machinery and the undertaking carried on in the properties which were to be sold under that agreement was the premises and undertaking of the Regal Cinema at Colchester. The date for completion fixed by the agreement was Feb. 28, 1947, but completion did not actually take place until Mar. 21, 1947, as appears from the notice given on behalf of the respondents to the solicitors for the applicants, dated Mar. 25, 1947. That sale being contemplated by the respondents on Feb. 4, 1947, an application was made that O.A.T.S. should be added as respondents and an order was made accordingly and the pleadings were amended on Feb. 6, an amended defence being delivered.

The report of the referee, as I have said, was made on May 15, 1947, and this matter has now come before me for further consideration under R.S.C. Ord. 53D, r. 17. The attitude which the court should adopt towards the report of a referee on such further consideration has been dealt with in three cases to which I have been referred and which I have carefully considered. The first is *Simpson v. Charrington & Co., Ltd.* (1), to which I have already referred. The second is *Dartford Brewery Co. v. Freeman* (3), where the matter was carefully considered by DU PARCQ, J., and the third is *British and Argentine Meat Co. v. Randall* (4). I need not read extracts from those cases. It is sufficient to say that the report is in no way binding on the tribunal even as regards its findings of fact. On the other hand, of course, if a referee of great experience has conducted a prolonged and careful investigation into the facts, one should be eager, as one certainly is, to avail oneself of what is found in his report with regard to the facts and, no doubt, one would normally be very loth to disturb what he finds without good reason. In the present case, the report certainly has, apart from its conclusions, been of the greatest value. It has recommended what is the appropriate amount of compensation to be assessed in accordance with the provisions of s. 4 and both parties have agreed that no further evidence should be called before me, and they further agree that I should be exonerated from going into the documents which are before me save in so far as either side drew my attention to anything in them or, of course, as I thought it proper to go into them myself.

When the applicant gets before the tribunal, he must prove certain things. First, he must prove, as appears from s. 5 (3) (a), that he is a suitable tenant. As to that, there has never been any dispute in this case. Next, he must prove that he would be entitled to compensation under s. 4. That has been disputed in this case by the respondents, but there was a great deal of evidence directly pointing to the conclusion that the applicants would be entitled to compensation under s. 4. The referee has reported in favour of the applicants on that point and has assessed that compensation at the sum of £2,100. So far as this further hearing before me has been concerned, it has no longer been disputed by the respondents that the applicants would be so entitled. The effect of the earlier dispute of that point by the respondents will be considered by me when I come to deal with another part of this matter. Next, the applicant has to prove that the sum which could be awarded to him under s. 4 would not compensate him for the loss he would suffer if he removed to, and carried on his trade or business in, other premises. There again, not merely was there a very substantial body of evidence, but, I think, it is now conceded that the referee has, inferentially, at any rate, reported in favour of the applicants because, in fixing the compensation which should be awarded under the proviso to s. 5 (3) (b), the

referee has fixed the sum of £3,000. There is a dispute, to which I shall have to refer presently, whether that £3,000 includes the sum of £2,100. At any rate, it is greater than the sum of £2,100 and I have no doubt that the referee intended to report that there was (what I will call for short) a loss to the tenant exceeding the sum which could be awarded under s. 4. In that respect I accept the report of the referee. Lastly, the applicant must, in my judgment, satisfy not the referee, but the tribunal, that the grant of a new lease would in all the circumstances of the case be reasonable.

A Counsel for the applicants has strenuously contended that, if the tribunal is not precluded by the facts of the case, in the light of the provisions contained in s. 5 (3) (a) and (b), from considering the grant of a new lease reasonable, it must consider the grant of a new lease reasonable. I do not agree with that contention. I agree that in, perhaps, the majority of cases, if the tenant proves the matters set forth in sub-s. (3) (b), there may well be no circumstances to induce the tribunal not to consider the grant of a new lease reasonable, but I am firmly of opinion that, although the tribunal may not be precluded by sub-s. (3) (a) or (b), it may still, in a proper case, come to the conclusion that the grant of a new lease is not reasonable. The language of the section seems to me to afford strong support for that view.—What the section says is :

C Where the tenant is the applicant, the grant of a new lease . . . shall not be deemed to be reasonable (a) unless the tenant proves . . . or (b) if the landlord proves . . . What the section should have said, if it were to give effect to counsel's contention, is : "The grant of a new lease shall be considered reasonable if the tenant proves and unless the landlord proves"—it should be the other way round. The section is so drafted, in my opinion, as to make it plain that the court is not precluded from granting a new lease, but it has, none the less, to consider judicially from the evidence whether the granting of the new tenancy is in all the circumstances reasonable. The referee has not expressly dealt with the question of reasonableness.—He considered that the respondents had proved the matters specified under (i) and (iv) of (b) so that the grant of a new lease could not be deemed by the tribunal to be reasonable. Upon that view which he has expressed in his report it might well appear to be irrelevant for the referee in the first instance, and the tribunal thereafter, to consider the question of reasonableness.

E It has been contended by counsel for the applicants that the referee reported on the question of reasonableness in favour of the applicants. I do not agree. I think that the referee, naturally, and, indeed, logically, did not consider that question, having arrived at the conclusion at which he had arrived under (i) and (iv) of sub-s. (3) (b). Counsel's contention that the referee had decided in his favour on the question of reasonableness is based on the fact that it is only where the tribunal is precluded from granting a new lease by reason of the provisions of sub-s. (3) (b) that it can award what I have described as s. 4 compensation. The provisions in the latter part of s. 5 (2) are, perhaps, somewhat curiously worded. They read as follows :

F . . . but if the tribunal is precluded on any of the grounds mentioned in para. (b) of the following sub-section from making such an order [i.e. an order granting a new lease] the tribunal may award such compensation as is provided under the last foregoing section, [i.e., under s. 4].

G It seems to me clear from these words that, if the tribunal is precluded on any of the grounds mentioned in para. (a) from making an order, it is not empowered to award s. 4 compensation. Equally, it seems to me clear that, if the tribunal considers it unreasonable to grant a new tenancy, even though it may not be precluded from doing so, then again it cannot award s. 4 compensation. In my opinion, the words of the section are plain, and, moreover, I think authority for the view which I have expressed is to be found in a case which neither side, so far as I recollect, cited to me in that connection, viz., *Smith v. Metropolitan Properties Co.* (2). It will be observed that the point is expressly dealt with by TALBOT, J., ([1932] 1 K.B. 332), and, I think, what he there says makes it plain that the view which I have expressed has his great authority behind it.

H I must now turn to sub-s. (3) (b) (i) and (iv). Under those clauses, the tribunal is precluded from granting a new lease if the landlord proves :

(i) that the premises are required for occupation by himself, or, where the landlord

is an individual, for occupation by a son or daughter of his over eighteen years of age, or . . . (iv) that for any other reason the grant of such a lease of the premises would not be consistent with good estate management, and for this purpose regard shall be had to the development of any other property of the same landlord.

Before I consider the arguments which have been adduced on those two clauses, there are one or two further facts which I must mention. The original lessors were Agers Cinema Circuit, Ltd. It is desirable for attention to be paid to the plan attached to the lease which shows to some extent the physical connection between the premises which Agers Cinema Circuit, Ltd., were letting to the applicants to carry on a cafe business and the part of the same building which was used for the purposes of a cinema. It is also desirable to have in mind certain protective covenants on the part of the tenant which Agers Cinema, Ltd., thought it desirable to exact, and, in particular, the tenant's covenants (f) and (k). Agers might have decided to use the cafe part of the premises themselves for the purpose of conducting a cafe business therein, but it is plain from the correspondence that they did not wish to do so, and that, on the contrary, they were anxious that the applicants should take a lease from them for the purpose of carrying on the cafe business. I do not know whether Agers, in 1933, had the necessary experience or organisation for carrying on a cafe business. It is plain that running a cafe business is essentially a very different thing from running a cinema or a circuit of cinemas. Another reason why Agers may very well have hesitated to take on the business of running the cafe is that, according to the evidence of Mr. Young, the valuer called by the applicants: "In those days cafes to cinemas were more or less an innovation. The newer cinemas built cafes with them, the older cinemas had nothing of the sort. It was rather a speculation as to how far those cafes attached to cinemas were going to pay," and then he goes on to say how that affected his figures. I mention that because at the time with which I am concerned, *viz.*, 1947, it most certainly, upon the evidence, is no longer an innovation to have cafes attached to cinemas and controlled by the same management, at any rate so far as the cinemas belonging to what is sometimes called the Odeon Group are concerned. There is evidence from a Mr. Marshall, who was called on behalf of the respondents, that of the 300 cinemas now belonging to O.A.T.S. about a third have cafes attached and in only five cases of those roughly 100 cafes are they controlled and managed by tenants and not by O.A.T.S., or by managers employed by O.A.T.S. to do so. Those five cases, according to Mr. Marshall, are only due to the fact that therein, as in the present case, prior to Mar. 25, 1947, tenancies were in existence which could not be got rid of.

Having said that, I can turn to the three points which counsel for the applicants raises in connection with (b) (i). The first question is: What is the material time to look at for the purposes of (b)? Both parties are agreed, and I agree, that the material time is the date of the expiration of the tenancy, or possibly the date when the tribunal comes to make its decision. Both parties are agreed that in this case the distinction makes no difference. I agree with that view and I, therefore, do not propose to waste any time in discussing whether the earlier or the later date in this case is the correct one.

Who then were the landlords for the purpose of (b) at Mar. 25, 1947? The applicants say Entertainments, the respondents say O.A.T.S. I turn, first, to the definition of landlord in s. 25 (1) of the Act:

"For the purposes of this Act, unless the context otherwise requires . . . The expression "landlord" means any person who under a lease is, as between himself and the tenant or other lessee, for the time being entitled to the rents and profits of the demised premises payable under the lease.

There is no question whatever that under that definition O.A.T.S. were the landlords of the premises between Mar. 21, 1947, and the date of the expiration of the lease. Strictly speaking, since Mar. 25, 1947, there has been no landlord or tenant of the premises, although, no doubt, the payment to be made under the order of June 30, 1947, which allowed the tenants to remain in possession for a further period pending the determination of this case, will have to be made to O.A.T.S. I think it is clear that, so far as that definition is concerned, the landlord may be a different person at different times. It will be observed that the definition contains the words "for the time being entitled to the rents" etc. It seems to me quite plain that it is only the person who is entitled to the

legal possession of the premises on the determination of the tenancy who can require the premises within (b) (i), or intend to pull them down within (b) (ii), or require vacant possession of the premises in order to carry out a scheme of re-development under (b) (iii). It seems to me abundantly clear that it is only the person who is entitled to the legal possession of the premises at the termination of the tenancy who can offer to sell the interest within s. 5 (7) to which, I think, no reference has been made. Lastly, it seems to me clear, and this is perhaps the most important of all, that no person can be ordered to grant a new lease under the section and no person can be bound to grant a new lease under s. 5 (10) except the person who is entitled to the legal possession at the termination of the lease.

The contention of counsel for the applicants involves these things. First of all, he argues, and, indeed, I think is compelled to argue, that the person to pay compensation under s. 4, if a claim has been made under that section where there has been a change of ownership during the currency of the proceedings, is not the person who came within the s. 25 (1) definition at the termination of the tenancy, but the person who came within that definition at the commencement of the proceedings. Secondly, he argues, and, indeed, is compelled to argue, that the person who can be ordered to grant a new lease by the tribunal, and the person who, under sub-s. (10), is bound to grant a new lease, again is not the person who had the right to legal possession at the termination of the lease or when the tribunal decided, but the person who had that right at the commencement of the proceedings. In other words, on this contention, the tribunal has to order a person who has no power to grant a new lease to grant one and a person who has no power to grant a new lease is bound to grant one under sub-s. (10) as the result of the tribunal's order. That seems to me to be a very difficult contention to make good, but I also think that *Smith v. Metropolitan Properties Co.* (2), and two other cases which were cited to me by counsel all go a very long way, if not the whole way, towards showing that the person who is liable to pay compensation under s. 4 is the person who was in receipt of the rents and profits immediately before the termination of the tenancy.

The two other cases to which I referred are *Dale v. Hatfield Chase Corporation* (5), and *Richards v. Pryse* (6). Counsel's contention, apparently, involves that the person who, by becoming the owner of the premises, gets the benefit of what is sometimes called the adherent goodwill is not the person who has to pay compensation for that adherent goodwill. That, as I have already said, involves that the person who alone can grant a new lease is not the person who can be ordered to grant a new lease. If, in the face of those difficulties, counsel were to argue that one person was the person to pay compensation and the other person the person to grant a new lease, or *vice versa*, I think his difficulties would be even greater.

Having said so much as to the difficulties of his contention it is now right that I should consider the sole foundation for it which he is able to adduce. I agree that in certain circumstances it might be conducive to justice if a change of landlord during proceedings under s. 5 were not allowed to affect the rights of the tenant. The landlords, when proceedings began, might be landlords who could never hope to prove the things mentioned in (b) (i) and (iv), but be replaced during the proceedings by landlords who could prove those things so that a tenant might begin proceedings for a new lease in circumstances warranting hopes of success and be defeated in the end by a change of circumstances during the proceedings. Again, a change of landlord might be deliberately made in order to defeat the claim for a new lease, the first landlord indirectly getting benefit from the vacant possession to which he was not entitled by selling or assigning for an enhanced price to a second landlord who was in a position to avail himself of the provisions of (b). That is not the case here, and I only mention the possibility to show that counsel has made the most of the argument. Although a section might have been inserted to crystallise, so to speak, the rights of landlord and tenant the question which I have to consider is whether s. 25 (2), on which alone counsel relies, amounts to such a section. That sub-section is as follows :

The designation of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of compensation.

I think that the effect of that section clearly, on ordinary principles of construction, should be reconciled, if possible, with the effect of the immediately preceding s. 25 (1), and, further, that before I give to that sub-section the very strained, and, indeed, extraordinary, meaning contended for by counsel I ought to consider whether it cannot be given a more natural construction which fits in with s. 25 (1) and does not produce the consequences which I have described as following from counsel's argument. Such a construction is extremely easy to find and I think it fits in perfectly with the significant wording of sub-s. (2). As I have already pointed out, and as was pointed out by the court in *Smith v. Metropolitan Properties Co.* (2), the claim for compensation under s. 4 can only be brought at the termination of the tenancy and on quitting the holding. As soon as the tenancy expires the designations "landlord" and "tenant" obviously become inappropriate. Thereafter, the person against whom the claim for compensation may be made is not, strictly speaking, a landlord and the person making that claim is not, strictly speaking, a tenant. The one might be described as an ex-landlord and the other as an ex-tenant. Accordingly, one can see at once scope for a sub-section laying it down that the designation which the two parties enjoyed at the date of the expiration of the tenancy should continue to apply to them until the conclusion of the proceedings. I emphasise the word "designation" as fitting in, as I think, so well with that explanation of the sub-section, but I also emphasise the last words of the sub-section: "proceedings taken in respect of compensation." All proceedings taken in respect of compensation under s. 4, as I have said, must be taken after the relationship of landlord and tenant has ceased to exist. On the other hand, all proceedings for the grant of a new lease taken under s. 5 must be taken before the tenancy has expired.

The material parts of s. 5 (2) are :

... the tribunal, on application being made for the purpose either by the landlord or by the tenant not less than nine months before the termination of the tenancy, or, where the tenancy is terminated by notice, within two months after the service of the notice . . .

Proceedings for a new lease must, therefore, be begun while the relationship of landlord and tenant still has nine months to run. The proceedings for compensation must be begun when that relationship has ceased to exist. Therefore, it is impossible that one should find those words at the very end of s. 25 (2) qualifying the proceedings referred to as being proceedings in respect of compensation. For these reasons I am satisfied that s. 25 (2) does not have the effect of overriding the provisions of s. 25 (1), and I do not think that it has any application to proceedings under s. 5. I, therefore, decide, as the referee clearly would himself have decided, that O.A.T.S. are the landlords for the purposes of the provisions in (b).

The next word to be considered is the word "required" in (b) (i). I think it might be convenient if I deal first with the words "for occupation by himself." I ask myself, therefore, the question : Are the premises required for occupation by O.A.T.S. ? Admittedly, the premises have not at any time since Mar. 21 and, indeed, I think since Jan. 27, been required for occupation by Entertainments, and that, of course, is why counsel has argued so strenuously that Entertainments have continued to be the landlords since Mar. 21 for the purposes of s. 5 (3) (b). I agree with counsel that a mere legal right to possession is not enough to constitute occupation for the purposes of this provision.

I have considered three cases to which counsel has referred me to see whether they throw any light on the question what does constitute such an occupation. They are *R. v. St. Pancras Assessment Committee* (7), *Bruce v. McManus* (8), and, lastly, and most surprisingly, *Hurst v. Picture Theatres* (9). It is sufficient to say that I find no assistance from any of these cases. I also suggested myself that perhaps some assistance might be derived from a consideration of any cases decided under the Increase of Rent Acts, because the language of (b) (i) in some respects resembles, and, indeed, perhaps, was suggested by, certain provisions in the Increase of Rent Acts, dealing with cases where the landlord requires premises as a residence for himself, or for a son or daughter of his over the age of 18. I do not think I need refer to those provisions in the Increase of Rent Acts because I have come to the conclusion—and, I think, counsel agrees—that a consideration of them, or of any cases decided under them,

can be of no help to me for present purposes. The Increase of Rent Acts provisions were dealing with a dwelling-house and residence therein which may well involve physical occupation by the landlord, whereas this Act deals with premises used for a trade or business which can clearly be occupied by a landlord irrespective of whether he is physically present on the premises. Indeed, the section itself expressly recognises that a landlord requiring the premises for occupation by himself may not be an individual, and, if not an individual, any physical occupation must clearly be by proxy. O.A.T.S. have, at least since Mar. 21, unquestionably intended on the expiration of the plaintiffs' lease to use the premises now in question to carry on therein a cafe business belonging exclusively to O.A.T.S. O.A.T.S. would take exclusively any net profits of that business and bear exclusively any net losses of that business. O.A.T.S. would provide any fund outside the takings which might be required for carrying on the business. Someone would have to manage the business carried on in the cafe, engage and dismiss staff, supervise their work, buy provisions, and so on, but the business would not be the business of the manager, and, if the manager were an individual, I think it would be quite out of the question to contend that the occupation of the cafe premises would be occupation by the manager and not occupation by O.A.T.S. Indeed, various parts of the management might be conducted by various persons.

Counsel's argument on this part of the case depends on the fact that Entertainments, in the first instance, and subsequently O.A.T.S., instead of themselves engaging somebody to manage the various branches of their business, which includes besides the cinema business the operation of cafes in conjunction with the cinemas, have chosen to employ another company, which, for short, I will call Odeon, to manage all the branches of Entertainments, and, subsequently, O.A.T.S., business for the latter company. I need not go into details but Odeon may be briefly described as a closely associated company. The first agreement of that kind which is before me is dated Aug. 25, 1944, made between Entertainments and Odeon Theatres, Ltd., not to be confused with Odeon. There was a further agreement made on Aug. 14, 1946, between Entertainments and Odeon Theatres, Ltd., one of the differences between the two agreements being that the remuneration payable to the managers was increased. On the same day, Aug. 14, 1946, there was an agreement made between Odeon Freeholds and Ground Rents, Ltd., which was then the name of the company which subsequently became O.A.T.S., and Odeon Theatres, Ltd. At that time the theatres belonging to Odeon Freeholds and Ground Rents, Ltd., did not include the theatre now in question, but it was an agreement for the management of a large number of theatres, and I think there is no doubt that on the acquisition of the Regal Cinema at Colchester that cinema would fall within the scope of the agreement. Counsel contends that the result of the management agreement made by O.A.T.S. with Odeon makes Odeon the contemplated occupier of the premises and not O.A.T.S. He pointed to the fact that the agreement to employ Odeon as managers is to last for 10 years, but that might equally be the case with an individual manager. He suggests that, if the management agreement was wrongfully terminated, or, to put it in another way, if the manager was wrongfully dismissed before the 10 years had expired, the remedy available to him might not be limited to damages, but might extend to a right to restrain O.A.T.S. from excluding him from the business premises. On that foundation he has sought to argue that Odeon became licensees on the premises with an irrevocable interest for 10 years. There might be cases where the owner of premises, when selling them or letting them, might, by means of a licence, confer such a right to the use of the premises by another as to prevent the owner from saying that he himself was occupying the premises within the meaning of the clause under consideration. I do not think that this could ever happen so long as the trade or business being carried on in the premises was exclusively the trade or business of the owner. The management agreement now under consideration lays down a great many duties that are to be performed by the managing company. I agree that those duties are extensive. I agree that in one respect at least the management agreement may be somewhat unusual, in that it enables a contract to be made by the manager in his own name as an alternative to making it in the name of the theatre owner, but the only right that the manager expressly gets

under this agreement is a right to be paid a weekly management fee during the continuance of the employment. That is the only right, and, in my view, there cannot be spelt out of these agreements any such right to occupation of the premises as is necessary if Mr. Beney is to succeed in his argument that the contemplated occupation of the premises is by the manager, Odeon, and not by the owners of the business to be carried on there, *viz.*, O.A.T.S. Counsel again has rightly insisted that for some purposes there is a vital distinction between the relationship of master and servant and the relationship of principal and agent, but in a trade or business to be carried on in premises for and on behalf of another it seems to me that whether the person physically resorting to the premises to carry on the trade or business is in the capacity of a servant or agent makes no difference to the question whether the premises are occupied by the owner of the trade or business. I have no doubt that it is O.A.T.S. who wish to have the premises in question for occupation by themselves.

I have used the word "wish" in order not to beg the remaining question which arises on cl. (b) (i), *viz.*, the true meaning to be given to the word "required." The word "required" by itself is certainly ambiguous. It may mean in some context no more than "desired," and an instance of this can be found in s. 5 (5): "every lease granted under this section shall, if the landlord so requires," etc. It may mean, on the other hand, in other contexts "indispensable," as when one says "human beings require adequate nourishment to maintain proper health." I agree with counsel for the applicants that the first meaning is too narrow in the present context, but I agree, on the other hand, with counsel for the respondents that the second meaning is too wide. I think that useful light on the proper meaning of (b) (i) is afforded by a consideration of (b) as a whole. In the proviso the following language is used:

... if the grant of a new lease is refused by the tribunal on any such ground as is mentioned in para. (b), the tribunal may make it a condition of refusal that if the landlord fails to carry out his intention within such period as may be allowed by the tribunal, the landlord shall pay . . .

There is nothing to indicate that the word "intention" is there limited to the intention mentioned in (b) (ii), and I think it applies also to the intention to occupy contemplated by (i) and the intention to carry out a scheme of redevelopment contemplated by (iii). I, therefore, think that what the landlord has to prove under (i) is that he intends to use the premises for occupation by himself, just as under (iii) he has to prove that he intends to use the premises to carry out a scheme of redevelopment. If that be correct, O.A.T.S. undoubtedly intended at the material time, and still intend, to use the premises for occupation by themselves. If, contrary to my opinion, the word "required" in (i) should be interpreted more favourably to the plaintiffs as meaning "reasonably needed," I should still be of opinion that O.A.T.S. have proved what is necessary to bring the case within that provision. The question as it seems to me is not whether the premises are reasonably needed to carry on the cinema business, but whether they are reasonably needed that O.A.T.S. may be able to carry on a cafe business in conjunction with the cinema business. About that it seems to me there is no doubt, and I, therefore, uphold the report of the referee upon s. 5 (3) (b) (i).

I have felt a little more doubt on s. 5 (3) (b) (iv), but I think the physical connection which I have already described between the parts of the building used for the cinema business and the parts of the building used for the cafe business does render it desirable from the point of view of good estate management that both parties should be under the same control. The fact that the original lessors to the applicants took a different view and were content to rely on protective covenants in the lease, which could be amended, and, indeed, if need be, reinforced in any lease granted by the tribunal, has been present to my mind, but on the whole I have come to the conclusion that to grant now a separate lease of the cafe part of the building would not be consistent with the good management of the estate in which the whole building is comprised. Furthermore, even apart from the connection between the cinema part of the building and the cafe part of the building, I think that to own about 100 cinema premises, to carry on a cafe business in about 95 of them, but cause the cafe businesses in the remaining 5 to be carried on by independent tenants is not, in the absence of some good reason for the distinction, consistent with good estate management, I, therefore, uphold the report of the referee also as regards s. 5 (3) (b) (iv).

These findings render it unnecessary for me to decide whether, if I am not precluded by s. 3 from considering the grant of a new lease to be reasonable, I should consider that the grant of a new tenancy is, in all the circumstances, reasonable. This question, however, has been fully argued before me, and since I have come to a clear conclusion on it I think I ought to state my conclusions. Counsel for the applicants has pointed to the expectation of the renewal held out by the original lessor, to the success made by his client of what was at the beginning an innovation and to the length of time during which they have carried on the business. He also relied on the two points which, unless established, would absolutely preclude the tribunal under s. 3 (a) from granting a new lease—that the applicants have been satisfactory tenants and that the compensation obtainable under s. 4 would not indemnify them for their loss of goodwill. Counsel for the respondents, on the other hand, relied on the physical connection between the parts of the building and on the fact that the cafe is carried on under the name which identifies it with the management of the cinema and on the connection originally contemplated and likely to be required in future between the cafe and the supply of refreshments, etc., in the cinema itself. He points out that the grounds on which the applicants rely as ousting the operation in favour of the respondents of s. 5 (3) (b) (i) are so highly technical that, even if the respondents had not technically brought themselves within (i), their resistance to the grant of a new lease has in substance the same merits as if they had brought themselves within (i). Similarly, he relies on the fact that it is consistent with good estate management to have the cafe under the same control as the cinema. He points out further that these are not the only cafe premises owned by the applicants even in Colchester, and that the loss of these premises does not mean that the applicants' cafe business as a whole will be closed down.

Balancing the hardship to the applicants which is likely to be occasioned by refusing a new lease against the hardship to the respondents which is likely to be occasioned by granting one, I consider, in the exercise of my discretion, that the grant of a new tenancy is not in all the circumstances reasonable. The respondents are content, however, that I should refuse to make an order on the ground that I am precluded from making one on the grounds mentioned in (i) and (iv) of (b), and I, therefore, award compensation calculated under s. 4 as recommended by the referee, *viz.*, £2,100. As regards costs, I have come to the conclusion that the applicants should pay three-fourths of the respondents' costs of the proceedings.

Report upheld.

Solicitors: *Goulden, Mesquita & Co.* (for the applicants); *Richards, Butler & Co.* (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

COPLANS v. KING.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), July 30, 1947.]

Landlord and Tenant—Rent restriction—Recovery of possession—Hardship—Comparative hardship—Finality of decision of county court judge—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, proviso.

Per cur : The decision of the county court judge, when considering whether or not to make an order for the possession of a house within the Rent Restrictions Acts, with regard to the balance of hardship under the proviso to sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, is final and cannot be made the subject of appeal to the Court of Appeal.

Dicta of SCOTT, L.J., in *Chandler v. Strevett* ([1947] 1 All E.R. 164, 165) not approved.

[AS TO RESTRICTIONS ON THE LANDLORDS' RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-334, paras. 392-399; and FOR CASES, see DIGEST, Vol. 31, pp. 576-578, Nos. 7256-7270.]

Case referred to :

(1) *Chandler v. Streveit*, [1947] 1 All E.R. 164; 176 L.T. 300.

APPEAL by the tenant from a decision of Judge KONSTAM at Brentford County Court dated Nov. 12, 1946.

The county court judge made an order for possession in favour of the landlord and his decision is now affirmed on a consideration of the evidence. The case is reported on the disapproval by the members of the court of the observations made by SCOTT, L.J., in *Chandler v. Streveit* (1).

R. L. Travers for the tenant.

Dennis Lloyd for the landlord.

LORD GREENE, M.R. : The landlord was seeking to recover possession from the tenant to whom she had purported to sub-let the whole of the house. She herself had been tenant under a three years' lease which had expired from a company who owned the house, but she had continued to pay rent, which was accepted by the company without comment. The point taken by counsel for the defendant was that the judge found that the landlord's tenancy from the company was not a contractual tenancy, as it would have been in the ordinary case of holding over, but that she was a statutory tenant of the company under the Rent Restrictions Acts; that, as she had parted with possession to the tenant of the whole of the house, she had ceased to be entitled to the protection given by those Acts; and therefore, *qua* the tenant, she was a stranger who had no right to recover possession. Assuming, however, that the judge directed his mind to the question to which, according to authority, he ought to have directed his mind, namely, what was the true inference from the whole of the evidence which had been given before him, I cannot find any evidence which would justify the inference that the landlord and the company intended that the relationship between them after the termination of the three years' lease should be that of statutory tenant and landlord under the Rent Restrictions Acts. On the contrary, the evidence seems to me to point conclusively to the other inference, namely, that they intended to maintain the ordinary relationship of holding over at common law. It is not necessary, therefore, to discuss the question where the burden of proof would lie in a case where the only evidence before the court was the payment and receipt of rent.

That is sufficient to dispose of the appeal, but counsel mentioned another argument, namely, the question of comparative hardship under the proviso to sched. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. He agrees that, if that had arisen, the only ground on which he could succeed in displacing the finding of the county court judge would be by relying on the *dicta* of SCOTT, L.J., in *Chandler v. Streveit* (1). Those *dicta* were not repeated by either of the two Lords Justices who sat with SCOTT, L.J., on that appeal, and, if I may say so with great respect to SCOTT, L.J., I should require a great deal of persuasion to be induced to follow them. He asks the question ([1947] 1 All E.R. 165): "Did Parliament intend to leave that very difficult task"—*i.e.*, the task of estimating the comparative hardship on either side—"in its entirety and finally to the county court judge to the exclusion of the Court of Appeal and even of the House of Lords?" With the greatest possible deference, I should have thought that that is the very thing that Parliament did intend in view of the class of persons that the statute was intended to benefit. The idea that the question of comparative hardship could be litigated up to the House of Lords appears, again with the greatest deference, to be one which, I should have thought, was clearly contrary to the intention of Parliament. Of course, if in a case there is evidence of hardship on one side and none on the other, the county court judge can come to only one conclusion, and if he finds hardship where the facts are not sufficient to constitute hardship in law—for example, something trivial, like the absence of a view of a neighbouring hill, river, tree, or something pleasant of that kind—he makes an error in law, but, once there is evidence which in law can amount to hardship on two sides, Parliament has deliberately made the county court judge the conclusive judge of the fact which is the greater hardship. So, with great deference to what SCOTT, L.J., said, I find myself constrained to disagree with the principle which I understand him to have suggested in that case. The appeal must be dismissed.

COHEN, L.J. : I agree, and I only desire to say that I share my Lord's difficulty in accepting the *dicta* of SCOTT, L.J., to which my Lord has referred. In saying this I am not in the least dissenting from the decision in *Chandler v. Strevett* (1)—indeed, I should not be at liberty to do so. It seems to me to be a good illustration of what my Lord has referred to, a case where the county court judge can be reversed because the evidence will only justify one conclusion regarding hardship. That was the ground for the decision of BUCKNILL, L.J., and SOMERVELL, L.J., in *Chandler v. Strevett* (1).

ASQUITH, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *H. N. H. Bransom* (for the tenant); *Bateman & Co.* (for the landlord).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

B. JOHNSON & CO. (BUILDERS), LTD. v. MINISTER OF HEALTH.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), July 22, 23, 24, 1947.]

C *Public Health—Housing—Compulsory purchase order—Confirmation—Duties of Minister—Disclosure of information acquired before order made—"Lis"—"Quasi-judicial"—"Duty to act fairly"—Housing Act, 1936 (c. 51), sched. I (4), (5).*

Owners of land comprised in a compulsory purchase order made by a local authority under s. 74 of the Housing Act, 1936, and confirmed by the Minister of Health under sched. I, para. (4) to the Act, applied to the court to quash the order on the grounds that the Minister, in considering objections to it, was bound to act in a quasi-judicial manner and that he had failed in that duty in that he had not made available to the objectors the contents (alleged to be relevant to the consideration of the objections) of certain letters written to the Minister by the local authority before the order was made :—

HELD : the confirmation of the order was essentially an administrative act, and the obligation of the Minister did not go beyond making available to both sides matter which had come into existence for the purpose of the quasi-*lis*, the inception of which was marked and constituted by the making of the objections. There was, therefore, no obligation on the Minister to make available material which came into his possession before that date.

Miller v. Minister of Health ([1946] K.B. 626), *Summers v. Minister of Health* ([1947] 1 All E.R. 184), and *Price v. Minister of Health* ([1947] 1 All E.R. 47) approved.

Board of Education v. Rice ([1911] A.C. 182) and *R. v. Westminster Assessment Committee, Ex p. Grosvenor House (Park Lane), Ltd.* ([1940] 4 All E.R. 132) distinguished.

[EDITORIAL NOTE.] In the course of his judgment, LORD GREENE, M.R., refers to observations of LORD SHAW in *Local Government Board v. Arlidge* (2) regarding the disclosure of the records of government departments. In the passage in question ([1915] A.C. 136, 137) LORD SHAW said : "The next proposition is this, that when a public local inquiry has been held in compliance with statute, the person whose interests are affected is entitled to something more, namely, a disclosure of the views of the inspector written out by him, in jottings or otherwise, for the guidance or consideration of the department in dealing with the case . . . I incline to hold that the disadvantage in very many cases would exceed the advantage of such disclosure. And I feel certain that if it were laid down in courts of law that such disclosure could be compelled, a serious impediment might be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks. The very same argument would lead to the disclosure of the whole file. It may contain, and frequently does contain, the views of inspectors, secretaries, assistants, and consultants of various degrees of experience, many of whose opinions may differ but all of which form the material for the ultimate decision. To set up any rule that that decision must on demand, and as matter of right, be accompanied by a disclosure of what went before, so that it may be weakened or strengthened or judged thereby, would be inconsistent, as I say, with efficiency, with practice, and with the true theory

of complete parliamentary responsibility for departmental action. This is, in my opinion, implied as the legitimate and proper consequence of any department being vested by statute with authority to make determinations." LORD GREENE, M.R., also referred to the following remarks of LORD LOREBURN, L.C., in *Board of Education v. Rice* ([1911] A.C. 82): "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board under s. 7 (3) of this Act. [Education Act, 1902.] The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by *mandamus* and *certiorari*."

AS TO COMPULSORY PURCHASE ORDERS UNDER THE HOUSING ACT, 1936, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 571-573, paras. 1207-1211.

AS TO QUASI-JUDICIAL POWERS, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 284-288, paras. 604-606; and FOR CASES, see DIGEST, Vol. 38, pp. 94-96, Nos. 697-704.]

Cases referred to :

- (1) *Robinson and Others v. Minister of Town and Country Planning*, [1947] 1 All E.R. 851.
- (2) *Local Government Board v. Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 38 Digest 217, 518.
- (3) *Miller v. Minister of Health*, [1946] K.B. 626; [1947] L.J.R. 146.
- (4) *Price v. Minister of Health*, [1947] 1 All E.R. 47; [1947] L.J.R. 291; 176 L.T. 305.
- (5) *Summers v. Minister of Health*, [1947] 1 All E.R. 184; 176 L.T. 237.
- (6) *Errington v. Minister of Health*, [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; Digest Supp.
- (7) *Board of Education v. Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 19 Digest 602, 290.
- (8) *R. v. Westminster Assessment Committee, Ex p. Grosvenor House (Park Lane), Ltd.*, [1940] 4 All E.R. 132; [1941] 1 K.B. 53; 104 J.P. 428; Digest Supp.

APPEAL by the Minister of Health from a decision of HENN COLLINS, J., dated Feb. 14, 1947, quashing a compulsory purchase order made by a local authority under the Housing Act, 1936, and confirmed by the Minister. The Court of Appeal now allowed the appeal and restored the order.

H. L. Parker for the Minister.

Rowe, K.C., and *Milmo* for the respondents (the objectors to the order).

LORD GREENE, M.R. : On Feb. 4, 1946, the Minister of Health confirmed a compulsory purchase order known as the Huyton-with-Roby (St. John's Road) Compulsory Purchase Order, 1945, which had been made by the local authority. HENN COLLINS, J., on the application of a company called B. Johnson & Co. (Builders), Ltd., the owners of the land comprised in the order, quashed that order for reasons which appear in his judgment. The grounds of the objection to the order may be stated quite briefly. It was said that the Minister, in considering the objection made by the applicants, who are respondents to this appeal—and I will call them "the respondents"—took into account certain letters which had been addressed to him by the local authority, before the order was made, and before, therefore, any question of objections by the respondents, had come into the picture. It is said by the respondents that the Minister, in considering the objections, was bound to act in a quasi-judicial manner, and that he had failed in that duty, because he had failed to make available to the respondents, as objectors, the matters mentioned in that correspondence,

which, it was said, were relevant to the consideration of the objections. The crucial point in the argument, and, indeed, the crucial point in the whole appeal, lies in the circumstance that the correspondence in question took place before the Minister came under any statutory duty to consider objections, because no objections had then been made or could have been made. It is said, nevertheless, that the Minister was under a duty to make those matters available to the objectors.

- A The matter arises under the Housing Act, 1936, pt. V, which deals with the provision of housing accommodation for the working classes. Section 71 imposes on local authorities the duty of considering "the housing conditions in their district and the needs of the district with respect to the provision of further housing accommodation for the working classes." There is also in the section an obligation placed on the local authorities, "within three months after notice has been given to them by the Minister"—*i.e.*, the Minister of
- B Health—"to prepare and submit to the Minister proposals for the provision of new houses for the working classes." The Act empowers local authorities to acquire land for the purpose of a scheme for the provision of such houses, and under s. 74 (1), the land may be acquired by agreement, or the local authority "may be authorised to purchase land compulsorily for those purposes by means of a compulsory purchase order made and submitted to the Minister and confirmed by him in accordance with the provisions of sched. I to this Act."
- C Schedule I lays down the necessary procedure for obtaining a compulsory purchase order. I need only refer to one or two of its provisions. I need not trouble with the machinery, previous to the decision of the council, with regard to submitting an order, but para. 3 provides that before submitting the order to the Minister—*i.e.*, submitting it for confirmation pursuant to s. 74—the local authority shall publish notices in newspapers, and serve on owners, lessees and occupiers affected a notice of intention to submit the order for confirmation, specifying the time and manner for making objections. Paragraph 4 is as follows :
- D

Except in the case of an order made under s. 36 of this Act, if no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, then, subject to the provisions hereinafter in this schedule contained, the Minister may, if he thinks fit, confirm the order with or without modification, but in any other case he shall, before confirming the order, cause a public local inquiry to be held, and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order either with or without modification : Provided that the Minister may require any person who has made an objection to state in writing the grounds thereof and may confirm the order without causing a public local inquiry to be held if he is satisfied that every objection duly made relates exclusively to matters which can be dealt with by the arbitrator

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F by whom the compensation is to be assessed.

- It will be seen that that paragraph makes it compulsory to hold a public inquiry where objections have been made and not withdrawn. The duty placed on the Minister with regard to objections is to consider them before confirming the order. He is also to consider the report of the person who held the inquiry. Having done that, his functions are laid down by the last words of the paragraph,
- G *viz.*, "and may then confirm the order either with or without modification." Those words are important, because they make it clear that it is to the Minister that Parliament has committed the decision whether he will or will not confirm the order after he has done all that the statute requires him to do. There is nothing in that paragraph, or anywhere else in the Act, which imposes on the Minister any obligation with regard to the objections, save the obligation to consider them. He is not bound to base his decision on any conclusion that
- H he comes to with regard to the objections, and that must be so when one gives a moment's thought to the situation. The decision whether to confirm or not must be made in relation to questions of policy, and the Minister, in deciding whether to confirm or not, will, like every Minister entrusted with administrative duties, weigh up the considerations which are to affect his mind, the preponderating factor in many, if not all, cases being that of public policy, having regard to all the facts of the case. I do not think that I need read anything more in that Act, but an amendment was introduced by the Housing (Temporary Provisions) Act, 1944. By s. 2, for a limited period, which was still running

at the relevant time in this case, the Minister was relieved of the obligation of causing a public local inquiry to be held. The obligation to consider objections was, however, preserved.

In the present case, the Minister decided not to hold a public local inquiry. Instead, he directed an informal inquiry at which the local authority and the respondents were heard and given an opportunity of pressing the submissions they wished to make. No objection has been made, or, indeed, could be made, to that procedure. The Minister was entitled to inform his mind by informal machinery of that sort, and it was a very convenient method of enabling the objectors to put forward their objections and any arguments that they wished to submit. Having considered the report made after that informal inquiry, and having considered the objections, the Minister confirmed the compulsory purchase order. The whole of that procedure was perfectly in order, subject to one question only, *viz.*, the question which we have to decide, whether the action of the Minister was vitiated by the non-production to the respondents of the correspondence to which I have referred. The objections were contained in a letter of Sept. 17, 1945, and were supplemented in a further letter of Oct. 16, 1945. Those objections, it is common ground, marked and constituted the inception of what is conveniently, but dangerously, referred to as the *lis*. The correspondence, the non-production of which is complained of, consisted, first, of a letter of Aug. 27, 1945, from the local authority to the Ministry, containing the statement that proposals for the making of a compulsory purchase order had "already been provisionally accepted by the department as the site for the council's second year housing programme." The other statement was this: "I may add that the district valuer's attempts to negotiate the voluntary sale of the land have failed." That statement is denied on behalf of the respondents. They say that there had not been any inquiries for voluntary sale, and the statement that negotiations had taken place and had failed was calculated to affect the mind of the Minister, in considering the objections. The other letter is one of Sept. 6, 1944, and the statement objected to there was this: "A transfer of ownership which was commenced prior to the war was not completed owing to war conditions until some time this year, and the land has now been purchased, I understand, by a firm of speculative builders who have expressed their readiness to sell the land to the council at 5s. per square yard, although, of course, they admit that this is a bargaining offer from which they would be prepared to make concessions." The price there mentioned, it is sufficient to say, is substantially in excess of the estimate given by the district valuer of the price which might be expected to be obtained as the result of an arbitration. The paragraph is stated by the respondents to amount to a statement that they were speculative builders, an expression which is said to be derogatory, who were demanding an excessive price and were out to extract as much as they possibly could in the way of purchase price. That again, it is said, was relevant to the objections, in the sense that with before him that statement and the innuendo said to be implicit in it the Minister would be affected in considering whether to give any, and what, weight to the objections. There is no question that the official in the Ministry who was dealing with this matter had this correspondence before him. What weight he gave to them, is another matter altogether.

Counsel for the Minister, put forward two arguments. He said, first, that, having regard to the date when these letters were received by the Minister, *viz.*, when the Minister's functions and character were purely administrative and not in any sense quasi-judicial, the so-called *lis* not having begun, he was under no obligation to make them available to the objectors. Alternatively, he said that, if he was under any obligation to disclose anterior documents—*i.e.*, documents anterior to the objections—it could only extend to documents that were relevant to the objections and that these statements were not relevant thereto.

Cases of this kind are to be found in the books in considerable numbers, and, although the provisions of every statute dealing with this class of matter have to be considered by reference to their own language, there are one or two general observations that I think may be made about the particular provisions with which we are concerned. First, the functions of the Minister in carrying these provisions into operation are fundamentally administrative functions.

In carrying them out, he has the duty which every Minister owes to the Crown, *viz.*, to perform his functions fairly and honestly, and to the best of his ability. But his functions are administrative functions, subject only to the qualification that, at a particular stage and for a particular and limited purpose, there is superimposed on his administrative character a character which is loosely described as "quasi-judicial." The language which has always been construed

- A "quasi-judicial" is to be found in the duty to consider the objections, which, as I have said, is superimposed on a process of Ministerial action which is essentially administrative. That process may begin in all sorts of manners—the collection of information, the ascertainment of facts, and the consideration of representations made from all sorts of quarters, and so forth, long before any question of objections can arise under the procedure laid down by the Act.
- B While acting at that stage, to carry the Act into effect or for purposes relevant to it and bearing on it, the Minister is an executive officer of government, and nothing else. The administrative character in which he acts reappears at a later stage because, after considering the objections, which may be regarded as the culminating point of his quasi-judicial functions, there follows something which again, in my view, is purely administrative, *viz.*, the decision whether or not to confirm the order. That decision must be an administrative decision,
- C because it is not to be based purely on the view that he forms of the objections, *vis-a-vis* the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue.

- It is manifest that, in the operation of hybrid functions of that kind, no perfectly logical result is to be expected. In the language that is used commonly in these cases, there are three phrases which crop up, and which, I think, deserve a little examination to see, at any rate, what they do *not* mean. The first of
- D these phrases I have referred to already, *viz.*, the word *lis*. *Lis*, of course, implies the conception of an issue joined between two parties. The decision of a *lis*, in the ordinary use of legal language, is the decision of that issue. The consideration of the objections, in that sense, does not arise out of a *lis* at all. What is described here as a *lis*—the raising of the objections to the order, the consideration of the matters so raised and the representations of the local authority and the objectors—is merely a stage in the process of arriving at an
- E administrative decision. It is a stage which the courts have always said requires a certain method of approach and method of conduct, but it is not a *lis inter partes*, and for the simple reason that the local authority and the objectors are not parties to anything that resembles litigation. A moment's thought will show that any such conception of the relationship must be fallacious, because on the substantive matter, *viz.*, whether the order should be confirmed or not, there is a
- F third party who is not present, *viz.*, the public, and it is the function of the Minister to consider the rights and the interests of the public. That by itself shows that it is completely wrong to treat the controversy between objector and local authority as a controversy which covers the whole of the ground. It is in respect of the public interest that the discretion that Parliament has given to the Minister comes into operation. It may well be that, on considering the objections, the Minister may find that they are reasonable and that the facts
- G alleged in them are true, but, nevertheless, he may decide that he will overrule them. His action in so deciding is a purely administrative action, based on his conceptions as to what public policy demands. His views on that matter he must, if necessary, defend in Parliament, but he cannot be called on to defend them in the courts. The objections, in other words, may fail to produce the result desired by the objector, not because the objector has been defeated by the local authority in a sort of litigation, but because the objections have been
- H overruled by the Minister's decision as to what the public interest demands. Unless that aspect of this stage in the process is thoroughly appreciated, the word *lis* may result in a completely fallacious approach to the type of problem with which we have to deal. Used in a broadly analogous sense, and in order to avoid undue length of exposition, the phrase is a convenient one, but I am endeavouring to secure that the phrase does not mislead me into pressing what is a very loose analogy to a point which would lead to results which would be quite unacceptable.

The next expression on which I would like to say a word is the word "quasi-

judicial." The matter in respect of which this quasi-judicial behaviour is called for is the matter imposed by way of statutory duty, *viz.*, the consideration of the objections. One thing is clear, that the decision of the Minister is not impeachable in the courts on the grounds on which a judicial decision might be impeached. I have given an example of what I mean. It would be impossible for an objector to attempt to get the decision set aside on the grounds that the evidence at the inquiry, or the evidence put before the Minister in his quasi-judicial capacity, was insufficient to support his decision to confirm the order. A
 An attempt was made recently in the *Plymouth* case (1) before this court to introduce that type of judicial conception into similar administrative provisions, and an attempt was made to show that in that case the evidence before the Minister compelled him, as a matter of law, to take the step which the objectors there said he ought to have taken. This court pointed out that to accept any such argument would involve substituting the opinion of the court as to what considerations should weigh with the Minister for the opinion of the Minister himself, which had been made by Parliament the decisive matter. B
 In a nutshell, the decision of the Minister is a thing for which he must be answerable in Parliament, and his actions cannot be controlled by the courts. Of course, I am speaking on the assumption that everything has been done regularly, and that the Minister has not failed in the duties which are put on him in his quasi-judicial capacity. I merely mention that to illustrate my point that, if the phrase "quasi-judicial" is not very closely watched, it is apt to lead to the fallacious view that the decision of the Minister is in some sense a quasi-judicial decision which can be challenged on the ground of lack of evidence, for instance, in the courts in the same way as a judicial decision might be challenged. C
 In this hybrid mixture of administrative and quasi-judicial function the two elements are closely intermingled, but, as I have said, the basic element is the administrative act which begins, or may begin, before, and ends after, the quasi-judicial stage has been completed. The word "quasi-judicial" again leads to a temptation to import into the area which that expression covers conceptions which are very suitable to the conduct of an ordinary piece of litigation, but which are quite unsuitable to the performance of the acts which have been entrusted to the Minister by Parliament. D

The last phrase about which I might say a word—and I say it particularly because I am disposed to think that HENN COLLINS, J., in this case really, E
 if I may say so with respect, confused the two meanings and applications of the phrase which I am about to cite—is the phrase "duty to act fairly." As I have said, every Minister of the Crown is under a duty, constitutionally, to the King to perform his functions honestly and fairly and to the best of his ability, but his failure to do so, speaking generally, is not a matter with which the courts are concerned. As a Minister, if he acts unfairly, his action may be challenged and criticised in Parliament. It cannot be challenged and criticised in the courts unless he has acted unfairly in another sense, *viz.*, in the sense of having, while performing quasi-judicial functions, acted in a way which no person performing such functions, in the opinion of the court, ought to act. F
 On the assumption, for instance, that the respondents are wrong in their contention, and that there was no obligation to disclose these documents, I can well understand some people might say: "Well, unless there was some other objection, the Minister ought, in fairness, to have let these people know what he had got in his file on this particular topic." G
 If the Crown is right and the respondents are wrong, the statement that in fairness he ought to have disclosed that information means nothing more than that, as a Minister is expected to act fairly, he might have been expected to do it. It would not mean that his failure to do it amounted to a breach by him of any duty imposed on him by law which could be discussed and enforced in the courts. On the other hand, if the expression "bound to act fairly" is used in strict reference to his semi-judicial functions, H
 it then bears a totally different meaning. It then means, not that a Minister must be expected under his general duty to act fairly, but that, if he does not act fairly, he breaks a rule laid down by the courts for the behaviour of a quasi-judicial officer. Therefore, it is important, in my opinion, if that phrase is used, to be quite sure in which of those two senses it is being used.

Returning to the present case, certain matters are common ground. It is not disputed by the respondents that the Minister, in coming to his decision

whether to confirm or not to confirm a compulsory purchase order, is entitled to have his mind informed in a number of ways. In other words, he is not limited to material contained in the objections—not limited to arguments, evidence, and considerations put forward by the local authority for the purpose of the considerations of the objections, or put forward by the objectors themselves. It is obvious to anyone who has any familiarity with the operations of government departments that matters of high public policy, such as this, are, or may be, under constant consideration and review by the necessary Minister. The problem does not, so to speak, arrive suddenly out of the blue by the putting forward by the local authority of a compulsory purchase order for confirmation. The housing conditions in great cities are the subject of continuous consideration, not merely by one Ministry, but by several. Information may have arrived, reports may have been obtained, representations and arguments may have been put forward by other Ministries, and in a great many cases one would expect to find a fairly bulky file, much of which, if not the whole of it, may bear on some particular application. Obviously, it would be absurd to say that a Minister, in considering whether to confirm the compulsory purchase order, must exclude from his mind information and considerations which have come before him in that sort of way. It is on the obligation alleged, *viz.*, to disclose information of that kind, that the present controversy turns. It is, not unfair to say that, generally speaking, the idea that a Minister can be compelled to disclose to anybody information of that kind, which he has obtained as a purely administrative person, is alien to our whole conception of government in this country. I referred in my judgment in the *Plymouth* case (1) ([1947] 1 All E.R. 858) to certain observations of LORD SHAW, in *Local Government Board v. Arlidge* (2) ([1915] A.C. 137), which, so far as I know, have never been contradicted, and which, in my opinion, substantially represent one aspect of our conception of government.* It is, therefore, admitted that matters of that kind can be taken into consideration, and that the decision of the Minister may be affected and governed by them, irrespective of the objections and what may be said or established in support of them. It is further common ground, and indeed, it is clearly established by authority, that statements made by, or obtained from, either of the two quasi-parties to the quasi-*lis* while it is pending, *viz.*, the local authority and the objector, must be disclosed to the other quasi-party. Information so provided and put before the Minister is information given to enable him to do the thing he is doing at that stage, considering the objections, and it has always been naturally said that information of that kind must be disclosed to the other party to give that other party an opportunity of converting it, or making comments upon it.

Does that obligation extend to a matter brought to the knowledge of the Minister before he assumes the quasi-judicial role, when his functions are purely administrative and his action in receiving the information and putting it in his file is a purely administrative action? The objectors maintain that, subject to certain qualifications which I will mention, material which is obtained and considered by the Minister and may effect his decision whether or not to give effect to the objections ought to be made available to the objectors, even if it was obtained long before any objections were or could be made. That proposition, if accepted, would involve remarkable results. The Minister may have—if I may describe the thing graphically—in his office a file (it may be a very large file) containing matters bearing on the particular case, or matters bearing generally, for instance, on the state of working class housing in a great city without reference to any particular plot of land. There may be a report which the Minister has obtained as to the state of working class houses in a particular city which makes it perfectly clear that, as a matter of public policy, he ought to do everything he possibly can to make land available for the construction of working class houses. A report of that kind may well induce him to say, when he comes to consider the objections: "This objector has got, from his point of view, a very strong case. He is going to be dispossessed, and it will mean a great hardship on him," and matters of that kind, but he may add: "I have got in my file a report which I obtained a year ago as to housing conditions in this city, and the matter contained in that report makes

* SEE EDITORIAL NOTE, p. 395 *ante*.

it imperative, in my view, to confirm this order, so as to carry out what I consider to be the proper public policy." A report of that kind would, clearly, be relevant to the objections, because, in the case I put, the report is the thing that has induced the Minister to overrule the objections, however sound in the abstract, and taken by themselves, he may consider them to be. The argument, therefore, if carried to that extreme point, would necessarily, as it seems to me, involve the disclosure to the objectors, and to the local authority, of the Minister's file. That is a proposition from which even counsel for the respondents shrank, and he qualified it by what, as was pointed out by COHEN, L.J., during the argument, is an illogical qualification. He limited the kind of information, the disclosure of which he said was compulsory, to communications received from the other quasi-party to the quasi-*lis*. So put, the proposition was sufficient to cover what he was striving to secure here, the production of letters originating with the local authority. That, he said, was sufficient for his purpose, but that will not do because the principle on which he bases that limited proposition is one which leads inevitably, if it be right, to the acceptance of the larger proposition, and that larger proposition is one which, I venture to think, is quite unacceptable.

There is one more qualification which he introduced, consisting of the word "relevant." He said that his principle only relates to relevant material. When asked who was to decide what material was relevant or not, he replied: "The court." Think what that means. The Minister searches in his file for correspondence with the local authority anterior to the submission of the order and the making of the objections. He finds a great deal which he decides is not relevant in any sense to these objections. He, therefore, does not disclose them. His action being challenged on the ground that he has failed to disclose relevant material, and the court then having before it the documents which the objectors say were relevant and the Minister thought were not relevant, the court is to decide which was right. That, again, would lead to very curious results. There may be a matter in the file which helps—or, perhaps, compels—the Minister to confirm the order. I gave an example a moment ago, a report obtained possibly some time before, it may be from the local authority itself, in pursuance of its duty under s. 71 of the Act. That would have to be disclosed because, although it may contain no reference to the land which ultimately becomes the subject of the compulsory purchase order, it is a matter which would affect the general view of policy of the Minister.

I cannot see how it could be suggested that material of that kind would not be relevant to the objections, because it would be material which would affect the Minister's mind in deciding what force, if any, to give to those objections. Therefore, we are back really where we started. Even on counsel's limitation, the whole of the material in the file which might affect the Minister's mind in making an administrative decision would have to be produced on the ground of its relevance. I cannot help thinking that the argument in this case, like the arguments in many of these cases, really rests on an attempt to force this very curious procedure, with its curious obligations, into the straight-jacket of the formulae of ordinary litigation by the use in ambiguous senses of such words as "*lis*," "quasi-judicial," and so forth. Indeed, the parallel, which suggests itself to one's mind in considering this particular argument is the parallel of discovery. There is, however, no analogy between this sort of thing, and discovery in an action. First, the object is not to discover the documents in the hands of the so-called parties. It is to discover something in the possession of the so-called judge, and to discover something in the possession of the so-called judge, which, pursuant to his duty as an administrative officer, he has collected in that capacity alone. What analogy to that sort of thing is to be found in the word *lis*, I do not know. The proposition would involve a clear-cut conflict, it seems to me, between the duties of the Minister as a purely administrative officer and his limited and temporary obligations as a quasi-judicial officer, limited in time and limited in relation to the particular statutory duty imposed on him, the considering of objections.

That is the real position. The presence of that quasi-judicial element in the process of carrying on this department of government would involve the obligation to disclose material which is purely administrative in character, and which, be it observed, would in many cases be of such a kind that the Minister would be

compelled to say : " It is not in the public interest that it should be disclosed." Therefore, if such a case arose (and it might very well arise, because the idea that Ministers could be compelled to disclose inter-departmental communications on this type of subject-matter is, as I say, alien to the whole of our conception of government), even if counsel was right, what he suggests would be completely inadequate to achieve the object he wishes to achieve. I may add one further matter. If material in writing were to be disclosed, why not material which is

A not in writing ? Logically, the proposition would involve that the Minister ought to communicate to the objectors and the local authority, or to the objectors, matters which he had ascertained, perhaps at conferences, long before the compulsory purchase order was ever on the stocks, matter which was locked up in his own recollection. Failure to communicate that to the objector would, on counsel's view, and on the logic of his argument, be just as detrimental as failure to disclose a minute of such an interview, if there happened to be one on the file.

B On principle, having regard to the considerations I have endeavoured to express, it appears to me that the obligation implied by the use of the word " quasi-judicial " does not extend beyond what HENN COLLINS, J., described in what, if I may say so, appears to me to be an extremely happy phrase in an earlier case. He had formulated it, clearly, with care, and it seems to me to bring out the distinction between the administrative and the executive aspect of the matter. I quote from his decision in *Miller v. Minister of Health* (3), also a case of a compulsory purchase order. There information had been obtained by the Minister in his administrative capacity, including information regarding the views of other government departments as to the suitability of the site in question. HENN COLLINS, J., said, in a paragraph which I find very helpful ([1946] 1 K.B. 628) :

D I think one must remember in approaching these matters that the question what a Minister shall or shall not do when acting administratively is not one that can be determined on any principle of law, nor yet on any principle, as I see it, of natural justice, as between the Minister and any one member of the community. The Minister, acting in his administrative capacity is governed by considerations of expediency only. He has to decide—ultimately, I suppose, subject to the review and governance of Parliament—what in his view is best for the community. No principle of natural justice as between any individual and the Minister of the Crown has any place in that kind of administration, but when questions as to whether those administrative powers should be exercised have been referred to him by Act of Parliament, in this case the Housing Act, 1936, at that point he has to consider judicially the matter that is so brought before him. That does not mean, as the authorities have shown, that he is not to use any knowledge which has come to him, so to speak, extra-judicially but all the material which has been formulated for his judicial consideration must be [made] available to him on both sides. That is the meaning of his acting with natural justice in a judicial capacity.

F He goes on to point out that the documents in that case had come into existence long before the *lis*, " as it has been conveniently described in some of the authorities, was ever adjudicated," and he rejected the application which was being made by the objector. The phrase, " which has been formulated for his judicial consideration," in my opinion, clearly means something which has come into existence for the purpose of the quasi-*lis*, and the learned judge is very careful to exclude the type of thing which he did exclude in that case, *viz.*, material which had come to the Minister without any connection with the quasi-*lis*, before the quasi-*lis* ever started, and when there were no quasi-parties in existence, there being no quasi-*lis*. The learned judge felt in the present case, I think, that he was resiling from what he had said in that case, but the reason he gave was this, in referring to his own decision and that of MORRIS, J.,

H in *Price v. Minister of Health* (4) :

All that has been said is that when the Minister is put in a quasi-judicial position, he does not necessarily act unfairly because he does not disclose to the objectors, all the information that he has, but that is not to deny, and I hope it will not be understood so far as I am concerned, ever to have meant that if he has in his possession a material statement, a statement material to his decision, about the status or conduct of the objectors, or of facts peculiarly within his knowledge with which they could deal, and which he proposes to consider, it is only natural and fair that the objectors should deal with it, or have an opportunity of dealing with it.

With all respect, I should have thought that was inconsistent, so far as it relates to earlier documents, with what he said in *Miller's* case (3), but there is, I think, if I may say so with the greatest respect, some confusion implicit in the phrase "only natural and fair." As I pointed out, it may be natural and fair for a Minister to disclose such information, but that is different from saying that there is a lack of fairness involving a breach of the duties which the law imposes on him when acting in a quasi-judicial manner.

I do not want to prolong this judgment by a careful examination of all the authorities. It is sufficient to say this. There is no single case in the books where it has been said, or, indeed, suggested, that the obligation of the Minister in considering objections, as regards discovery, goes beyond an obligation to see that matter which has come into existence for the purpose of the quasi-*lis* is made available to both sides, and I am not going to extend the obligation on the Minister beyond that point. It seems to me that, if it is to be extended beyond that point, it will lead to a chaotic and unacceptable result with regard to information in Ministerial files. As I said, at the beginning of this judgment, if the legislature chooses to mix, for the purpose of one essentially administrative process, a quasi-judicial element so as to make a sort of hybrid operation of it, one cannot expect lines of division to produce an entirely logical result. The quasi-judicial element must not be permitted to cause interruptions into a purely administrative sphere. Not only was that view taken, as I read this judgment, by HENN COLLINS, J., in *Miller's* case (3), but it has been taken by MORRIS, J., in two cases which have recently come before him, *Summers v. Minister of Health* (5), and *Price v. Minister of Health* (4). In each of those cases, the learned judge had to consider the question of documents which were anterior in date to the inception of the quasi-*lis* by the notice of objection. In *Summer's* case (5) MORRIS, J., said this ([1947] 1 All E.R. 188):

In his judgment in *Miller's* case (3), HENN COLLINS, J., refers to the distinction between material that had come into existence before the *lis*, and material which he describes as being material formulated for the judicial consideration of the Minister. It seems to me that the first three documents which I have mentioned in this case came into existence before the *lis* was joined, and that they were not documents which the Minister was obliged to submit to the applicants before the Minister came to a decision. Then he said this (*ibid.*, 189):

For example, by the first objection, the applicants said that the land proposed to be scheduled was land that was absolutely vital for the proper occupation, management and agricultural development of the farm. The Minister may have been persuaded of that. He may have accepted that suggestion. He may have accepted also what was set out in other objections, but he may have thought that other considerations which he had to take into account were overriding considerations, and that he ought in the public interest, to confirm the order.

That expresses, in language much more economical than I have used, a point which I have endeavoured to express earlier in this judgment. In *Price v. Minister of Health* (4), precisely the same question as to letters anterior to the *lis* arose, and, speaking of *Errington v. Minister of Health* (6), a decision of this court MORRIS, J., says ([1947] 1 All E.R. 50):

The events under consideration there occurred after the holding of the public inquiry, and indeed, what is more important, after the time when the Minister began to act in a quasi-judicial capacity.

Later he said (*ibid.*, 51):

I think it is clear that many documents must come into the possession of the Minister while he is acting administratively, and before a time when he enters on semi-judicial duties, or, to use the language of GREER, L.J., "before . . . the *lis* is joined between the objecting property owners and the local authority." The Minister, in the nature of things, it seems to me, must enter upon his quasi-judicial duties with much knowledge acquired administratively.

Then, dealing with the facts of that case, he says:

It is sufficient if I deal with the present case on its own facts. For the reasons I have indicated, I am satisfied that there has been no sort of prejudice to the objectors, owing to the fact that they did not have these two letters before them . . . I am of the opinion that it was not necessary to have laid before the objectors copies of those two letters.

A There are two clear decisions by MORRIS, J., on the point that we are dealing with here. I agree with what he said in those cases, and with the reasons that he gave. I do not think that I need prolong this judgment by an examination of the earlier authorities—*Errington v. Minister of Health* (6), and so forth. They do not go beyond what a moment ago I said the authorities laid down with regard to the obligation of the Minister when acting quasi-judicially. I ought, however, to refer to one matter, because counsel for the respondents placed great reliance on it, *viz.*, the well-known observations of LORD LOREBURN, L.C., in *Board of Trade v. Rice* (7) ([1911] A.C. 182).^{*} I shall not read the passage, but it is clear, to my mind, that LORD LOREBURN was there dealing with a different type of matter from that with which we have to deal here. He was dealing with something which was a *lis* in a much truer sense, because, as he said: "The Board is in the nature of an arbitral tribunal." Apart from that, his observations were not directed to the sort of statute we are dealing with, nor do I think the language which he used is in any way applicable to the consideration of the present case.

B The only other authority, which I must just mention, is a rating case, relied on by counsel for the respondents, *R. v. City of Westminster Assessment Committee, Ex p. Grosvenor House (Park Lane), Ltd.* (8). It is sufficient to say that it dealt with a totally different type of statute and was concerned with a totally different kind of subject-matter—a quasi-*lis*, if I might continue to use that expression, of a very different kind, and a document of a very different kind, *viz.*, the report of an expert which the rating authority had obtained. I find nothing in it which in any way affects the conclusion to which I have come. In the result, my opinion is that the appeal must be allowed and the order must stand.

D COHEN, L.J. : I agree both with the conclusions which my Lord has given and with the reasons he has given for those conclusions. As we are differing from the learned judge in the court below, I will recite shortly my reasons, in my own words. The Minister's primary functions are executive. In exercising them, he must, of course, act fairly and impartially, but, if he fails to do so, he is responsible only to Parliament and cannot be made responsible in the courts. Parliament, in its wisdom, has thought fit to superimpose on the executive functions of the Minister certain duties which he must discharge, and which have been described in this court as quasi-judicial duties. Thus, once the quasi-*lis* has started, he must not hear one party in the absence of the other: see *Errington's* case (6). Again, when through his officer, he holds a public, or, indeed, private inquiry, that officer must give each of the parties an opportunity of stating his case; he must not hear one side, and refuse to hear the other. Again, as my Lord has pointed out, once the quasi-*lis* has started, if he receives a communication from one party, he must no doubt give the other party an opportunity of commenting on it. I think it must also be the case that, once the quasi-*lis* has started, if he receives from some third party a document relevant to the subject of the quasi-*lis*, he should give both parties an opportunity of commenting on it. Counsel for the respondents would seek to make him not only a quasi-judge, but a quasi-litigant, bound to give quasi-discovery to each of the parties to the quasi-*lis*. Logically, on this kind of argument he would be bound to supply copies of all relevant documents and to answer quasi-interrogatories as to matters communicated to him earlier in his executive capacity, before the quasi-*lis* started. Counsel indeed recognised that this would be an impossible position to support, and sought to avoid it by limiting the alleged duty to a duty to disclose only the substance of any written communication in his possession, without an obligation to disclose the source of the information, or give a copy of the document. So limited, H in my opinion, counsel's argument is logically unmaintainable. It ignores the fundamental distinction between the executive and quasi-judicial functions of the Minister, and is not justified by authority. The truth of the matter is, I think, correctly stated by HENN COLLINS, J., and MORRIS, J., in the passages from the cases which my Lord has already cited. It is essential to keep separate the quasi-judicial and executive duties of the Minister. His duty as regards information received by him in his executive capacity is to use that information

* SEE EDITORIAL NOTE, p. 396 *ante*.

fairly and impartially. This may involve that he should give an opportunity to the authority or to the objector, as the case may be, of dealing with some allegation in a communication he has received before the quasi-*lis* started, but, if he fails to do so, he is responsible only to Parliament for the discharge of his executive duties, and cannot be made responsible in these courts.

There is only one other matter I desire to mention, and that is to say a few more words on the subject of *R. v. City of Westminster Assessment Committee* (8), on which counsel for the respondents particularly relied. In that case, the assessment committee were hearing an objection by Grosvenor House (Park Lane), Ltd., to a provisional valuation list. The surveyors to the parties agreed the figures at which the property in question should be entered in the list, but the assessment committee adopted a different figure, acting on the authority of a general report by an expert appointed by them in exercise of the powers conferred upon them by s. 38 of the Rating and Valuation Act, 1925. They did not disclose this report to either party, who had, therefore, no opportunity of correcting or contradicting it. Grosvenor House (Park Lane), Ltd., applied for writs of *certiorari* and *mandamus*, and this court held that both writs must go. SCOTT, L.J., took the view that a report obtained before the date of hearing an objection should be regarded merely as one of the sources from which the committee properly obtained its information, and that there would be no duty to disclose, at the hearing, that particular source any more than any other source of its expert knowledge, but the majority of the court were of opinion that it made no difference that the report was obtained before or after the commencement of the hearing, or that it was of a general and not specific character. I do not derive any assistance from that case. While it is true, as pointed out by SCOTT, L.J., that the assessment committee are essentially an executive and non-judicial body, except when they are called upon to hear an objection, when they are so called upon, their functions as an executive body are, so to speak, suspended, and they have to give a judicial decision on the objection. In this connection, I think it is worth referring to the terms of the section under which they give that decision, s. 47 (6) of the Valuation (Metropolis) Act, 1869, which provides :

The committee shall hear and determine on the objection in the same manner as if it were an objection to a valuation list, and may make such order as they think just. In those circumstances, I respectfully agree with the majority of the court that, if the committee are going to act on a report obtained from an expert, while performing their functions under the section I have read, it would be their quasi-judicial duty to disclose that report to the parties, and give them an opportunity of commenting on it. Here, however, the position is entirely different. The Minister is not required to hear and determine the objection. The objection having been made, he has to comply with the terms imposed upon him by the Act. He has to consider the objection and the report, but he is not required to give a determination on the merits of the objection. He has, in his executive capacity, to decide whether or not to confirm the order. He may, as counsel for the Minister points out, come to the conclusion that the objection is well-founded, but he may, none the less, confirm the order, because he takes the view that it is in the national interest to disregard the objection.

For these reasons, it seems to me that no assistance can be derived by counsel for the respondents from the decision in the *Westminster* case (8), and for these reasons, I agree that the appeal should be allowed.

ASQUITH, L.J. : I agree.

Appeal allowed with costs.

Solicitors : *Solicitor, Ministry of Health* (for the Minister) ; *Pritchard, Englefield & Co.*, agents for *Aneurin Rees & Davies*, Liverpool (for the respondents).
[Reported by C. N. BEATTIE, Esq., *Barrister-at-Law*.]

BEARD v. PORTER.

[COURT OF APPEAL (Tucker, Somervell and Evershed, L.JJ.), June 20, July 22, 1947.]

Sale of Land—Conditions of sale—Breach—Damages—Vacant possession by certain date—Failure by vendor to give possession—Purchaser's right to recover stamp duty and legal costs of purchase of second house.

A By a written contract, dated Jan. 30, 1945, the defendant (the vendor) agreed to sell to the plaintiff (the purchaser) a freehold dwelling-house known as "Thistledown," which came within the scope of the Rent Restrictions Acts. The house was then occupied by a tenant, but the vendor agreed that the purchaser was to be given vacant possession on Aug. 1, 1945. In Mar., 1945, the purchase was completed, but the tenant refused to quit the house on Aug. 1, and the purchaser sued for damages for breach of the vendor's undertaking to give vacant possession on that date. The commissioner of assize awarded (1) £980 being the difference in value between the purchase price of £2,500 and the value of the house subject to the tenancy of H., viz., £1,520; (2) solicitors' charges incurred by the purchaser in buying a second house to live in, £52 18s. 0d.; (3) *ad valorem* stamp duty in respect of the conveyance of the second house, £30; and (4) payments made by the purchaser in respect of lodgings for five weeks after Aug. 1, £15 15s. 0d. The Court of Appeal confirmed the awards of damages relating to items (1) and (4), and with regard to items (2) and (3),

B HELD: (TUCKER and SOMERVELL, L.JJ., EVERSLED, L.J., *dissentiente*) the legal costs and stamp duty were not part of the purchase price of the second house, but were outgoings necessitated by the vendor's breach for which the purchaser received no countervailing benefit and which were not reflected in the value of the house which he purchased, and, therefore, the purchaser was entitled to recover those amounts.

D *Per* EVERSLED, L.J.: The purchase of the second house was a transaction wholly distinct from the purchase of the first; expenses incurred by the purchaser in respect of the second purchase could not be said to constitute loss or damage flowing from the vendor's breach of the terms of the first transaction; if they could, they were too remote.

E [AS TO DAMAGES FOR BREACH OF A CONTRACT OF SALE OF LAND, see HALSBURY, Hailsham Edn., Vol. 29, pp. 389-394, paras. 535-541; and FOR CASES, see DIGEST, Vol. 40, pp. 262-267, Nos. 2273-2341.]

F APPEAL by defendant from a judgment of Mr. COMMISSIONER STREATFEILD, K.C., without a jury, at Winchester, dated Dec. 12, 1946. The facts are summarised in the headnote. The Court of Appeal, by a majority, dismissed the appeal.

R. Stock for the defendant.

C. Oldham for the plaintiff.

July 22. The following judgments were read.

G EVERSLED, L.J. [having considered the facts and reached the conclusions summarised in the headnote]: In my view, the plaintiff is in difficulty on the second and third heads of damage, namely, the legal costs and stamp duty incurred by him in respect of his second purchase. Having regard to the proved facts of the case, the contract sued on took a remarkable form (as I think). Since it was of the essence of the matter that vacant possession should be given, and the plaintiff only entered into the transaction on that footing, one would have expected the contract to take the form, usual in such cases, that completion would take place when vacant possession was given, so that, should the defendant fail to implement this vital part of his promise, the plaintiff would be entitled to treat the contract as at an end and abandon a transaction which had ceased to be of use to him. It is true that in certain letters which were read at the trial the defendant "guaranteed" that vacant possession would be given on the date named in the contract. The plaintiff, however, does not sue on such letters; he sues on the written contract of Jan. 30. Notwithstanding the facts and the correspondence, the

Cur. adv. vult.

contract took the form that, on the face of it, the plaintiff was bound to complete and buy the property whether or not the defendant procured the departure of the tenant, Mr. Hoare. No claim has ever been made to rescind the sale and, having regard to the conveyance, I assume no such claim could be made. The plaintiff has got what he contracted to buy, and he has received compensation for the loss in value of the thing purchased by reason of the defendant's failure to give vacant possession. It is true that the plaintiff has presumably paid in respect of his purchase a larger sum to his solicitors and a larger amount of *ad valorem* duty than he would have been called upon to pay had the purchase price originally been £1,520 instead of £2,500, but no claim is made in respect of such an overpayment. A

In the circumstances, the plaintiff's second purchase seems to me to be wholly distinct from his first, and expenses incurred by him in respect of his second purchase cannot, in my view, be said to constitute loss or damage flowing from the defendant's breach of the terms of the first transaction. If they can, then they are, in my judgment, too remote. Were it otherwise, then, so far as I can see, the plaintiff would be entitled to ask the court to investigate the question whether his second house was as good a bargain as the first, and charge the defendant by way of damages with a sum to compensate the plaintiff to the extent to which he paid an excessive price or otherwise got a less attractive and convenient abode. In truth, on a purchase of land the scale charges and stamp duty are part of the cost of purchase. The price paid by the plaintiff for "Thistledown" (as now reduced) was £1,520, plus the legal costs and duty. For that sum he got, as I construe the contract, what, in the circumstances, he bargained to get and at a proper price. Similarly, as regards the second purchase, he paid the purchase price, plus costs and stamp duty, and, so far as the evidence goes, he got value for his money. If he did not, then, in my view, that is a matter for which the defendant cannot be held responsible. I can see no reason for treating part of what he had to pay, namely, his solicitor's charges and stamp duty, as constituting damages properly flowing from the defendant's breach of one of the terms of the contract of Jan. 30 which has since been completed, according to the terms of the contract itself, by the conveyance of the subject-matter of the contract, in effect at a reduced price, to the plaintiff. B C D

TUCKER, L.J. : I agree with the judgment which has been delivered by **EVERSHED, L.J.**, except with regard to the sums claimed for solicitors' costs and stamp duty incurred in respect of the purchase of the second house. These items appear to me to result directly from the defendant's breach of contract. The plaintiff had to find somewhere to live. For five weeks he lived in lodgings and is entitled to recover the cost. At the end of this period he moved into the house which he had been compelled to purchase. He must be presumed to have received full value for the money he paid for its purchase, but the stamp duty and legal costs were not part of the purchase price. They are, no doubt, items which were necessarily payable on the purchase and can thus be described as part of the cost of the purchase, but they were outgoings necessitated by the defendant's breach for which the plaintiff has received no countervailing benefit. They are sums which he has paid away and which are not reflected in the value of the house which he purchased. For these reasons these items appear to me to stand on the same footing as the cost of temporary lodging accommodation and to have been properly included in the total sum awarded to the plaintiff by way of damages for the defendant's breach of contract. In my opinion, the appeal fails and should be dismissed. E F G

SOMERVELL, L.J. : I agree with the judgment delivered by **EVERSHED, L.J.**, on the main point in the case. I differ from him and agree with **TUCKER, L.J.**, on the subsidiary point as to damages. On the basis, which is not disputed, that the plaintiff, to the defendant's knowledge, bought the house for the express purpose of a home for himself, I think the items of solicitors' charges and duty are admissible. By awarding £980 the judge put the plaintiff financially in the position of having in cash and money's worth £2,500, that is, the purchase price of a house of similar value. To provide himself with a home he had to spend a few weeks in lodgings and then pay the purchase price of a new house, plus solicitors' charges and stamp duty. The defendant was clearly entitled to have the *quantum* of these charges calculated on the basis of a house of similar H

value. No point was taken as to this. If objection had been taken to these items below I think that, perhaps, the same sums might have been more properly claimed in a somewhat different form. In assessing his primary claim, the plaintiff would have taken not only the purchase price but also the solicitors' charges and stamp duty which he had expended. That is what he expended to get a home. He would then have set against this the sum he could get for the first house without vacant possession. No point seems to have been taken below that these items were too remote, and I myself see no reason why the plaintiff should not have them.

Appeal dismissed.

Solicitors: *W. F. Gillham*, agent for *G. T. Richards*, Bournemouth (for the defendant); *Tarry, Sherlock & King*, agents for *A. V. Clappen & Weaver*, Bournemouth (for the plaintiff).

[*Reported by R. L. ZIAR, ESQ., Barrister-at-Law.*]

Affirmed. H.L. [1949] 1 All E.R. 261.

Explained. ELECTRIC AND MUSICAL INDUSTRIES, LTD. v. I.R. COMRS. [1950] 2 All E.R. 261.

INLAND REVENUE COMMISSIONERS v. TOOTAL BROADHURST LEE CO., LTD.

[COURT OF APPEAL (Tucker, Somervell and Evershed, L.JJ.), July 17, 18, 1947.]

Revenue—Excess profits tax—“Income received from investments”—Royalties received from licences of patented inventions—“Investment”—Finance (No. 2) Act, 1939 (c. 109), sched. VII, pt. I, para. 6 (1).

A company, trading as manufacturers and merchants of cotton, linen, woollen and other goods, in the course of manufacture used patents covering inventions and processes which had for the most part been developed in its own research department. From time to time the company granted non-exclusive licences of a number of these patents to other manufacturers, and royalties in respect thereof were received by the company both in the standard period for excess profits tax purposes and during the chargeable accounting period, July 1, 1939, to June 30, 1940. The Crown claimed excess profits tax in respect of the royalties received in that accounting period from licences granted in respect of three patents:—(1) A crease resisting process developed in the company's research department. The company did not itself employ this process, but the cloth produced by the company was treated in accordance with the process either by a subsidiary of its own or by licensee finishers. (2) A process to prevent felting in woollen goods, the patent rights in respect of which the company bought in 1939 from the original patentees, taking over the burden and benefit of existing licences. The company had granted further licences, and the process was used in the manufacture of its own goods. (3) Controlling devices on stentering machines, invented by a person connected with the company. A joint application was made by the company and the inventor at the same time as an application by a second company which had produced a similar device. The company and the inventor assigned their interest to the second company in return for a royalty. On the question whether the patent royalties were “income received from investments” within the meaning of the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 6 (1), for the purposes of excess profits tax,

HELD: (i) as regards the patents (1) and (2), the subject-matter of each patent was used in the company's business, and, it being immaterial whether the company was employing its own employees to use the patent, or whether it was paying somebody else to do the work for it, the patent could not be regarded as a mere “investment.”

Inland Revenue Comrs. v. Desoutter Bros., Ltd. ([1946] 1 All E.R. 58) applied.

(ii) as regards patent (3), the subject-matter related to the business which the company was carrying on, and could not be considered to be an “investment” for the purposes of para. 6 (1).

[FOR THE FINANCE (No. 2) ACT, 1939, sched. VII, pt. I, para. 6 (1), see HALSBURY'S STATUTES, Vol. 32, p. 1220.]

Cases referred to :

- (1) *Inland Revenue Comrs. v. Desoutter Bros., Ltd.*, [1946] 1 All E.R. 58; 174 L.T. 162.
- (2) *Inland Revenue Comrs. v. Rolls-Royce, Ltd.*, [1944] 2 All E.R. 340; 171 L.T. 238; Digest Supp.
- (3) *Inland Revenue Comrs. v. Sangster*, [1920] 1 K.B. 587; 89 L.J.K.B. 673; 122 L.T. 374; 12 Tax Cas. 208; Digest Supp.

APPEAL by the company and cross-appeal by the Crown from a decision of ATKINSON, J., dated June 19, 1946.

The Special Commissioners of Income Tax considered that the royalties from each of the patents in question were "income received from investments," but at the request of the Crown, stated a Case, which was heard by ATKINSON, J., who held that the royalties in respect of the first two patents were not "income received from investments," but affirmed the decision of the Special Commissioners as regards the third patent. The Court of Appeal now dismissed the appeal of the company as regards the first two patents, and allowed the cross-appeal of the Crown in respect of the third patent. The facts appear in the judgment of SOMERVELL, L.J.

J. Millard Tucker, K.C., and *Donovan, K.C.*, for the company.

The Solicitor-General (Sir Frank Soskice, K.C.) and *R. P. Hills* for the Crown.

SOMERVELL, L.J. : This case turns on the application of a few words in para. 6 of part I of sched. VII to the Finance (No. 2) Act, 1939, and is concerned with sums received in respect of (I will use neutral words) patent rights. The question is whether those sums are income received from investments, within the meaning of para. 6. Paragraph 6 provides :

(1) Income received from investments shall be included in the profits in the cases and to the extent provided in sub-para. (2) of this paragraph and not otherwise.

The taxpayer in this case does not come within sub-para. (2), so, if the income is income received from investments, it is not to be included in the computations which give rise to the assessments which are under appeal. The Solicitor-General emphasised, and rightly emphasised, that in this Act, *e.g.*, in s. 12 (4), which is the main charging section in respect of excess profits tax, there is the phrase "investments or other property." He also pointed out that that phrase is to be found in the Finance Act, 1937, which dealt with national defence contribution, and he submitted that where one finds the expression "investments" without the expression "or other property," it is an indication that it is to be given a narrower construction and income derived from the source in question is not to be regarded as "income received from investments" simply because it could be described and might naturally fall under the description "income from property."

The taxpayer, Tootal Broadhurst Lee Co., Ltd., appealed against an assessment to excess profits tax for the chargeable accounting period, July 1, 1939, to June 30, 1940. The Case states :

(3) The company carries on trade as manufacturers and merchants of cotton, linen, woollen and other goods. In the course of manufacture the company (together with its subsidiaries) uses patents covering inventions and processes which have been mostly developed in its own research department, which has been in operation for 20 years. The staff of this research department is permanent and is employed largely for the purpose of perfecting old processes and devising new. The company has from time to time granted non-exclusive licences of a number of such patents to other manufacturers and finishers both in the United Kingdom and abroad at a royalty. Royalties from such licences were received by the company in the standard period and in the chargeable accounting period in question. (4) The royalties the subject of this appeal were received in respect of three groups of patents :—(a) Crease-resisting process. This process was developed by the company's research department, and is patented in many countries abroad. The company itself does not employ this process, but the cloth it produces is treated either by a subsidiary of its own or by licensee finishers . . . (b) process to prevent felting in woollen goods. In 1939, the company bought the patent rights in respect of this process from the original patentees, taking over the benefit and burden of existing licences. The company has since granted further licences, and the process is also used in the manufacture of its own goods . . . (c) Controlling devices on stentering machines. These devices govern the transit of cloth on conveyor belts on drying machines. They were invented by a person connected with the company; a joint application by the company and this person was made

almost simultaneously with an application by another company (hereinafter called "the assignees") which had produced a somewhat similar device. By an agreement made on Mar. 12, 1940, the company and the person connected with it transferred their interest to the assignees in return for a royalty, and the assignees took out a consolidated patent under the two applications.

None of the licences granted was exclusive, or for the whole term of the patent. The Case also states:

The negotiation of the licences gives the company a fairly substantial amount of trouble and expense but once a licence is granted little is involved except collecting the royalty.

The Commissioners found:

Having considered the evidence and arguments submitted to us, we were of opinion that patents which had been exploited by licensing them out at a royalty fell within the term "investments," and allowed the appeal.

Then the Crown expressed dissatisfaction. On appeal to the court, the judge reversed the finding of the commissioners in respect of the sums covered by para. 4 (a) and 4 (b) and he held that they were not income from investments. He held that the sums received under para. 4 (c) were income from an investment. The taxpayer appeals from the decision in respect of 4 (a) and (b), and the Crown cross-appeals in respect of the decision under (c).

The question of royalties received in respect of patent rights in this connection came before this court in *Inland Revenue Comrs. v. Desoutter Bros., Ltd.* (1). The company was a British company, and the matter came in the first instance before MACNAGHTEN, J., who decided that the royalties were not income received from investments, following a principle he had laid down in an earlier decision, *Inland Revenue Comrs. v. Rolls-Royce, Ltd.* (2), a principle that, for there to be an investment, there must have been a laying out of money to acquire it. Applying that test, the royalties in that case were not income received from investments. When that case came before this court, the decision of MACNAGHTEN, J., was affirmed, but the general principle which he had laid down was dissented from. LORD GREENE, M.R., said ([1946] 1 All E.R. 60):

Speaking for myself, I am always disinclined to accept any general definition or test for the purpose of solving this type of question. The question whether or not a particular piece of income is income received from an investment must, in my view, be decided on the facts of the case. The facts must be ascertained, and then the question has to be answered. For the court to find itself fettered by some apparently comprehensive attempt at a definition directed to the solution of the problem in relation to one type of property, I cannot help thinking is unfortunate.

Later in the judgment—and this is important on the general question of construction—he said (*ibid.*, 61), referring to a certain argument:

It is contrary to what one may call the popular conception of the word "investment," which is not a word of art, but has to be interpreted in a popular sense.

MACKINNON, L.J., in the same case said (*ibid.*, 63):

I think that the word "investments" in the relevant sections of the statute is not a word capable of legal definition. Like so many words in modern legislation, it is a word of current vernacular.

LORD GREENE's judgment, therefore, must be read as not laying down any general principle, but as dealing with the facts of the case before him, and I fully accept that point which counsel for the company rightly emphasised. What the MASTER OF THE ROLLS says is (*ibid.*, 61):

To my mind, it is obvious that a patent in the hands of a manufacturer is quite a different type of property, both in the business and in the practical sense, to a patent in the hands of somebody who is a mere passive owner of the monopoly right. For instance, a member of the Bar, who was fortunate enough to have bequeathed to him a patent, or who had purchased a patent, the validity of which had been established by the court, might continue, without any active participation in manufacturing himself, merely to exploit that monopoly by granting licences. He would then be merely passive; he would be the passive recipient of income from that particular piece of property. In such a case it might very well be, and I strongly suspect it would be, held, if members of the Bar were subject to excess profits tax, that the income from that patent could properly be described as income from an investment. But directly the patent is held by a manufacturer of the patented article, it seems to me

that the situation is entirely changed. When you have a manufacturer who is exploiting his monopoly right, not merely by excluding all competitors, but by letting one competitor in on terms, to say that the profits so derived are profits from an investment seems to me to be a misuse of language. It is contrary to what one may call the popular conception of the word "investment," which is not a word of art, but has to be interpreted in a popular sense. The contrast, I venture to think, is brought out exactly in the two examples I have put. One is that of a private individual not concerned with manufacture at all, but merely holding a patent, as he might hold a copyright in a book, and simply drawing the income from the royalties payable under the copyright. He would merely be a passive person drawing the income which flows from that particular chose in action. That is one example. The other example is the manufacturer who can, if he likes at any moment, exploit his monopoly in a number of different ways—either by manufacturing himself, or by vending himself, or by allowing somebody else to manufacture and vend or manufacture but not vend, or to vend but not manufacture. The mere granting of such licences does not seem to me to take the income out of the category of income of the business.

By that last phrase, the MASTER OF THE ROLLS clearly meant profits of the business as distinct from income from investments. As counsel for the company rightly emphasised, in dealing with this paragraph, the words do not cover income from investments except income of the business. You would not need a special paragraph in the schedule to exclude from the computation income from investments which had nothing whatever to do with the business. It may be difficult to imagine such income in the case of a company, but certainly in the case of an individual or partnership it is easy to imagine income from investments which would not have anything to do with the business in question. The passage I have cited seems to me to give the guidance which we have got to apply in this case.

In one sense the present case is not covered by the decision in the *Desoutter* case (1). There are two differences on which counsel for the company relied. In the first place, in the *Desoutter* case (1) the taxpayer was manufacturing, as I understand it, the articles covered by the patent, and that is not so in this case. Secondly, counsel said that in the licensing agreements in that case there were provisions which went beyond the ordinary licence provisions and dealt with the supply of drawings of drills and tools and so on, and, therefore, were provisions which might have led the court to take the income in that case out of the character of income from investments, whereas if those provisions had not been there they might have decided differently. Those, undoubtedly, are differences, but they do not seem to me to lead—with regard to the two categories of income dealt with in 4 (a) and (b)—to a different conclusion. With regard to these two categories of income, the judge, after referring to *Desoutter* (1), said :

It seems to me that, so long as the subject-matter of the patent is being applied in their business on their cloth, it is immaterial whether they are employing their own employees or whether they are paying somebody else to do it for them. It is something being used in the business, and it cannot, in my view, be described as a mere investment.

I agree with that. It seems to me a correct application of the general principles to be found in the *Desoutter* case (1), and I have nothing that I wish to add to it.

I now turn to para. 4 (c) of the Case. The sums in question here had a somewhat unusual origin, and were not quite like those dealt with in para. 4 (a) and (b). The company and a Mr. Laurie, who is said in the Case to have been connected with the company, applied for letters patent for the invention as described in the Case. The other parties to the agreement, John Dalglish & Sons, had also made an application for letters patent in respect of a similar invention, and there were, therefore, rival claims in respect of an invention. The parties effected a compromise or settlement, and the taxpayer in this case and Mr. Laurie sold and assigned to the other party all their right, title and interest whatsoever of and in the patent application which they had put forward. They did that in return for an undertaking by the assignees to pay royalties and to use their best endeavours to work the said invention on a commercial scale in the United Kingdom of Great Britain and Northern Ireland. The company had the option to require the assignees to grant licences to any party or parties whom the company might from time to time nominate for this purpose if the gross amount due under the agreement should be less than £100 in any one year. I am bound to say, speaking for myself, that it would never have occurred to me to call that an investment.

I am not sure what the suggested investment is, but our attention was drawn to some observations made by ROWLATT, J., in *Inland Revenue Comrs. v. Sangster* (3). That case was concerned with a man who had invented a number of devices and had licensed them to two companies, of each of which he was managing director, and under those licences he got royalties. ROWLATT, J., said ([1920] 1 K.B. 594):

A There is, therefore, a very great difficulty in treating this royalty income as anything other than income of an investment which has been called into being by his past efforts.

He later said (*ibid.*, 597):

B It seems to me that carrying on a business involves, in a case like this, the disposal of the article which is produced as opposed to retaining it as a valuable thing in itself which can be treated as an investment, just as anything bought with the money obtained for it if it had been sold could be treated as an investment.

C The importance of that case, to my mind, is that, while we have to consider what is the ordinary popular or business sense of the word "investment," we find ROWLATT, J., a judge of the greatest experience in this class of case, using "investment" as a word that occurred to him as appropriate in relation to royalty income being received by an inventor. He was not, of course, deciding that royalty income was "income received from investments" within this paragraph, still less was he deciding the question we have to decide in respect of the particular agreement before us, but I do attach importance to the language he used.

D The judge in the court below, when dealing with this part of the case, referred to the *Desoutter* case (1) and enunciated three propositions which he thought could be "more or less safely laid down" in the light of that case. His second was this:

If the owner merely permits by licence others to use it, deriving no business benefit from the patent other than the receipt of royalties, it may fairly be said to be an investment, and the royalties may be fairly said to be income from an investment.

E For the reasons which I shall state shortly, it is unnecessary now to decide whether as a general principle that is right. I do not think it can be derived from what was said in the *Desoutter* case (1) and I think there is a good deal in the argument which was put forward by the Crown, that it may go too far and might cover cases in which it would not be right to say that the income was income from investments. On the third patent he said:

F I think the third group is quite different. I think that is a very good example of my second proposition. Here the subject-matter of the patent was mechanical . . . Messrs. Tootal, Broadhurst, are not machinists; they do not manufacture machines and it is no part of their business to make those devices or to get other people to make them and then sell them to the company. There is no finding that the devices were to be made for fixing on to their own machinery or that they would be of any use when fixed to their own machines. I know that stentering machines are used in finishing and bleaching, but I do not know whether they are of any use to a mere manufacturer. That is immaterial. The Case does not find that those devices were or would be of any use in their own manufacturing business or that they would benefit in any way by the assignment other than by the receipt of royalties. Therefore, it seems to me that the commissioners were there well entitled to take the view that the royalties received under the agreement of Mar. 12, 1940, were income from an investment. G The distinction seems to me to be that, whereas in the other patents with which the Case deals they were wanted for their own business, here there is no finding that they were of any business use at all to them, and *qua* their rights with regard to that invention they were mere passive receivers of income.

H On that matter I differ from the judge, but in a sense on a very narrow ground, because the subject-matter of the agreement was a patent or patent rights which obviously related to textile machinery and the taxpayer is a textile manufacturer. The Case says: "These devices govern the transit of cloth on conveyor belts on drying machines" and, where you find that a manufacturer is receiving money in respect of patent rights which are related to the business which he is carrying on, it seems to me, at any rate *prima facie*, that income from them is not "income received from investments," but falls within the principle which the judge applied to the income from the patents dealt with in para. 4 (a) and (b). For these reasons, I think that the appeal fails on 4 (a) and (b)

and should be allowed on 4 (c).

TUCKER, L.J.: I agree. I only desire to say a word or two, as we are differing from the judge on 4 (c), which concerns the cross-appeal. As I read the judge's judgment, he decides to support the finding of the commissioners because of the absence of any finding that the device covered by the third patent was of any business use to the taxpayer. He takes the view that for income received from a patent—and I am not here drawing any distinction between a patent and the agreement which gave rise to the receipt of these moneys—to cease to be investment income, it is necessary for the patent to be of business use to the recipient of the income, and, in so saying, he is applying what he thinks is some principle laid down by the MASTER OF THE ROLLS in the *Desoutter* case (1). I do not think any such principle can be extracted from that case. It has already been pointed out by SOMERVELL, L.J., that the MASTER OF THE ROLLS was there dealing with the case of a patent in the hands of the manufacturer, and was pointing out how different that case is from that of a patent in the hands of such a person as a member of the Bar. All he says is ([1946] 1 All E.R. 61):

To my mind, it is obvious that a patent in the hands of a manufacturer is quite a different type of property, both in the business and in the practical sense, to a patent in the hands of somebody who is a mere passive owner of the monopoly right.

Although he instances the holding of a patent by a member of the Bar and says that, in his view, income received by such a person from a patent would be income received from an investment, I cannot find in his judgment that he indicates any view as to the position of a manufacturer who holds a patent which is not proved to be actually used or of direct beneficial benefit to him in connection with the goods which he manufactures.

In my view, the judge has taken too narrow a view of the problem before him in deciding that the sums which were receivable under the agreement mentioned in para. 4 (c) of the Case had the character of income from investment merely because of the absence of an express finding that they were of use to the company in their business. As SOMERVELL, L.J., has pointed out, they were devices which governed the transit of cloth on conveyor belts on drying machines. Referring only to the Case and not placing reliance on ATKINSON, J.'s statement that he knew that stentering machines were used in finishing and bleaching, it is obvious that these machines are used in a process of drying. I am entitled to assume that until the cloth is dry, the process of manufacture has not been completed.

The company in this case carried on business as manufacturers and merchants of cotton, linen, woollen and other goods, and when I find that they are receiving money under an agreement, which for this purpose I will assume gives them an interest in a patent, connected with devices governing the transit of cloth on conveyor belts on drying machines, I come to the conclusion that *prima facie* that would not be described by a business man as an investment. I leave entirely open for consideration, if and when it arises, in what circumstances, if any, where a manufacturer owns a patent and receives royalties in respect thereof, that income may be income from an investment.

EVERSHED, L.J.: I also agree. On the cross-appeal I only venture to add that the judge based his conclusions with regard to the agreement relating to the third patent on the view that that matter was an instance of the owner of a patent, which was unrelated to the business he was carrying on, turning it into a source of revenue by more or less "passively" licensing it to others in return for royalties. As has been pointed out by my brethren, it seems to me, on the facts as set out in the Case, that it is going too far to say that the subject-matter of this patent was unrelated to the business of the company, who are cotton manufacturers. I also agree with what has been said by SOMERVELL, L.J. It seems to me that, in applying the words of para. 6 (1) of sched. VII, "income received from investments," to the sums here in question, it is not possible to say that there was an investment from which those sums had been received. In this case, for reasons which have been explained, the company, together with a Mr. Laurie, disposed altogether of the patent in return for a number of rights which they obtained under a contract. Those contractual rights included the contractual right to receive sums described as royalties, but, in my judgment,

applying the test laid down by MACKINNON, L.J., that the word "investment" must be given a business sense according to current vernacular, it is impossible to say that the sums received are received from an investment in that sense. For these reasons, I agree that the appeal should be dismissed and the cross-appeal succeed.

Appeal dismissed. Cross appeal allowed.

A Solicitors: *Ellis, Peirs & Co.*, agents for *Slater, Heelis, Sandbach, Marriott, Smiths & Irvine*, Manchester (for the company); *Solicitor of Inland Revenue* (for the Crown).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

R. v. BUTTERWASSER.

B [COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Lynskey, JJ.), July 28, 1947.]

Criminal Law—Evidence—Previous convictions—Imputations by defence on character of witnesses for prosecution—Evidence of previous convictions of prisoner—Admissibility—Evidence of convictions before verdict—Need of strict proof.

C Where a prisoner has not put his character in issue, but has merely attacked the witnesses for the prosecution, evidence cannot be called by the prosecution to prove that he is a man of bad character. If a prisoner takes advantage of the Criminal Evidence Act, 1898, and goes into the witness box, he may then, if he has attacked the witnesses for the prosecution, be cross-examined as to matters of character. If he denies a conviction, it can be proved against him under the Criminal Procedure Act, 1865, s. 6. Where, because of the provisions of a statute or the circumstances of a case, it is permissible to give evidence of the prisoner's bad character, that evidence must satisfy the requirements of the rules of evidence. It must be, *e.g.*, evidence to which a witness can swear of his own knowledge, as that of a police officer who knows the prisoner and his habits, but that of an officer who merely produces a list of the prisoner's convictions, as is done to inform the court after verdict, is not sufficient.

E *Per cur.*: witnesses called after verdict to inform the court are sworn on the *voire dire*, and not on the oath administered to witnesses during the course of a criminal trial.

[EDITORIAL NOTE. It is submitted that, if a witness who has been sworn during the trial also gives evidence after verdict regarding the prisoner's character, there is no need for him to be resworn on the *voire dire*.]

F AS TO EVIDENCE AS TO CHARACTER, see HALSBURY, Hailsham Edn., Vol. 9, pp. 188-191, paras. 271-274; and FOR CASES, see DIGEST, pp. 361-366, Nos. 3818-3874.]

Case referred to:

(1) *R. v. Rowton*, (1865), Le. & Ca. 520; 10 Cox C.C. 25; 5 New Rep. 428; 34 L.J.M.C. 57; 11 L.T. 745; 29 J.P. 149; 14 Digest 289, 3051.

G APPEAL against a conviction before the Recorder of the Central Criminal Court of wounding with intent to do grievous bodily harm. The conviction was quashed. The facts appear in the judgment of LORD GODDARD, C.J.

J. Burge for the appellant.

Neve, K.C., and *W. M. F. Hudson* for the Crown.

H LORD GODDARD, C.J. (delivering the judgment of the court): The appellant was convicted before the Recorder of London at the Central Criminal Court of wounding with intent and was sentenced to three years' penal servitude. He appeals on two matters of law. It was a serious case of razor-slashing after an altercation in the street. During the prosecutor's evidence, counsel for the appellant attacked the character of the prosecutor and of the prosecutor's wife, and put to them convictions, which they had to admit, of violence and other offences. He clearly wanted to discredit their evidence, and, no doubt, was also suggesting that it was really the prosecutor who attacked the appellant. That having been done, counsel knew that, if he called the appellant, he would be

liable to be cross-examined as to his own previous convictions of offences of violence. So he did not call the appellant. The prosecution were then allowed to give evidence-in-chief of the appellant's bad character, a police officer being called who testified to his previous convictions.

In the opinion of the court, that was not a course which was permissible under the existing law. It is elementary that, ever since the practice has grown up—as it has in the last 150, or, perhaps, 200, years—of allowing a prisoner to call evidence of good character, or to put questions to witnesses for the Crown and obtaining, or attempting to obtain, admissions from them that he is a man of good character—in other words, where he puts his character in issue—evidence in rebuttal can be given by the prosecution to show that he is, in fact, a man of bad character. Evidence of character is nowadays very loosely given and very loosely received, and it would be as well if all courts paid attention to a well-known case in the Court of Crown Cases Reserved, *R. v. Rowton* (1), in which a court of twelve judges laid down the principles which should govern the giving of evidence of character and of evidence of bad character in rebuttal and pointed out that the evidence must be evidence of general reputation and not dependent on particular acts or actions. However that may be, there is no authority for the proposition—and it is certainly contrary to what all the present members of the court have understood during the whole of the time they have been in the profession—that, where the prisoner does not put his character in issue, but has merely attacked the witnesses for the prosecution, evidence can be called by the prosecution to prove that he is a man of bad character. What is permissible is this. If a prisoner takes advantage of the Criminal Evidence Act, 1898, which made prisoners competent witnesses on their trial in all cases, and goes into the witness box, he may then, if he has attacked the witnesses for the prosecution, be cross-examined with regard to convictions and matters of character, and I have no doubt that, if he is cross-examined, a conviction is put to him and he denies it, the provisions of the Criminal Procedure Act, 1865, s. 6, would apply and the conviction could be proved against him. But by attacking the witnesses for the prosecution and suggesting they are unreliable, he is not putting his character in issue. He is putting their character in issue. In those circumstances, the recorder should have declined to allow the evidence to be given. In this case, therefore, inadmissible evidence on a most vital point was admitted.

There are certain cases where it is admissible to give evidence of bad character on the part of the prisoner generally because a statute has provided that that can be done, *e.g.*, in certain cases under the Larceny Act and under the Prevention of Crimes Act. There are other cases in which, no doubt, it becomes inevitable because it is relevant and is a matter directly in issue, but, speaking generally, to use the words of COCKBURN, C.J., in *Rowton's* case (1) (10 Cox C.C. 29, 30) :

Although, logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a ground for the presumption and the probability of guilt as previous good character lays the foundation of innocence, yet you cannot, on the part of the prosecution, go into the evidence as to bad character.

The learned Chief Justice is there, of course, speaking generally. In certain cases, either because of the provisions of a statute or because of the circumstances of the case, it is permissible to give evidence of bad character. If, for example, it becomes directly in point whether a prisoner was at a certain place on a certain day, the prosecution may show that he could not have been in that place on that day because he was then serving a sentence of imprisonment, but, generally speaking, apart from those exceptional and statutory cases, it is clear, in the judgment of the court, that the prosecution cannot lead evidence to show that the prisoner was of bad character even when he has attacked witnesses called for the prosecution.

The second ground of appeal is that, even assuming the evidence of bad character was admissible, it could not be proved in the way it was proved in this case, *viz.*, by calling a police officer, who did not pretend that he knew the appellant, to say that, according to the records at Scotland Yard, the appellant had certain convictions recorded against him. That evidence would be properly admissible after verdict, but what happens after verdict is very different from what happens before verdict. After verdict, there is no longer an issue between

the Crown and the prisoner. The issue has been determined by the verdict of the jury and there is no more room for evidence except what may be considered necessary, to inform the mind of the court of the prisoner's previous history to enable the court to assess the proper sentence. There is no obligation on a court to hear evidence after verdict. One small point which is worthy of mention shows the distinction between evidence after verdict and evidence before the verdict, *viz.*, the different oaths which ought to be administered to the witness. The form of the oath which is administered to the witnesses during the trial is well-known :

The evidence you shall give to the court and jury sworn between our Sovereign Lord the King and the prisoner at the Bar, shall be the truth . . .

After verdict, the witness who comes into the box to give evidence ought properly to be sworn on what is called the *voire dire*, *i.e.* :

B You shall true answer make to all such questions as the court shall demand of you.

The court can then demand any information it thinks fit. If one goes back historically in these matters, one of the great complaints made in the Stuart times was that the Star Chamber, unlike the courts of common law, always claimed to examine the witnesses on the *voire dire*. The oath which the witness takes *voire dire* is not an oath as to a matter in issue between the Crown and the prisoner ; it is an oath to inform the court truthfully in answer to its questions.

C If it becomes admissible and relevant, as it may in a certain limited class of case, to prove that the prisoner was of bad character, a witness cannot be called to give evidence other than that which is strictly evidence according to the well-known rules which govern the giving of evidence in English courts. It must be evidence to which a person can swear of his own knowledge. The evidence of a police officer who knows the prisoner and his habits and has seen him in

D the streets is, no doubt, very proper, but an officer who may be a correct person to come and tell the court after conviction : " I have here a list of the prisoner's convictions," may not be a person who can give evidence on a matter which must be proved according to the rules of evidence. It sometimes happens that when a police officer is called after verdict and reads out a prisoner's record, the prisoner disputes a conviction, and, if he does that, either the court must state that they ignore it, or the matter must be postponed for proof.

E In many cases there is a count in the indictment alleging that the prisoner has previously been convicted of felony, and in certain circumstances that has to be proved because the sentence may be more severe. If the prisoner denies the previous conviction the prosecution must call evidence, either of a police officer or of some other person who was present when he was convicted, properly to prove the previous conviction.

F This was a serious case, but, having regard to the nature of the defence set up, and the general circumstances, we do not feel able to apply the provisions of the proviso to s. 4 of the Criminal Appeal Act and to say that the jury would necessarily have come to the decision they did if the evidence which has been attacked had not been given. It was evidence on a vital matter, and when evidence is given with regard to the bad character of the prisoner which ought not to have been given, in my experience this court has always quashed the conviction. In these circumstances, we feel that the conviction should be quashed.

G *Appeal allowed.*
Solicitors : W. R. Perkins (for the appellant) ; The Solicitor Metropolitan Police (for the Crown).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

Re BATE (deceased), CHILLINGWORTH v. BATE.

[CHANCERY DIVISION (Jenkins, J.), July 16, 17, 1947.]

Executors and Administrators—Commorientes—Presumption—Death in order of seniority—"Uncertainty" of survival—Degree of evidence needed to remove—Law of Property Act, 1925 (c. 20), s. 184.

To exclude the presumption which arises under the Law of Property Act, 1925, s. 184, where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, that the deaths occurred in order of seniority so that a younger person shall be deemed to have survived the elder, it is necessary that there shall be evidence leading to a defined and warranted conclusion that one died before the other.

Dictum of VISCOUNT SIMON, L.C., in Hickman v. Peacey, [1945] 2 All E.R. 215, applied.

[AS TO COMMORIENTES, see HALSBURY, Hailsham Edn., Vol. 14, p. 212, para. 354; and FOR CASES, see DIGEST, Vol. 23, pp. 88, 89, Nos. 790-801.

AS TO PRESUMPTIONS AS TO COMMORIENTES, see HALSBURY, Hailsham Edn., Vol. 13, pp. 629-634, para. 701; and FOR CASES, see DIGEST, Vol. 22, pp. 171-173, Nos. 1472-1496.]

Case referred to:

- (1) *Hickman v. Peacey*, [1945] 2 All E.R. 215; [1945] A.C. 304; 114 L.J.Ch. 225; 173 L.T. 89; Digest Supp.

ADJOURNED SUMMONS to determine the order in which the testator and his wife must be presumed to have died. JENKINS, J., held that, in the absence of evidence leading to a "defined and warranted conclusion" regarding the survival of one or the other, the presumption under the Law of Property Act, 1925, s. 184, that the younger survived, must prevail. The facts appear in the judgment.

Harris Walker for the plaintiff.

Jopling & R. C. Horne for defendants.

JENKINS, J.: This summons raises the question of the order in which the testator, George Bate, and his wife, Ada Jane Bate, are to be presumed to have died for the purpose of determining the devolution of their estates under the will of George Bate and the intestacy of his wife.

On Jan. 8, 1946, at 10 p.m., the husband and the wife were found dead in their kitchen, the cause of their deaths being carbon monoxide poisoning. At the date of the tragedy the testator was in his 84th year and his wife was in her 76th year. Therefore, if the circumstances leave it uncertain which of them survived the other, the presumption prescribed by the Law of Property Act, 1925, s. 184, will apply and the deaths will have to be presumed to have occurred in order of seniority, the younger, *i.e.*, the wife, being deemed to have survived the elder, *i.e.*, the husband.

In an affidavit, Harriett Elizabeth Miles, who occupied two rooms on the top floor of the house where the testator and his wife resided, said that at about 10 p.m., on Jan. 8, 1946, she went upstairs and observed that a milk bottle which she had placed in the hall at 1.30 p.m. had not been moved. She opened the kitchen door and, she continued:

I saw Ada Jane Bate lying on her back with her head near the corner of the far end of the kitchen. The body of George Bate was lying across that of his wife, his head near the sink. I saw that the tap of the gas oven was slightly turned on. The gas oven door was closed. I turned the gas tap off. There was a cooked joint in the gas oven. I noticed that the window was closed, but saw a small ventilator open. I know from my own observation that it was the custom of Ada Jane Bate to go to the kitchen first to prepare a meal and later to call her husband.

On Jan. 10 Dr. John Taylor, a distinguished pathologist, carried out a post-mortem on the bodies. He says:

In the case of George Bate the cerebral atheroma would account for giddiness, otherwise he was very healthy. The cause of death was coal gas poisoning with 57 per cent. saturation. This is a high concentration. Coal gas in its early stages often produces vomiting and then unconsciousness. In the case of Ada Jane Bate there was no active disease except granular kidneys. Death was due to coal gas poisoning and the saturation was 42 per cent. Under the same conditions I am of

opinion that in all reasonable probability Ada Jane Bate died first, since the concentration of coal gas in her blood was lower. The concentration of carbon monoxide gas in the blood tends to rise with the length of exposure. After death no further absorption takes place, and, therefore, when two people have been exposed to the same concentration of carbon monoxide gas, it is, in my opinion, reasonable to conclude that the person whose blood contains a higher concentration of carbon monoxide gas died after the person whose blood shows a lower concentration.

A Further medical evidence, on the other side, is contained in the affidavits of two other eminent pathologists. The first, Dr. R. D. Teare, says :

When a sample of blood is taken for analysis of its saturation with carbon monoxide errors may arise before the blood reaches the laboratory. These errors depend on the fact that the carbon monoxide in the blood escapes into the surrounding atmosphere, and, consequently, the final analysis gives a higher figure than that which is present at the time of death.

B He explains that an error may occur if the bottle in which the specimen of blood is carried to the laboratory is not completely full, and continues :

The error varies with the amount of air left in the bottle, the degree of shaking of the bottle occurring during transport and the time intervals between death, the taking of the specimen and the actual laboratory analysis. It is generally accepted that the concentration of carbon monoxide haemoglobin in the blood which will cause death is 60 to 80 per cent. The usual figure is 70 per cent.

C It will be observed that those figures are much higher than those found in the sample—42 per cent. in the case of the wife and 57 per cent. in the case of the husband—which Dr. Taylor said was a high concentration. The conclusion of Dr. Teare is :

D It appears, therefore, that the figures which Dr. Taylor has put forward cannot represent the concentrations of carbon monoxide haemoglobin in the bodies of the deceased persons at the time of death and that there has been a loss of carbon monoxide from both specimens. How much loss, in my opinion, cannot be estimated, and I do not think the figures are a guide as to which of the persons died first.

The concluding sentence is, I think, important.

Sir Bernard Spilsbury, the pathologist, says :

E When death occurs from the inhalation of carbon monoxide gas contained in coal gas, it considerably exceeds 50 per cent. saturation in the blood and may be as high as 75 per cent. or 80 per cent. In infants or in severe anaemia or with advanced lung disease such as chronic tuberculosis 50 per cent. saturation may be fatal, but there was no such disease in these cases. Fifty-seven per cent. saturation is low in a fatal case. I am very doubtful whether 42 per cent. saturation could prove fatal. Consciousness is not lost usually until the blood is half saturated. These lower concentrations raise a suspicion that the blood samples lost carbon monoxide after they were collected and before they were tested. This occurs readily unless the samples are collected with great precaution. For these reasons I do not regard the blood tests as a reliable indication of which of these two persons died first, and I do not find any medical facts which indicate which would be likely to die before the other, the only fact being that the wife was eight years younger than her husband and would have a rather better expectation of life. In the circumstances of their death from carbon monoxide poisoning I find nothing in the medical history which gives any reasonable probability that the one survived the other.

G Finally, there is an affidavit in reply by Dr. Taylor. He says that he agrees with Dr. Teare that it is possible that the percentage of saturation with carbon monoxide found in the blood was appreciably lower when tested than it was at the time of death. He goes on :

H This could have been caused by the fact that the post-mortem examination did not take place until the evening of Jan. 10, 1946—two days after the death—and some carbon monoxide may well have been lost from the blood during this period. It is true that the bottles containing the blood samples were not completely filled, but only a small fraction of each sample was exposed to the air above it and the bottles were not shaken between the time of collection and of testing. In these circumstances I do not consider that there is likely to have been any substantial change in the percentage of saturation between collection and testing. In any event, both samples of blood were subject to the same conditions, and, if any decrease in the percentage of saturation took place between the time of death and the time of testing, it would be reasonable to suppose that both samples would be affected to the same extent. The difference between the percentages of saturation in the two cases (57 per cent and 42 per cent.)

was very considerable, and, in my view, could not be accounted for by anything which occurred after the time of death.

He disagrees with Sir Bernard Spilsbury and with Dr. Teare as to the percentage of saturation which would cause death and says :

Once the brain cells are sufficiently damaged by the poisonous effects of the gas, death can occur even after all traces of carbon monoxide have been removed from the blood. The degree of damage sustained by the brain cells will depend not only on the concentration of carbon monoxide in the blood, but also on the time during which the cells are subjected to it. For these reasons I think that the percentages of saturation as found on testing are relatively significant and that, apart from any other circumstances, they indicate a strong probability that Ada Bate died before George Bate. A

The question for me is whether on that evidence the circumstances in which the testator and his wife died were such as to render it "uncertain" which of them died first, within the meaning of the Law of Property Act, 1925, s. 184, or whether the circumstances are such that I can find that there is no uncertainty, but that one of them died before the other, *i.e.*, that the wife, although she was the younger, died before her husband. This question must depend on the degree of proof which, on the true construction of s. 184, is to be regarded as establishing the certainty of the death of one person before another, or the degree of deficiency of proof, one might say, which amounts, on the true construction of the section, to uncertainty. I have been referred to a number of passages in the speeches in the House of Lords in *Hickman v. Peacey* (1), which dealt with deaths caused by one explosion which destroyed an air raid shelter in which the persons concerned had taken refuge. The questions involved were whether the deaths ought to be held to have taken place simultaneously and whether s. 184 of the Law of Property Act, 1925, contemplated simultaneous deaths at all. The question, therefore, was different there from that which I have to decide, because no question of simultaneous deaths arises here. In the course of their speeches, however, their Lordships did express themselves in varying language on the question what would be certainty within the meaning of the section. VISCOUNT SIMON, L.C., who delivered a dissentient opinion, said ([1945] 2 All E.R. 220) : B

The use of the word "uncertain" in s. 184 is nothing to the point, for we are not engaged in applying the section, and in any case the uncertainty there referred to is uncertainty which is not removed by evidence leading to a defined and warranted conclusion. C

LORD MACMILLAN says (*ibid.*, 223) :

In my opinion, the legislature in employing the word "uncertain" in the section which the House has to construe was not thinking of the kind of certainty with which the law has to be content but was using the word in its ordinary acceptance as denoting a reasonable element of doubt. D

So, LORD SIMON says that it is enough if there is evidence which warrants a definite conclusion on the matter, and LORD MACMILLAN puts it rather higher, because he seems to say that the matter must be proved to the exclusion of all reasonable doubt. LORD WRIGHT, who was the other dissentient, said (*ibid.*, 226) : E

But I think that the section is not applicable unless there is uncertainty as to survivorship and in this case I am of opinion that there is no uncertainty because the proper finding of fact is that the persons died at the same moment. F

I suppose by a "proper finding of fact" he must have meant the same thing in effect as LORD SIMON meant by "defined and warranted conclusion." LORD PORTER said (*ibid.*, 231) :

If, then, the fact which had to be proved was the sequence, if any, in which the persons interested died or that all died at the same instant, it would be enough that the balance of probability pointed one way ; it would not be necessary to show absolute certainty. But in the present case, under the section, what has to be proved is not whether there was simultaneous death or not, but the certainty of simultaneous death or rather uncertainty as to who survived whom. G

Then he suspends judgment on the question :

I merely deal with the point because I understand some of your Lordships take the view that an inference reasonably drawn on a balance of probabilities is sufficient. I am not sure whether it is or not, and would leave the point open. For the reasons I H

have given, however, I would allow the appeal and say that it was uncertain which of the four persons survived the others.

LORD SIMONDS said (*ibid.*, 235) :

I conclude, then, that the true construction of s. 184 is that it proceeds upon the footing that the proof of simultaneous death is impossible, or in other words upon the footing that, if survivorship is not proved, the only alternative is uncertainty. If it is thus read, there is no *casus omissus* and the section can be so construed as to cover every case in which it cannot be proved that one of two persons dying together survived the other.

Therefore, there was something less than unanimity among their Lordships as to the degree of proof of survivorship which, in their view, was necessary to exclude the presumption enacted by s. 184, but I think all would have agreed that LORD SIMON did not put it too high when he spoke of "evidence leading to a defined and warranted conclusion."

Applying that as the test, am I, as a tribunal of fact, on this evidence, warranted in coming to a definite conclusion that the testator survived his wife? To do that, I think, I must be able to do something more than merely conclude that a reasonable explanation of the circumstances was that the testator survived his wife or, indeed, that on the whole the more reasonable conclusion is that he survived her. I think I must be able to come to a conclusion of fact on grounds which so far outweigh any grounds for a contrary conclusion that I can ignore the latter. It seems to me that, on the evidence in this case, I cannot do anything of the kind. In support of the conclusion that the wife died first the strongest non-medical evidence, the admissibility of which was objected to by counsel for some of the defendants, was that of her custom of going into the kitchen before her husband to prepare the meal. Whether that is admissible or not does not seem to me to matter, because there is no certainty that the gas jet was turned on before the husband entered the kitchen. Then it is said that, as the husband's body was lying across his wife's body, she must have collapsed and died first and he fell on top of her. That is a possible—perhaps, a probable—explanation of the position of the bodies, but it is by no means the only explanation. Mrs. Bate may have fallen on the floor, unconscious but still alive, and Mr. Bate may have fallen on top of her and died as he fell, or Mrs. Bate may have gone to the assistance of her husband when he was collapsing and he may have borne her to the ground so that they fell simultaneously. Finally, there is the medical evidence. In view of the conflict there is in the affidavits of the three eminent medical men as to the inference to be drawn from the percentage of carbon monoxide in the blood samples, I do not see how I can draw any conclusion from that evidence.

Therefore, having given the best consideration I can to the evidence, I find that there is no reliable ground on which I can hold that Mrs. Bate died before Mr. Bate or *vice versa*. In those circumstances, it seems to me that it is "uncertain," within the meaning of s. 184, which of these two people survived the other. That being so, the presumption enacted by s. 184 must prevail and for all purposes affecting title to their respective property their deaths must be presumed to have occurred in the order of seniority, which means that Mrs. Bate must be deemed to have survived Mr. Bate.

Order accordingly.

Solicitors: *Johnson, Jecks & Colclough*, agents for *Down, Scott & Down*, Dorking (for the plaintiff and some defendants); *Thicknesse & Hull* (for other defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re COATS' TRUSTS, COATS *v.* GILMOUR AND OTHERS.

[CHANCERY DIVISION (Jenkins, J.), June 19, 20, 25, July 16, 1947.]

Charities—Charitable purposes—Advancement of religion—Carmelite convent—Association of strictly cloistered and purely contemplative nuns.

The income of a trust fund was to be applied to the purposes of a Carmelite convent, if those purposes were charitable. The convent comprised an association of strictly cloistered and purely contemplative nuns, who devoted themselves entirely to worship, prayers and meditation and engaged in no activities for the benefit of anyone outside their own association. They were regarded, however, in the Roman Catholic Church, as causing by means of their private worship, prayers and meditations, the intervention of God to bring about the spiritual improvement of members of the public (both Catholic and non-Catholic) outside the convent, and also as providing an example of self-denial and concentration on religious matters which was of spiritual benefit to the public:—

HELD: the purposes of the convent were not charitable purposes within the legal definition of "charity" because charity, for the purposes of 43 Eliz., c. 4, and the case law founded thereon, was concerned with human, as opposed to divine or supernatural, activities, and related only to such benefits as men could confer on their fellows by human agency (*i.e.*, benefits which were the products of human bounty as opposed to divine benevolence); the promotion, maintenance, or manifestation of the teachings, doctrines, or observances of any religious sect within a closed circle of cloistered nuns could not be considered an advancement of religion among the public or a section of the public; and the public benefit claimed to be produced by the convent through edification by mere example was too indirect and incidental to convert the main or substantial purpose of the convent from the advancement of religion among its own nuns to the advancement of religion among the public or a section of the public.

Cocks v. Manners (1871) (L.R. 12 Eq. 574) followed.

Keren Kayemeth Le Jisroel, Ltd. v. Inland Revenue Comrs. ([1931] 2 K.B. 465) considered.

[AS TO RELIGIOUS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-122, paras. 155-160; and FOR CASES, see DIGEST, Vol. 8, pp. 248-254, Nos. 74-160, and Supplement.]

Cases referred to:

- (1) *Cocks v. Manners*, (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 8 Digest 248, 75.
- (2) *Re Joy, Purday v. Johnson*, (1888), 60 L.T. 175; 8 Digest 309, 898.
- (3) *Re White, White v. White*, [1893] 2 Ch. 41; 62 L.J.Ch. 372; 68 L.T. 187; 8 Digest 249, 89.
- (4) *Re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 8 Digest 296, 731.
- (5) *Re Delany, Conoley v. Quick*, [1902] 2 Ch. 642; 71 L.J.Ch. 811; 87 L.T. 46; 8 Digest 245, 50.
- (6) *Dunne v. Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 8 Digest 294, 718.
- (7) *Chesterman v. Federal Comr. of Taxation*, [1926] A.C. 128; 95 L.J.P.C. 39; 134 L.T. 360; Digest Supp.
- (8) *Re Williams, Public Trustee v. Williams*, [1927] 2 Ch. 283; 96 L.J.Ch. 449; 137 L.T. 477; Digest Supp.
- (9) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest 241, 1.
- (10) *Re Barclay, Gardner v. Barclay, Stewart v. Barclay*, [1929] 2 Ch. 173; 98 L.J.Ch. 410; 141 L.T. 447; Digest Supp.
- (11) *Re Ward, Public Trustee v. Berry*, [1941] 2 All E.R. 125; 110 L.J.Ch. 171; *sub nom. Re Ward, Public Trustee v. Ward*, [1941] Ch. 308; 165 L.T. 115; Digest Supp.
- (12) *Charities Comrs. v. M'Cartan*, [1917] 1 I.R. 388; 8 Digest 276, a.
- (13) *Munster & Leinster Bank v. A.-G.*, [1940] I.R. 19; Digest Supp.
- (14) *A.-G. v. Haberdashers' Co.*, (1834), 1 My. & K. 420; 8 Digest 263, 254.
- (15) *McNamee v. Mansfield*, [1945] I.R. 13; Digest Supp.
- (16) *Re Howley, Naughton v. Hegarty*, [1940] I.R. 109; Digest Supp.
- (17) *Maguire v. A.-G.*, [1943] I.R. 238; Digest Supp.

(18) *O'Hanlon v. Logue*, [1906] 1 I.R. 247; 8 Digest 251, a.

(19) *Re Caus, Lindeboom v. Camille*, [1934] Ch. 162; 103 L.J.Ch. 49; 150 L.T. 131; Digest Supp.

(20) *Keren Kayemeth Le Jisroel, Ltd. v. Inland Revenue Comrs.*, [1931] 2 K.B. 465; 100 L.J.K.B. 596; 145 L.T. 320; *on appeal*, [1932] A.C. 650; Digest Supp.

ADJOURNED SUMMONS by the trustees of a declaration of trust to determine whether the purposes of a Carmelite convent were charitable purposes within the legal definition of charity. The nuns of the convent belonged to one of the strictly cloistered and purely contemplative orders of the Roman Catholic Church, and it was held that the purposes of the convent were not charitable purposes. The facts appear in the judgment.

R. R. A. Walker for the trustees.

Gravenor Hewins for the prioress of the convent.

Humphrey King for the trustees of the Converts' Aid Society.

Cur. adv. vult.

July 25. JENKINS, J., read the following judgment. The plaintiffs in this case are the trustees of a declaration of trust dated June 10, 1946, under which a trust fund consisting of a sum of £500 and the investments for the time being representing the same is held :

... upon trust if the purposes of the Roman Catholic community situate and known as the Carmelite Priory, St. Charles Square, Notting Hill, in the county of London are charitable, to apply the income of the trust fund to all or any such purposes with power to pay the same to the prioress for the time being of the said community for the purpose aforesaid without seeing to the application thereof; but if the purposes of the said community are not charitable then upon trust to apply the trust fund to all or any of the purposes of The Converts' Aid Society of 20, Holmes Road, Twickenham, Middlesex, with power to pay the same to the trustees for the time being of the said society for the purposes aforesaid without seeing to the application thereof.

The first-named defendant is the present prioress of, and sued as representing, the Carmelite Priory (which I will term "the convent") referred to in the declaration of trust. The remaining defendants are the present trustees of, and sued as representing, the Converts' Aid Society.

The formal question now raised for determination by the court is, shortly, whether the income of the trust fund should be applied for the purposes of the convent or whether the trust fund should be applied for the purposes of the society, but (having regard to the terms of the declaration of trust) the substantial question (and, I may add, the question which the declaration of trust was admittedly designed to raise) is whether the purposes of the convent are charitable purposes within the legal definition of charity. That question was answered in the negative, with respect to a religious community admittedly similar in all material respects to the convent in the present case, by WICKENS, V.-C., in *Cocks v. Manners* (1), which has stood for nearly 80 years and has been cited with approval in many subsequent cases, but, for reasons which will hereafter appear, it has been contended before me that I am not bound to follow, and ought not to follow, *Cocks v. Manners* (1) in deciding the present case.

As appears from an affidavit of the prioress, the convent is one of the communities of the Discalced Nuns of the Order of Our Blessed Lady of Mount Carmel. The Discalced Friars and Nuns have been a separate branch of the order under the jurisdiction of their own Father-General, the other branch being the Calced Carmelites, or the Carmelites of the Old Observance, since the General Chapter of the whole order which was held at Cremona in 1593. The Discalced Carmelite Nuns and Friars were founded by St. Teresa of Avila with the object of restoring the strict enclosure and intensifying the contemplative life of the communities and promoting their share in the apostolate. The first convent of nuns was founded by her at Avila on Aug. 24, 1562. The convent in the present case was founded in 1878 at the request of the late Cardinal Manning from the Convent of the Incarnation at Paris. From the convent 33 other convents have been founded since the end of the 1914-1918 war. The Discalced Carmelite nuns throughout the world follow the Primitive Rule which was drawn up by St. Albert Patriarch of Jerusalem and confirmed by Pope Innocent IV in 1247 and the Constitutions of 1591, as modified in 1926 to bring them into conformity with the new code of canon law of the Roman Catholic Church. Each

Carmelite convent consists of not more than 20 or, in exceptional cases, 21 nuns who live in community and are presided over by a prioress who is assisted by other officers and in some matters by a council of some of the other members of the community. The convents in any one country are not grouped under the jurisdiction of a provincial, but each convent is autonomous and all are subject under the Constitutions to the jurisdiction of the General of the Discalced Carmelite Friars or of the local bishop.

The effect of the evidence as a whole can, I think, be fairly summarised by describing the convent as comprising an association of strictly cloistered and purely contemplative nuns who devote themselves entirely to worship, prayers and meditation within the four walls of their cloister, and perform no works and engage in no activities whatever for the benefit of anyone outside their own association, but who are regarded, in the belief and teaching of the Roman Catholic Church, as causing, by means of their private worship, prayers and meditations, the intervention of God to bring about the spiritual improvement of members of the public (both Catholic and non-Catholic) outside those walls, and also as providing an example of self-denial and concentration on the life of the spirit tending to the spiritual edification of such members of the public. The question I have to decide is whether, on this evidence, and having regard to the relevant authorities and such principles as are deducible from them, the substantial or main purpose of the convent should be held to be the advancement of religion for the benefit of the public or a section of the public (which is admittedly a charitable purpose), as opposed to the advancement of religion for the private benefit of the association of individual nuns comprised in the convent (which is admittedly not a charitable purpose).

In the course of the argument I was referred to the preamble to 43 Eliz., c. 4, and to a considerable number of authorities. It is, of course, well settled that the preamble to the statute merely contains instances of charitable objects of different kinds and is not an exhaustive definition of all charitable objects. As, however, the court proceeds by analogy to the statute in considering the claims of particular institutions or purposes to be held charitable, it is, I think, pertinent to the present case to observe that the instance of religious charity mentioned in the preamble is "repair of . . . churches," which may, I think, be paraphrased as "the maintenance of places of public worship," and, perhaps, explained by analogy into "the provision of means of religious worship, instruction and improvement in which all so minded may share."

I do not think it is necessary for me to refer to any of the authorities earlier than *Cocks v. Manners* (1). That case concerned a gift by will of certain shares in a residuary estate, comprising pure and impure personality, to two religious institutions, namely, the Dominican Convent at Carisbrook and the Sisters of Charity of St. Paul at Selley Oak, and it was necessary to decide whether those institutions were charitable, not only on account of a possible question of perpetuity, but also because, as the law then stood, a gift to a charitable institution could only be valid so far as it took effect out of pure personality. WICKENS, V.-C., held that the community of sisters at Selley Oak was a charitable institution on the ground that, although the primary object of these sisters was self-sanctification, they employed themselves, as a means thereto, in the exercise of works of piety and charity in teaching the poor and nursing the sick, so that the bequest in this case was good only as to the pure personality, but he held that the Dominican Convent at Carisbrook was neither within the letter nor the spirit of 43 Eliz., c. 4, that the gift to it did not involve a perpetuity and, therefore (not being a charitable gift), was good both as to the pure and impure personality. WICKENS, V.-C., said (L.R. 12 Eq. 585):

As regards the Dominican convent the case is a little different, and more difficult. There are two questions, whether the gift is a charitable gift, and whether it is good if it be not charitable. A charitable gift in English law is a gift such as is described in the preamble of the statute 43 Eliz. c. 4, or as can be considered as analogous to the gifts there described. The preamble has received a very wide construction, but it is difficult to help feeling that such a gift as that to the Dominican convent in the present case is not only not within the words of the statute, but probably, and without reference to the faith professed, one of the last gifts which the legislature which passed the Act would have thought of including in it. On the Act unaffected by authority

I should certainly hold that the gift to the Dominican convent is neither within the letter nor the spirit of it; and no decision has been referred to which compels me to adopt a different conclusion. A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word "charitable" is used in its popular sense or in its legal sense. It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public; an annuity to an individual, so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so long as they lived together in retirement and performed acts of devotion, be charitable. Therefore the gift to the Dominican convent is not, in my opinion, a gift on a charitable trust.

In *Re Joy, Purday v. Johnson* (2) it was necessary for CHITTY, J., to decide whether a gift to a society for the suppression of cruelty to animals "by united prayer" would be a good charitable gift. CHITTY, J., said (60 L.T. 178):

I am not prepared to accede to Mr. Byrne's argument as to the purposes disclosed being charitable purposes. That may be; but it is a question of some considerable nicety, and possibly does not arise. But, as I stated, the opinion I have formed with reference to this point is, that the trust is for the benefit of the "Society for the Suppression of Cruelty by United Prayer." Now, it is said by Mr. Byrne, that a society for suppressing cruelty to animals is a charity, or a charitable society, and a gift for the purpose of suppressing cruelty to animals is a good charitable gift. With that I do not in any sense quarrel; but this is not a gift for the suppression of cruelty to animals generally. The object is to suppress it by united prayer. What I mean by this is, that you cannot cut the sentence into two parts, and say there were two objects. There is one object, and one object only, and that is by united prayer to suppress cruelty to animals. Then I have to inquire what the meaning of "united prayer" here is. I turn to the rules of the society, upon which I have made some observations already, in anticipation of this point. It was not by public prayer. It was by what the lady termed "united prayer" which means prayer of the description I have already stated—private prayer—and it is clear that if the purpose is a mere improvement of the individual by private prayer that is not a purpose of public or general utility within the statute, or within the analogy in the statute of Elizabeth. That, I understand, to be the opinion expressed by WICKENS, V.-C., in the case of *Cox v. Mallow* [sic.] (1). In one sense of course the improvement of the individual results in the improvement of the community, and the more the individual members of the community can be improved by prayer, or by any other means, the greater must be the general improvement. Though it may result in public benefit, and be a matter of public utility, it is clearly to my mind not within the statute, as I have said, or within the analogy of the statute.

In *Re White, White v. White* (3) (where a gift "to the following religious societies viz.—to be divided in equal shares among them" was held by the Court of Appeal to be a valid charitable gift with respect to which a scheme should be directed, on the ground that a bequest to a religious institution and for a religious purpose is *prima facie* a bequest for a charitable purpose). LINDLEY, L.J., said, in the course of the argument ([1893] 2 Ch. 48):

WICKENS, V.-C., in *Cocks v. Manners* (1), seems in your favour; for he says: "It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public."

In delivering the judgment of the court, LINDLEY, L.J., said (*ibid.*, 51):

A society for the promotion of private prayer and devotion by its own members, and which has no wider scope, no public element, no purposes of general utility, would be a "religious" society, but not a "charitable" one: see *Cocks v. Manners* (1). In that case it was held that a gift by will to a Dominican convent was not a charitable gift.

In *Re Macduff, Macduff v. Macduff* (4) (the case of the gift for "charitable" or "philanthropic" purposes) RIGBY, L.J., said ([1896] 2 Ch. 474):

I have only one word to say about the case of *Re White* (3). The court was there constrained by the authorities to say that religious purposes were all charitable; and although it was suggested that in the case of *Cocks v. Manners* (1), it had been shown that a gift to a particular religious society in the terms in which it was given was not a charity, that to my mind makes no difficulty, because, as far as I know, and for the purposes, at any rate, of this case, I think it is true, when you class charities under the heads "gifts to the poor, trusts for the advancement of education, trusts for the

advancement of religion," that does not mean that in every conceivable case where you can bring a gift under those general words such gift is necessarily a charity. It means, as in the case of "for the general benefit of the community," that these are heads under which valid charities may be arranged. No one will suggest, for instance, to take only one illustration, that the education of pickpockets in a thieves' kitchen to make them fit for their profession is a charity. It must be education of a particular kind; and when it is a gift to a religious society you may in the same way say, "Yes, but the gift is not necessarily made a charitable gift by the circumstance that it is given to a religious society, for there may be, as in *Cocks v. Manners* (1), a religious society which does not attempt to promote religion." The particular convent in that case was a set of religious people who met together, but who abstained even from good works as regards the outside public, and they did not attempt to proselytise or even to attend to the sick and to the poor, and it was held that the gift to such a society could not be called a charity.

In *Re Delany, Conoley v. Quick* (5) FARWELL, J., held that the objects of certain religious communities similar to the community of sisters of charity in *Cocks v. Manners* (1) were charitable notwithstanding that (as in the case of the sisters of charity) the motive for performing works of charity was self-sanctification. He said ([1902] 2 Ch. 647, 648):

I am further of opinion that the objects of the association are charitable, and that the gifts, therefore, fail. The case is indistinguishable from that of the Sisters of the Charity of St. Paul at Selley Oak in *Cocks v. Manners* (1). The care of the aged and infirm poor and of incurable and orphan children is the outward and visible object of the association of the Poor Sisters of Nazareth, and this admirable object is not rendered less charitable within the meaning of the Act of Elizabeth because the sisters also desire to sanctify their own souls by prayer and contemplation, whether such sanctification is regarded as concurrent with or assisted by their charitable work. The court can only look to the actual purpose aimed at by the association, and cannot inquire into the motives of the members of the association. The care of the aged poor and the like is a charity within the Act whether the persons who devote their lives to it are actuated by the love of God, a desire for their own salvation, or mere pique, or disgust with the world. The legacy and share of residue, therefore, given for the Poor Sisters of Nazareth fail.

In *Dunne v. Byrne* (6) LORD MACNAGHTEN said ([1912] A.C. 410):

Passing from these two points we come to the real difficulty of the case. The fund is to be applied in such manner as the "Archbishop may judge most conducive to the good of religion" in his diocese. It can hardly be disputed that a thing may be "conductive," and in particular circumstances "most conducive," to the good of religion in a particular diocese or in a particular district without being charitable in the sense which the court attaches to the word, and indeed without being in itself in any sense religious. In *Cocks v. Manners* (1), there is the well-known instance of the dedication of a fund to a purpose which a devout Roman Catholic would no doubt consider "conductive to the good of religion," but which is certainly not charitable.

LORD MACNAGHTEN commented on *Re White* (3) thus (*ibid.*, 411):

The Court of Appeal held that the gift was in substance a gift to "religious societies for religious purposes," and so holding they considered themselves bound by a long stream of authority to determine that the bequest was a good charitable gift. Whether they were right in so construing the unfinished sentence before them may perhaps be doubted, but it is perfectly clear that they did not mean to lay down any new law, or to extend the law as laid down in former decisions. All they did was to hold, as had often been held before, that a bequest for religious purposes was a good charitable gift. It was too late in their opinion to depart from long-established decisions, although the MASTER of the ROLLS did observe that "a religious society may or may not be a charitable society in the sense in which that expression is used."

In *Chesterman v. Federal Commissioner of Taxation* (7) LORD WRENbury said ([1926] A.C. 131):

It is not all religious purposes that are charitable. Religious purposes are charitable only if they tend directly or indirectly towards the instruction or the edification of the public.

He then cited *Cocks v. Manners* (1).

In *Re Williams, Public Trustee v. Williams* (8) CLAUson, J., said ([1927] 2 Ch. 289):

In *Comrs. for Special Purposes of Income Tax v. Pemsel* (9), LORD MACNAGHTEN stated that "charity" in its legal sense comprises, amongst other trusts, trusts for

the advancement of religion. But the trusts must be such as tend either directly or indirectly towards benefiting the public. The materiality of that qualification was distinctly brought out by the decision in *Cocks v. Manners* (1), where a bequest to a Dominican convent at Carisbrook was held not to be a good charitable bequest on the ground that the services performed by that institution did not tend, either directly or indirectly, towards the instruction or edification of the public.

Then he quoted *Dunne v. Byrne* (6), and said (*ibid.*, 290) :

A LORD MACNAGHTEN in that case referred to *Cocks v. Manners* (1), as a well known instance of the dedication of a fund to a purpose which a devout Roman Catholic would no doubt consider "conducive to the good of religion" but which was certainly not "charitable" . . .

He then cited the passage from the judgment of LINDLEY, L.J., in *Re White* (3) to the same effect. In *Re Barclay, Gardner v. Barclay* (10) (the Farm Street church case), LORD HANWORTH, M.R., said ([1929] 2 Ch. 190) :

B But the maintenance of religious services tending directly or indirectly towards the instruction or the edification of the public is a good charitable purpose : see *per* WICKENS, V.-C., in *Cocks v. Manners* (1). The emphasis is on the edification or instruction of the public, as pointed out by FARWELL, J., in *Re Delany* (5), in contradistinction to "attempting to improve one's own mind or save one's own soul."

C In *Re Ward, Public Trustee v. Berry* (11) CLAUSEN, L.J., said ([1941] 2 All E.R. 129) :

Cocks v. Manners (1) is an instance of a case in which it was held that the purpose of self-sanctification by the observance of various religious practices and rules, though no doubt connected with religious conviction, was not a purpose conducive to the advancement of religion. The testator may no doubt indicate that he uses such a phrase as "religious purposes" in a special sense . . . The judge appears to find an indication of the use of the phrase in that extended sense in the words "for Roman Catholics in the British Empire." I fear that I cannot agree that these words supply the necessary context.

D LUXMOORE, L.J., said (*ibid.*, 131) :

It is true that in a number of cases it has been said that the words "religious purposes" are wide enough to embrace purposes which are not charitable within the legal meaning of the word. It is perhaps sufficient to refer to the statement made by WICKENS, V.-C., in *Cocks v. Manners* (1) . . .

E LUXMOORE, L.J., quoted the passage to which I have already referred, and said :

It is to be observed that in *Cocks v. Manners* (1), the court had not to consider what meaning should be attached to the words "religious purposes" for those words did not appear in the will under consideration.

F I was also referred to several Irish decisions. In *Charities Comrs. v. M'Carton* (12) a bequest for establishing a monastery was held not to be charitable. O'CONNOR, M.R., said ([1917] 1 I.R. 395, 396) :

Was there a binding charitable trust in this case ? Monsignor M'Cartan's executors and trustees say that there was not, because the purposes declared were not all charitable, and it was open to Monsignor M'Cartan to select a non-charitable purpose. It is said that the establishment of a monastery is not a charitable purpose, because a monastery is not necessarily an institution devoted to works of charity such as the education of poor children or the nursing of the sick poor. This is undoubtedly so, because monasteries of men and women are often, if not mostly, institutions the members of which devote their lives exclusively to acts of piety such as pious meditation, prayer and self-denial. Such institutions, however praiseworthy, are not charitable in the sense recognised by this court.

G In *Munster & Leinster Bank, Ltd. v. A.-G.* (13) a gift to the Catholic Young Men's Society was held not to be charitable on the ground that, while the society had one charitable object, it also had other objects merely directed to the benefit of its members. BLACK, J., said ([1940] I.R. 30) :

H Now, if these objects extended to the welfare of the community at large, or of a defined section of it, I should have to go deeply into the argument of counsel that all, or at least some of them, could be regarded as charitable ; for, as was emphasised by the Court of Appeal in *Re Macduff* (4), some trusts for purposes beneficial to the community are not charitable.

After dealing with social welfare, which, he said, he ruled out at once, he said (*ibid.*) :

As regards "spiritual welfare," I think that, taking the rules as a whole, it is clear that promotion of the "religious welfare" of the members is intended to be, and is beyond doubt, an object of the society. But, the promotion of their own religious welfare was precisely the object of the Dominican nuns in *Cocks v. Manners* (1), a case quoted as still authoritative by the highest courts, including the late Irish Court of Appeal. Yet, the purpose of the Dominican nuns was held not to be charitable. Without presuming to question a decision which I must take to be good law, I think something might be said for the potential reactions upon religion amongst the neighbouring public, arising from the very existence in its midst of a community of nuns, all of whom had given up fortune, pleasure, and liberty for an ideal, even if confined, as the court said, to working out their own salvation. Example is sometimes better than precept, and the pattern of a self-sacrificing life may impress some more than an indifferent sermon. One must have read history to little purpose who does not know that men have sometimes done more to influence public causes by supreme self-sacrifice than they could ever have accomplished by missionary endeavour. On the other hand, one can see the force of what LORD BROUGHAM said in *A.-G. v. Haberdashers' Co.* (14), against admitting a gift which is only consequentially charitable as a charitable use. There are perhaps few forms of human activity, good in themselves, but solely designed to benefit individuals associated for the purpose of securing that benefit, which may not have some repercussions or consequential effects beneficial to some section of the general community; and unless a further and sweeping inroad is to be made on the rule against perpetuities, the line must be drawn somewhere. *Cocks v. Manners* (1), has drawn it.

In *McNamee v. Mansfield* (15) gifts to the superioress of a Carmelite convent and to the prior of a community of Carmelite fathers were held not to be charitable, on the ground that some of the purposes of the two orders were not legally charitable.

On the other hand, in *Re Howley, Naughton v. Hegarty* (16) GAVAN DUFFY, J., doubted the applicability to Southern Ireland of the *ratio decidendi* in *Cocks v. Manners* (1), on the ground that the Irish public might find edification in "cloistered lives devoted purely to spiritual ends," even though the English public might not. Discussing the decision of the Judicial Committee of the Privy Council in *Dunne v. Byrne* (6), he said ([1940] I.R. 113):

... the Committee referred, as an instance, to *Cocks v. Manners* (1), where a gift to a community of nuns, established to work out the salvation of the sisters by religious exercises and self-denial, was held not to be a charitable gift in English law, on the ground that private piety in a convent does not tend, directly or indirectly, to edify the public; this *dictum* (for the bequest was held good as a personal gift for the members of the community) has come to represent established law in England and has sometimes been tacitly accepted here under similar jurisprudence, which constantly resorts for precedent to the vast field of English judge-made law. I apprehend that the point ought not to be taken as having been finally settled for us in England, where the law was determined by the English outlook upon societies for self-sanctification. The assumption that the Irish public finds no edification in cloistered lives, devoted to purely spiritual ends, postulates a close assimilation of the Irish outlook to the English, not obviously warranted by the traditions and *mores* of the Irish people.

In *Maguire v. A.-G.* (17) GAVAN DUFFY, J., held that a gift to found a convent for the perpetual adoration of the Blessed Sacrament was a valid charitable gift, and declined to regard *Cocks v. Manners* (1) as having any authority in Southern Ireland. He said ([1943] I.R. 248, 249):

The law laid down by LORD ELDON and LORD MANNERS seemed plain enough, but a strange effect upon their established principles has been attributed to *Cocks v. Manners* (1): a testamentary gift to maintain the worship of God or a gift to be applied in the service of the Redeemer remained charitable, unless the donor had been so maladroit as to express his bounty in the form of a gift to a society of cloistered men or women, wholly devoted to those charitable purposes, when the charity was submerged in the overwhelming egoism of the chosen instruments (who with sublime love of their Redeemer—I must not say "sublime charity"—had consecrated their lives to His worship in their monastery); but, if the donees were a pious community engaged in civic works of mercy, the ensuing public benefit somehow redeemed the inherent vice of the spiritual family, and charity triumphed. It has been assumed that SIR JOHN WICKENS decided, as a matter of law, that a testamentary gift to a contemplative religious order cannot be charitable on the ground that, in the eyes of the law, the public is neither instructed nor edified by the gift. I agree with the very different view, adumbrated by Mr. O'Cuiv on behalf of the Attorney-General. The decision on this point seems to me incontrovertibly to have been a judgment

on fact, and the essential fact determined was the fact that the England of 1871 was not edified by sequestered piety, unaccompanied by civic works of mercy. Perhaps all cloistered cenobites were regarded as eccentrics in mid-Victorian England. Possibly they may be so regarded in England today. The law laid down was that religious purposes, to be charitable, required services tending to instruct or edify the public; the fact was assumed that the Dominicans did not pass that test. Taking that view of *Cocks v. Manners* (1), I hold that there is not now, and never has been, the flimsiest warrant for attributing the same outlook to public opinion here. I shall waste no time

A in establishing the proposition of fact that the cloister is a powerful source of general edification in this country. The finding, or assumption, in *Cocks v. Manners* (1), that the convent of a contemplative community tended neither directly or indirectly towards public edification has no scintilla of authority as a determinant of the actual position among us.

In this state of the authorities, it seems to me that, notwithstanding the difference of judicial opinion which appears to have emerged of recent years in Southern

B Ireland, my duty as an English judge of first instance must *prima facie* be to follow *Cocks v. Manners* (1) irrespective of any opinion of my own in the matter. Counsel for the prioress of the convent contended that I was not bound to follow, and ought not to follow, *Cocks v. Manners* (1), and the numerous later cases in which that case has been followed and approved, on grounds which are, I think, fairly summarised in the following three propositions:—(i) The evidence on

C which *Cocks v. Manners* (1) was decided was incomplete, inasmuch as it contained no mention (a) of the fact that the prayers of a cloistered Roman Catholic community are never confined in intention to the benefit of its own members, but invariably include an intention to benefit the public outside the cloister; or (b) of the Roman Catholic belief and teaching to the effect that the prayers of such a community cause and stimulate divine intervention to bring about the spiritual improvement of the public outside the cloister; or (c) of the spiritual

D improvement or edification held by the Roman Catholic Church to be derived by the public outside the cloister from the example of self-denial and devotion to the life of the spirit set by the members of the cloistered community. (ii) In considering whether a particular religious purpose is for the benefit of the public, and, therefore, charitable, the court will assume the tenets or beliefs of the particular religion in question to be true. (iii) If the objects of a given religious society are necessarily charitable, it matters not that the motive for pursuing

E those objects may be the spiritual improvement of its own members and, therefore, self-seeking as opposed to charitable or altruistic. Counsel for the prioress says, in effect, that acceptance of these three propositions not only throws the question open to me as a judge of first instance, notwithstanding *Cocks v. Manners* (1), but leads inevitably to the conclusion that the convent is a charitable institution because its purpose is the advancement of religion in such a

F way as necessarily to benefit the public, first, by means of the divine intervention to the spiritual advantage of the public (which must be assumed, in fact, to flow from, or be effectively stimulated by, the private devotions of the nuns in the convent); and, secondly, by means of the spiritual improvement or edification which the public must be assumed, in fact, to draw from the example of self-denial and religious devotion set by the nuns, the fact that the motive or ultimate aim of the nuns is their own spiritual perfection being irrelevant.

G The first of these three propositions must, no doubt, be taken as strictly correct, since, according to the reports, the evidence before WICKENS, V.-C., in *Cocks v. Manners* (1) was, in fact, incomplete in the respects which I have mentioned, but the considerations that Christian religious communities are wont to pray for others besides themselves, that devotion to a life of prayer postulates belief in the efficacy of prayer, and that the example set by those who renounce the world and devote themselves to contemplative religion may tend

H to the spiritual improvement of others, can hardly be termed abstruse, and I am not satisfied that they were absent from the mind of WICKENS, V.-C., in deciding *Cocks v. Manners* (1), or from the minds of the many high authorities who have followed or approved that decision. The second proposition seems to me to go a good deal too far. I think the true principle is that, in considering whether a particular religious purpose is charitable, the court will assume the advancement of the religion concerned to be beneficial, without inquiring into the truth or soundness of its doctrine or tenets, provided they involve nothing contrary to morals or law. I do not think *O'Hanlon v. Logue* (18), and *Re*

Caus, Lindeboom v. Camille (19) really go any further than this, and I am certainly not prepared to do so. For example, a particular religion might include a belief that diseases among the public could be cured by prayer. In considering whether a trust for the purposes of that religion was charitable, the court would (subject to the proviso mentioned above) assume its advancement to be beneficial without going into the truth or falsity of the belief about the cure of disease. This is a very different thing from the proposition (which I reject) that the court in such a case should reason thus: "The adherents of the religion in question believe that their prayers will cure disease amongst the public. The court must accept this belief as true. Here is a trust to promote prayer in accordance with the religion in question. The court must, therefore, assume that prayer in accordance with this trust will cure disease among the public. The prevention and cure of disease is beneficial to the public. Therefore, this is a trust for religious purposes beneficial to the public. Therefore, it is a charitable trust." In this example I have assumed a belief that prayers will, through divine intervention, improve the physical health of the public at large, but I see no distinction for the present purpose between a belief of that character and a belief that prayers will, through divine intervention, secure improvement in the spiritual health of the public at large, as distinct from the spiritual improvement which those persons who themselves pray, or who, as members of a congregation, take part in or witness the offering of prayers, may be expected to derive from that exercise or observance. The third proposition I do not dispute. It accords with the decision in *Cocks v. Manners* (1) (as regards the sisters of charity) and with the decision in *Re Delany* (5) (as regards the two communities there under consideration), but it is relevant only where the objects (as distinct from the motive) of the particular society in question are in fact shown to be charitable.

Assuming in favour of counsel for the prioress that, on the grounds which he has advanced, I should regard the question as open to me, notwithstanding *Cocks v. Manners* (1) and the many subsequent cases in which it has been approved, I still find myself unable to accept his conclusion. It is, I think, in great measure destroyed by my rejection of the second of the three propositions stated above. Moreover, I think it is founded on a misconception of the character of the benefits which objects claimed to be charitable must be shown to confer on the public or a section of the public before they can be accepted as charitable objects. Charity, for the purposes of 43 Eliz., c. 4, and of the case law founded on it, is, in my view, concerned with human, as opposed to divine or supernatural, activities, and relates only to such benefits as men can confer on their fellows by human agency—benefits which are the product of human bounty as opposed to divine benevolence. Thus, in my judgment, the element of public benefit which a religious trust or purpose must, in order to be charitable, be shown to possess, is to be sought, not in the blessings (whether spiritual or temporal) which the prayers of the faithful, according to the tenets of the particular sect, may cause God to bestow on the public at large, but in the instruction, edification, or spiritual comfort which the execution of the trust or purpose may be expected to impart to members of the public by the operation on their minds, through the recognised human channels of communication and perception, of the religious activities directly or indirectly promoted or maintained by such execution. In a word, I think that the law recognises the spiritual benefit as a product, or potential product, of religious charity which men derive from being taught to pray and from praying as they have been taught to do, but not the benefits, whether spiritual or temporal, which their prayers may cause God to bestow on other people. This, I think, accords with the view taken by CHITTY, J., in *Re Joy* (2) of a trust to suppress cruelty to animals by united prayer. To hold otherwise would, as it seems to me, produce a revolution in the law of religious charity as heretofore understood. For instance, a trust to maintain in perpetuity a chaplain to conduct services in a private chapel open only to members of a particular family and to perform no other office whatever, would be charitable as a trust for the advancement of religion for the benefit of the public so long as it could be shown (a) that the prayers offered up in the chapel included in their intention the public at large and (b) that, according to the tenets of the particular religion, such prayers would, in fact, cause God to bring about the spiritual improvement of the public

at large. Again, a trust to maintain a hermit in a secret and solitary life of prayer and meditation would similarly be charitable, given proof that, according to the tenets of the particular religion, his prayer and meditation would, in fact, cause God to intervene to the spiritual advantage of mankind in general.

A In short, the distinction, up to now considered vital, between public and private religious purposes would be for all practical purposes destroyed. Moreover strange anomalies and subtle distinctions would arise. There might be two religious communities both equally cloistered, both equally rigid in their abstention from all works of preaching or teaching or of ministering to the poor or sick outside their walls, and in all discernible respects precisely alike. If the contention of counsel for the prioress were right, a gift to a sect which believed that the prayers of such a community were effective to secure divine blessings for the public at large would be charitable, while a gift to a sect which believed that the prayers of such a community were effective only to secure the spiritual improvement of its own members would not be charitable. Thus, charitable status and its attendant advantages would be made to depend on an esoteric point of doctrine. I do not think that *O'Hanlon v. Logue* (18) and *Re Caus* (19), on which counsel for the prioress relied, by any means justify the new departure I am invited to make. In *Re Caus* (19) LUXMOORE, J., said ([1934] Ch. 169, 170):

C I have no hesitation in holding that a gift for the saying of masses constitutes a valid charitable gift on the grounds, first, that it enables a ritual act to be performed which is recognised by a large proportion of Christian people to be the central act of their religion, and, secondly, because it assists in the endowment of priests whose duty it is to perform that ritual act.

D This seems to me to be nothing approaching an authority for holding the purposes of the convent in the present case to be charitable.

The widest definitions of religious charity to which I was referred were, I think, those contained in the judgments of ROWLATT, J., and LORD HANWORTH, M.R., in *Keren Kayemeth Le Jisroel, Ltd. v. Inland Revenue Comrs.* (20), where ROWLATT, J., said ([1931] 2 K.B. 469):

E The promotion of religion meant the promotion of the spiritual teaching of the religious body concerned and the maintenance of the spirit of its doctrines and observances.

LORD HANWORTH, M.R., said (*ibid.*, 477):

F The promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it—not merely a foundation or cause to which it can be related. Religion as such finds no place in the memorandum of the association [*i.e.*, the memorandum of association of the convent concerned.]

G Counsel for the prioress relied on those definitions and said that, on the evidence, the convent in the present case, in the words of ROWLATT, J., maintains the spirit of the doctrines and observances of the Roman Catholic Church, and, in the words of LORD HANWORTH, M.R., maintains the doctrines on which the teaching of the Roman Catholic Church rests “and the observances that serve to promote and manifest it,” and is, therefore, charitable. I cannot agree that either definition involves the conclusion that the promotion, maintenance or manifestation of the teachings, doctrines or observances of the Roman Catholic Church or any other religious sect within a closed circle of cloistered nuns is advancement of religion amongst the public or a section of the public. As regards the public benefit claimed to be produced by the convent, through H edification by mere example, this benefit is, in my judgment, too indirect and incidental to convert the main or substantial purpose of the convent from the advancement of religion amongst its own nuns to the advancement of religion amongst the public or a section of the public. I do not think decisions or *dicta* to the contrary from Southern Ireland should be followed here. By parity of reasoning, it might be argued that a thrift club qualifies for charitable status as tending to relieve poverty through the inculcation by example of provident habits, and that a private educational trust is charitable as tending to promote habits of study among the public at large.

For all these reasons, I am of opinion that the purposes of the convent are not charitable purposes and, accordingly, that the trust fund is applicable for the purposes of the Converts' Aid Society, and will so declare.

Declaration accordingly. Costs of all parties as between solicitor and client to be taxed and paid out of the trust fund.

Solicitors: *Witham & Co.* (for the trustees of the fund and the convent); *Ellis, Bickersteth, Aglionby & Hazel* (for the Converts' Aid Society).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.] A

JAMES v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), July 10, 28, 1947.]

Royal Forces—Pension—Leave to appeal out of time—Appeal on basis of subsequent decision of superior court—R.S.C., Ord. 55E, r. 2 (1)—Pensions Appeal Tribunals Act, 1943 (c. 39), s. 6 (2). B

On July 24, 1941, J. joined the army, and in January, 1943, he contracted Hodgkins disease, the cause of which is unknown. In April, 1943, he was discharged because of the disease, and his claim for a pension was rejected by the Minister of Pensions. In February, 1946, the disease caused his death, and the widow's claim for a pension was rejected both by the Minister and an appeal tribunal. She did not apply to the tribunal for leave to appeal to the court within the 6 weeks allowed under the rules of the tribunal, but, after the decision of DENNING, J., in *Donovan v. Minister of Pensions*, on Nov. 21, 1946 (unreported), where the husband of the successful claimant had died from Hodgkins disease, she applied to the tribunal for leave to appeal out of time. This was refused by the tribunal and by the President of the Pensions Appeal Tribunals, and the widow appealed to the court. C

HELD: (i) the Pensions Appeal Tribunals Act, 1943, in no way limited the time within which the court might give leave to appeal; R.S.C., Ord. 55E, r. 2 (1), by which "an application to the nominated judge for leave to appeal shall not be made unless an application has been made to the tribunal and has been refused," was directory and not imperative, and did not introduce the condition that, before the court could give leave to appeal, an application must have been made to the tribunal within the time limited by the Pensions Appeal Tribunals, England and Wales Rules, 1946, rr. 25 (2) and 33; and, therefore, the court had power to grant leave to appeal. D

(ii) although in ordinary litigation it was not sufficient for a litigant to come to the court and ask for leave to appeal on the ground that a subsequent decision of a superior court had determined that the principle of law on which his case was decided was wrong, having regard to the circumstances of pension appeals, it was proper that an applicant whose claim had been dismissed by a tribunal should not be debarred from relying on a later decision of a court superior to the tribunal. The widow in the present case should have leave to appeal so that the question could be investigated whether the tribunal had properly directed themselves in law with regard to the burden of proof. E

[AS TO WAR PENSIONS FOR MEMBERS OF H.M. FORCES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 781, 782, para. 1102; and FOR CASES, see DIGEST Supp.] F

Cases referred to:

- (1) *Donovan v. Minister of Pensions*, (1946), unreported.
- (2) *Phillips v. Minister of Pensions*, (1946), unreported.
- (3) *Finnerty v. Minister of Pensions*, (1947), unreported.
- (4) *Richardson v. Minister of Pensions*, (1945), Reports of Selected War Pension Appeals, 427 (Court of Session).
- (5) *White v. Minister of Pensions*, (1946), Reports of Selected War Pension Appeals, 483 (Court of Session).
- (6) *Edwards v. Minister of Pensions*, [1947] 1 All E.R. 379; [1947] 1 K.B. 564.
- (7) *Re Berkeley (Earl)*, *Borrer v. Berkeley*, [1944] 2 All E.R. 395; [1945] Ch. 1; 171 L.T. 303; Digest Supp.
- (8) *Miller v. Minister of Pensions*, (1947), ante, p. 372.

APPEAL by the applicant against a decision of a pensions appeal tribunal refusing leave to appeal out of time against the rejection of a claim for a pension. G

The court now allowed the appeal, the facts of which appear in the judgment.

Crispin and Band for the applicant.

The Attorney-General (Sir Hartley Shawcross, K.C.) and H. L. Parker for the Minister of Pensions.

Cur. adv. vult.

July 28. DENNING, J., read the following judgment. Gunner James joined the Army on July 24, 1941, at the age of 32. In January, 1943, he had a swelling on the right side of his neck which gradually spread. He was sent to hospital, where a diagnosis of Hodgkins disease was made. In April, 1943, he was discharged on account of it. He claimed a pension. It was rejected by the Minister. In February, 1946, he died as a result of the disease. His widow claimed a pension. Her claim was also rejected by the Minister. She appealed to a tribunal who, on Sept. 18, 1946, rejected her appeal. She did not apply to the tribunal for leave to appeal within the 6 weeks allowed by the rules of the tribunal. On Nov. 21, 1946, I heard *Donovan v. Minister of Pensions* (1), which was also a case of Hodgkins disease, and I decided it in favour of the widow. When knowledge of this decision came to Mrs. James's advisers they sought from the tribunal leave to appeal out of time. The tribunal itself and the President of the Pensions Appeals Tribunals refused to extend the time or to grant leave. The widow now applies to me for leave to appeal. Two points arise: (1) Whether I have any jurisdiction to grant leave. (2) If I have jurisdiction, whether leave should be granted in this case.

The jurisdiction of this court is given by s. 6 of the Pensions Appeal Tribunals Act, 1943. The section lays down two essential conditions which must be fulfilled before I have any jurisdiction. The first is that the Minister or the appellant should be dissatisfied with the decision of the tribunal as being erroneous in point of law. The second is that leave to appeal from the decision should be given by the tribunal or by me. So far as leave by the tribunal is concerned, the procedure is governed by the Pensions Appeal Tribunals Rules, 1946, made by the Lord Chancellor under s. 6 (1) and the schedule to the Act. Those rules, however, have no application to leave given by me. This court is bound only by the statute and its own rules. The statute in no way limits the time within which I may give leave. The only limitation is that imported by the fact that, if I give leave, the appeal must be lodged "within such time as may be limited by Rules of Court," but, whenever any time is so limited, this court has power to enlarge the time on such terms as the justice of the case may require: see R.S.C., Ord. 59, r. 16, and Ord. 64, r. 7; and the legislature must be deemed to have been aware of this. There is nothing, therefore, in the statute to limit my jurisdiction to grant leave.

The Minister says, however, that my jurisdiction is limited by an amendment to Ord. 55E, r. 2 (1), made on July 28, 1944, which provides:

... an application to the nominated judge for leave to appeal shall not be made unless an application has been made to the tribunal and has been refused.

The Minister argues that this rule introduces, in effect, a third essential condition of my jurisdiction, namely, that an application must have been made to the tribunal within the time limited by the Pensions Appeal Tribunals Rules, 1946, rr. 25 (2) and 33, and must have been refused. I do not think that is the effect of the amended Ord. 55E, r. 2 (1). That rule, like the other Rules of Court, is directory and not imperative. This court has an inherent jurisdiction to dispense with any of its own rules of procedure, and this is recognised in Ord. 70, r. 1. Even if Ord. 55E, r. 2 (1), is taken by itself, it can be seen to be directory and not imperative. That is shown by the fact that, if for any good reason application cannot be made to the tribunal, as, for instance, if a member of the tribunal has died or retired, or is absent, application can be, and is, made direct to me. Furthermore, it has been held in many authorities that Ord. 58, r. 17 (which is the rule for the Court of Appeal corresponding to Ord. 55E, r. 2 (1), for this court) is directory and not imperative and does not deprive the Court of Appeal of jurisdiction to hear an application in the first instance. Finally, if the amended Ord. 55E, r. 2 (1), were imperative, it would be *ultra vires* because it would introduce a third essential condition to my jurisdiction which is not warranted by the statute, whereas, if it is directory, there is no such difficulty, because it then deals only with procedure and does not trespass

on jurisdiction. I hold, therefore, that it is directory. That means that it prescribes the normal procedure, but leaves it open to me in a proper case to dispense with that procedure. The result is that a claimant who is out of time for applying to the tribunal for leave to appeal should, in the first instance, apply to the tribunal for an extension of time and for leave. If the tribunal extend the time, but refuse leave, I clearly have jurisdiction to give leave. If they refuse to extend the time, that refusal does not oust my jurisdiction as the Minister suggests. The statute entrusts this court with a reserve power to grant leave to appeal in proper cases, and this power is not to be cut down by the rules or actions of the pensions appeal tribunals. This reserve power has often proved a decisive force in obtaining for service men their rights.

When I first sat to hear cases under this Act on Jan. 11, 1946, the very first application was in *Phillips v. Minister of Pensions* (2) for leave to appeal after the tribunal had refused to extend the time for applying to them. I heard arguments and held that I had jurisdiction to give leave, and gave it. The effect was decisive. When the appeal came on for hearing on Apr. 1, 1946, the Ministry conceded the claim. Later in that year there was a series of cases in this court and the Court of Session which showed that the tribunals had been acting on the wrong principles. This led to many applications to me for leave to appeal after the tribunals had refused to extend the time. They were in my list for hearing on July 29, 1946. The effect was again decisive. The Minister stated that all men whose claims had been rejected by tribunals up to July 31, 1946, should have the right to have their cases reviewed by the Minister with an appeal to a special tribunal. I am told by counsel for the British Legion that this system has worked exceedingly well, and that many men, whose claims had been previously rejected, have now been allowed their rights under the Royal Warrant. Cases have often occurred where I have given leave to appeal after the tribunal have refused it and then the Minister concedes the claim before the appeal comes on for hearing. A striking case occurred the other day, in *Finnerty v. Minister of Pensions* (3), where the widow of a warrant officer who died of cancer of the lung was refused a pension by the Minister and by the tribunal, who further refused leave to appeal. I granted leave, and when the appeal came on for hearing on July 1, 1947, the Minister conceded the claim because a careful study of the history showed that the man in the course of his service had been subjected to radium which might have had an influence in the onset or progress of the cancer.

I am aware that the Court of Session in two early cases—*Richardson v. Minister of Pensions* (4) and *White v. Minister of Pensions* (5)—took a different view from that which I took in *Phillips's* case (2) and in the present case. I desire to state, however, that, in my opinion, the doctrine of *stare decisis* does not apply in its full rigour to this branch of the law. It is inevitable that, in a field where the law has had to be declared and developed so rapidly, there should occasionally be errors. I do not, therefore, regard myself as absolutely bound by my previous decisions or those of the Court of Session, but I follow them in the absence of strong reason to the contrary. Such a strong reason appeared recently in *Edwards v. Minister of Pensions* (6), in which the Minister did not seek to support the previous decision. Take again this present case. On May 23, 1945, when the Court of Session decided *Richardson's* case (4) they thought that the tribunal or the President of the Tribunals would extend the time whenever it was just so to do, but experience has shown that that did not happen. The applications that were in my list for hearing on July 29, 1946, contained many cases where the man had a good ground of appeal, but was a few days out of time owing, not to his own fault, but to oversight or pressure of work on the part of the British Legion or his legal advisers. Nevertheless, the tribunals and the President of the Tribunals refused to extend the time. The experience in Scotland seems to have been similar: see *White's* case (5) (Reports of Selected War Pension Appeals, 489). In my opinion, the statute gives me power to remedy injustice of this kind by myself giving leave to appeal, and this experience affords a strong reason why I should apply the law as I believe it to be and not hold myself bound by decisions which I believe to be wrong.

Now that I have held that I have jurisdiction to grant leave to appeal, the question arises whether I should grant leave in this case. In considering this question I shall apply the principle stated by the Court of Appeal in *Re Berkeley*

(7). I shall consider the whole of the circumstances, and if, in the light of those circumstances, I consider it just to grant leave to appeal, I shall do so. I am aware that in ordinary litigation it is not sufficient for a party to come to the court and say that a subsequent decision of a superior court has determined that the principle of law on which his case was decided was wrong. The circumstances of pensions appeals differ, however, from ordinary litigation. The parties are rarely represented before the tribunals by legal advisers. The service man usually appears in person or is helped by a British Legion representative. The Minister appears by one of his officers who is not a lawyer. The only lawyer present is the chairman of the tribunal. If the case gives rise to a point of law, the service man or the Legion representative cannot be expected to raise it, because they are not skilled in the law. It is the duty of the chairman to raise it and of the tribunal to consider it, because the rules expressly provide that it is the duty of the tribunal to assist any appellant who appears to them to be unable to make the best of his case. Suppose, then, there is such a point of law which the chairman raises and the tribunal decides against the man without telling him anything more than that his appeal is dismissed, and the point is subsequently discovered by the man owing to a decision of this court which shows that it should have been decided in his favour. He is clearly dissatisfied with the decision of the tribunal as being erroneous in point of law. He has not been in fault himself. The only persons who have erred are the tribunal. In such cases it is only just that he should have leave to appeal. The circumstances are altogether different from ordinary litigation where it is the duty of the party, and not the court, to raise any point of law on which he relies. Here it is the duty of the tribunal and I shall assume that they have done their duty and raised and considered any point of law to which the case gives rise, even though they have not expressly mentioned it.

The present case is a striking example of the principles I have stated. Mr. James in his lifetime put his point shortly and simply :

As I have never known any illness prior to entering the forces, also as medical science has not been able to find out how it (Hodgkins disease) is contracted, I think I have more right in saying it is due to war service than you have to say not.

His widow after his death relied on that statement in support of her appeal.

It involved an important question of law as to diseases of which the cause is unknown, namely, what is the proper direction in point of law as to the burden of proof in such cases ? That question has since been considered by me in *Donovan's* case (1) and *Miller's* case (8). In *Donovan's* case (1), which was a case of Hodgkins disease, I allowed the appeal because the tribunal misdirected themselves in point of law. The widow there obtained her pension. The present case is also a case of Hodgkins disease and the facts seem indistinguishable. Is the result to be different ? That raises a difficult question.

In many pensions cases the facts are indistinguishable. Each of two men is fit when he goes into the Army. Each is afflicted during his service with the same disease. It is not right that on identical facts one should be awarded a pension and the other not. Such a difference in result may, of course, be simply due to the personal factor, namely, the difference in constitution of the two tribunals who heard the two cases, but that is unlikely. Nor is any such difference likely so long as the medical evidence is fully and accurately put before each tribunal by the Minister, and each tribunal directs itself properly in point of law. Where there is a difference in result, it is likely to be because the medical evidence was different or because one of the tribunals did not direct itself properly. If it is because the medical evidence was different, I cannot interfere, because no point of law is involved. If it is because the tribunal did not direct itself properly in point of law, I can.

In a case where the reason for the difference is uncertain, it seems to me that the matter should come before this court to see whether the tribunal did direct itself properly. It is the only remedy available, because once a tribunal has given a decision, even if it is a wrong one, the Minister has no power to alter it. The remedy is only in this court. Applying this test, the medical evidence in *Donovan's* case (1) was more detailed than in this case. Here it was meagre, and I think there is a real question whether the tribunal properly directed themselves as to the burden of proof. It was a case of a rare disease of unknown origin which can only be rightly decided with

full medical evidence and a careful direction as to the burden of proof. I give leave to appeal so that the question can be investigated whether the tribunal properly directed themselves in point of law.

Order accordingly.

Solicitors: *Culross & Trelawny* (for the applicant); *Treasury Solicitor* (for the Minister of Pensions).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

EVANS v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning J.), July 11, 1947.]

War Injury—Approach of flying bomb when workers en route to shelter—Rush for cover—Personal Injuries (Civilians) Scheme, 1944 (S.R. & O., 1944, No. 369), art. 1 (25).

On Aug. 15, 1944, Mrs. E. was at her place of employment when there was an air-raid warning, and she proceeded with others to pass through a garage to the shelter. A flying bomb was heard approaching, and, as the garage had a glass roof, she went quickly, but without panic, towards a lavatory which afforded better shelter. At the entrance to the lavatory she slipped and fell, injuring her back.

HELD: the fall was clearly caused by the discharge of a missile by the enemy, and her injury was, therefore, a "war injury" within the Personal Injuries (Civilians) Scheme, 1944, art. 1 (25).

Minister of Pensions v. Ffrench, ([1946] 1 All E.R. 272) distinguished.

[AS TO WAR PENSIONS FOR CIVILIANS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 781-784, paras. 1102-1106; and FOR CASES, see DIGEST supp., title Work and Labour.]

Case referred to;

(1) *Minister of Pensions v. Ffrench*, [1946] 1 All E.R. 272; [1946] K.B. 260; 115 L.J.K.B. 267; 174 L.T. 238.

APPEAL by the applicant from a decision of a pensions appeal tribunal that her injuries were not caused by the discharge of a missile by the enemy. DENNING, J., allowed the appeal, and sent the case back to the tribunal on the question whether the disablement from which the applicant was suffering was due to the war injury. The facts appear in the judgment.

Montagu, K.C., and *T. J. Kelly* for the appellant.

H. L. Parker for the Minister of Pensions.

DENNING, J.: On Aug. 15, 1944, Mrs. Evans was employed by the London Co-operative Society at Forest Gate, London. There was an air-raid warning, and she, with others, was passing through a garage to get to the shelter. The noise of an approaching flying bomb was heard. As the garage had a glass roof, she and others made for the ladies' lavatory where there was no glass. There was no panic, but, as she was hurrying, she slipped and fell on her back at the entrance to the lavatory, injuring herself. The flying bomb passed overhead and exploded a quarter of a mile away. The question is whether she should have compensation under the Personal Injuries (Civilians) Scheme, 1944. That depends on whether her injuries were war injuries, that is, physical injuries caused by "the discharge of a missile by the enemy." The tribunal were of opinion that the case was governed by *Minister of Pensions v. Ffrench* (1), and dismissed her appeal, but, in my view, *Ffrench's* case (1) is entirely different. In that case no missile had any causative effect on the situation. The discharge of a missile was not the cause of the injury. Here the flying bomb had a decisive effect. Mrs. Evans's fall, taking place as it did, as she was hurrying because she heard the flying bomb, was clearly caused by the discharge of that missile by the enemy. The case comes within my words in *Ffrench's* case (1) ([1946] 1 All E.R. 273):

If there had been bombs or gunfire taking place, there would be the discharge of missiles and the use of weapons and then, in such a case, the only question might be one of causation.

I pointed out that that was absent in *Ffrench's* case (1). Plainly it is present here. The appeal, therefore, must be allowed in respect of the question whether Mrs. Evans received a "war injury." I send the case back to the tribunal on the second question, whether or no the injury or disablement from which she is suffering was caused by the war injury, only observing that the benefit of any reasonable doubt on the question is, by the Scheme, to be given to her.

Order accordingly.

A Solicitors: *John Holt* (for the appellant); *the Treasury Solicitor* (for the Minister of Pensions).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*]

B RIDLEY v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), July 10, 1947.]

Royal Forces—Pension—Attributability—Accident to man while billeted in own home.

C On Apr. 26, 1940, owing to lack of accommodation in barracks, camp, and requisitioned premises, the appellant was billeted in his own home. During the night he left his bedroom to go to the lavatory, and, on his return, he mistook the entrance to the staircase for that of his bedroom, fell down stairs, and fractured his skull.

HELD: the accident occurred in the appellant's own personal sphere; his being billeted at home had no causal relation to the accident; and, therefore, the accident was not attributable to the appellant's war service.

D [FOR THE PENSIONS APPEAL TRIBUNALS ACT, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 480.]

APPEAL by the claimant from a decision of a pensions appeal tribunal. The facts appear in the headnote and the judgment.

G. H. Crispin for the appellant.

H. L. Parker for the Minister.

E DENNING, J.: In 1940 the appellant, Joseph Knox Ridley, was in a company of the Buffs, every member of which had his home in Folkestone, where the company was stationed. There was no available accommodation in barracks, camp, or requisitioned premises, so the men were billeted in their own homes, and were granted ration and billeting allowances. On Apr. 26, 1940, Mr. Ridley had 24 hours leave. He spent the night at his own home
F which he knew well, having lived in it for the preceding twelve months. At 2.30 a.m. he went from his bedroom across the landing to the lavatory, and, on his return, he mistook the entrance to the staircase for that of his bedroom, fell down the stairs and fractured his skull. That has left him with several troubles—deafness and so on—and he claims a pension. It is said on his behalf
G that, if he had been in barracks and had had such an accident, he would have been entitled to a pension, or, if he had been billeted anywhere other than his home and had had such an accident, it would have been held to be attributable to war service. Why, then, it is argued, should he not also be so entitled when billeted at his own home? In my judgment, where an accident or misadventure is one which occurs in the man's own personal sphere, it is not attributable to war service. In this case, although the appellant was billeted at home, the billeting had no causal relation to the accident, which was simply a misadventure,
H entirely personal to him, in his own home. It seems to me that war service played no part in this accident. The distinction between this case and those which were mentioned is that, if the appellant had been billeted at some other house, the structure and condition of that house (where he would be compelled to be by virtue of his war service) would be a causal factor in the injury, and he would be entitled to a pension unless the injury was proved not to be due to war service. In this case it is clear that the billeting had no causal relation to the accident at all. It is said, also, that if the appellant had had an accident while travelling to or from home on short leave he would have been granted

a pension. That is the practice under the White Paper (Cmd. No. 6459), but that is a very different case from the present. I am satisfied that the tribunal were entitled to find that the appellant's accident was not attributable in any way to war service. The appeal is, therefore, dismissed.

Appeal dismissed.

Solicitors: *Culross & Trelawny* (for the appellant); *Treasury Solicitor* (for the Minister).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.] **A**

Affirmed, but for different reasons.
C.A. [1948] 1 All E.R. 373.

Applied. FAIRMAN v. FAIRMAN.
[1949] 1 All E.R. 935.

GINESI v. GINESI.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson and Barnard, JJ.), July 23, 24, 1947.] **B**

Divorce—Evidence—Adultery—Standard of proof.

In a matrimonial case the same strict proof is required of adultery (which has been described as a "quasi-criminal offence") as is required in criminal cases in connection with criminal offences properly so called.

Dictum of LORD MERRIMAN, P., in Churchman v. Churchman ([1945] 2 All E.R. 190, 195) *applied.* **C**

Case referred to:

(1) *Churchman v. Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 114 L.J.P. 17; 173 L.T. 108; Digest Supp.

APPEAL from Bradford justices.

The justices found that the wife had committed adultery and on that account discharged a separation order obtained by her against her husband on the ground that he had wilfully neglected to maintain her. The wife appealed. The appeal was allowed. **D**

R. T. Barnard for the wife.

J. E. S. Simon for the husband.

HODSON, J.: This appeal from justices for the petty sessional division of Bradford is by a wife, who had obtained a separation order against her husband on the ground that he had wilfully neglected to maintain her, against a finding against her of adultery and the discharge of her order on that ground on the application of her husband. **E**

This case undoubtedly caused the justices considerable difficulty, but there are indications in the judgment which, to my mind, make it plain that they were not alive to the standard of proof which is requisite in this class of case. It might be desirable if I were to say at once what I mean by the standard of proof in this class of case. It is a matter of history that in matrimonial cases, adultery having been described as a quasi-criminal offence, the standard of proof is a high one, and if authority is required it is to be found in the language used by LORD MERRIMAN, P., in *Churchman v. Churchman* (1) ([1945] 2 All E.R. 195): **F**

The same strict proof is required in a case of a matrimonial offence as is required in connection with criminal offences properly so-called. **G**

I am forced to the conclusion, from the language which they used, that the justices dealt with this case without that standard in mind. They seem to have had in mind rather the proper attitude to adopt in an ordinary civil case, where merely the preponderance of evidence, or even the balance of probability, might probably be taken into account. Speaking of the wife and the man with whom the wife was accused of having committed adultery, they say when they state their conclusions: **H**

Well, it may be that they had not committed adultery; there is just the possibility that they had not, but the probability that they had is so very great that, in our opinion, we should hold that adultery has been proved.

That language, to my mind, does not square with the very plain statement of the standard of proof which is to be applied, and which I have just read.

[His LORDSHIP then reviewed the evidence and continued]: The justices have indicated that they have based themselves to a very large extent on the cir-

circumstances in which these people were, on the nature of their acquaintanceship, and so forth, and they refer to the fact that the wife was living apart from her husband, "a grass widow," that the man with whom she is alleged to have committed adultery was a widower, and that they were tolerably attractive people, what the justices call "inflammable" material. But, after all, none of that amounts in law to more than that the temptations to which human beings are liable must be taken into account, and if the justices had directed themselves, as I feel they ought to have directed themselves, to the very high standard of proof required in this class of case, I feel certain that the only conclusion to which they could have come would have been that this allegation must fail on the shadowy material which was before them. There was not enough in the position and character of these people, their status and the general relationship which they bore to one another, and the opportunity (because, in effect, that is all there was) to justify a conviction. Having come to that conclusion, in my judgment, this appeal must be allowed and the discharging order reversed so that the original order which the wife obtained will stand.

BARNARD, J. : I agree. It seems clear from the fact that the justices concluded the case on Apr. 1, 1947, and adjourned it to consider their judgment, which was finally delivered on Apr. 16, 1947, and also from the very language of that judgment, that they really had some doubt. They applied the wrong test, the test which might well be applicable in a civil action, instead of the very strict test which is required in the Divorce Court. If they had applied the right test, the only course they could have taken would have been to have found that this charge of adultery had not been proved beyond all reasonable doubt. For that reason, and for the reasons given by my Lord, with which I entirely agree, I think this appeal must be allowed.

Appeal allowed with costs.

Solicitors : *Blundell, Baker & Co.*, agents for *H. T. Manknell*, Bradford (for the wife); *James A. Lee & Priestley*, Bradford (for the husband).

[Reported by R. HENDRY WHITE, Barrister-at-Law.]

GRUNDT v. GREAT BOULDER PROPRIETARY GOLD MINES,

(1947).

July 25, 29, 1947.]

GRUNDT v. GREAT BOULDER
PROPRIETARY GOLD MINES,
LTD. ([1947] 2 All E.R.
439). *Reversed.* C.A.

[1948] 1 All E.R. 21

*apparentment was, whereby the person
office.*

*tors—Retirement by rotation—Retiring
in circumstances if vacancy not filled—
ment—Proposed resolution for re-
Right of retiring director to continue in*

A company's articles of association provided that the business of an ordinary meeting should be (*inter alia*) to elect directors in place of those retiring in rotation; that, until otherwise determined by the company in general meeting, the number of directors should be not less than three and not more than five; that, at the ordinary meeting in each year, one third of the directors should retire from office and be eligible for re-election; and that, at any general meeting at which any directors retired, the company might fill up the vacated offices. Article 102 provided: "If at any general meeting at which an election of directors ought to take place the place of any director retiring by rotation is not filled up, he shall, if willing, continue in office until the ordinary meeting in the next year, and so on from year to year until his place is filled up, unless it shall be determined at any such meeting... to reduce the number of directors in office." At the annual general meeting held on July 9, 1947, G. retired by rotation from the board of directors and offered himself for re-election, but the resolution for his re-election was lost on a show of hands. After G.'s retirement there remained four directors of the company. G. contended that, under art. 102, he continued in office until the ordinary meeting in 1948, and so on from year to year, until his place was filled up, unless it should be determined at any meeting to reduce the number of directors:—

HELD : on the true construction of the company's articles, the only

occasion on which an election of directors "ought to take place" within the meaning of art. 102, was when the number of directors was reduced to less than three; at the general meeting on July 9, 1947, the position was not that "an election of directors ought to take place"; and therefore, art. 102 had no application and G. did not continue in office as a director.

Dictum of ROMER, J., in Batcheller (Robert) & Sons, Ltd. v. Batcheller ([1945] 1 All E.R. 522, 531), *applied*.

[AS TO RETIREMENT OF DIRECTORS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 340, 341, para. 560; and FOR CASES, see DIGEST, Vol. 9, pp. 524, 525, Nos. 3448-3455, and Supplement.]

Cases referred to :

- (1) *Batcheller (Robert) & Sons, Ltd. v. Batcheller*, [1945] 1 All E.R. 522; [1945] Ch. 169; 114 L.J.Ch. 156; 172 L.T. 298; Digest Supp.
- (2) *Holt v. Catterall*, (1931), 47 T.L.R. 332; Digest Supp.

MOTION for a declaration that the plaintiff, who had retired by rotation from the board of directors of the defendant company, was entitled under its articles of association to continue in office. It was agreed to treat the motion as the trial of the action, and it was held that the plaintiff was not entitled to continue in office. The facts and the relevant articles appear in the judgment.

J. F. Bowyer for the plaintiff.

Charles R. Russell for the company.

WYNN-PARRY, J. : This is a motion by the plaintiff in the action and, by consent of the parties, it is to be treated as the trial of the action. The relief which the plaintiff seeks is :

... a declaration that the plaintiff, having retired by rotation from the board of directors of the defendant company at the annual general meeting held on July 9, 1947, and not having been re-elected and his place on the board not having been filled up and the number of directors in office not having been reduced and he being willing so to do, continues in office pursuant to art. 102 of the defendant company's articles of association until the ordinary meeting in the next year and so on from year to year until his place is filled up, unless it shall be determined at any such meeting on due notice, to reduce the number of directors in office.

The defendant company was incorporated on June 20, 1894. By art. 68 of its articles of association it is provided :

The business of an ordinary meeting shall be to receive and consider the profit and loss account, the balance sheet and the reports of the directors and of the auditors, to elect directors in place of those retiring in rotation, and auditors, and vote their remuneration, to declare dividends and to transact any other business which under these presents ought to be transacted at an ordinary meeting. All other business transacted at an ordinary meeting and all business transacted at an extraordinary meeting shall be deemed special.

By art. 88 :

Until otherwise determined by the company in general meeting, the number of the directors shall be not less than three nor more than five.

By art. 99 :

At the ordinary meeting in 1935, and in every subsequent year, one third of the directors, or, if their number is not a multiple of three, then the number nearest to but not exceeding one third, shall retire from office, and be eligible for re-election. The company at any general meeting at which any directors retire may fill up the vacated offices by electing a like number of persons to be directors.

By art. 101 :

No person not being a retiring director shall, unless recommended by the board for election, be eligible for election to the office of director at any general meeting, unless a nomination signed by five members, together with a notice in writing signed by the person nominated, and expressing his willingness to act as director, shall be left at the registered office of the company not less than 7 clear days nor more than 28 days before the day for election of directors.

By art. 102 :

If at any general meeting at which an election of directors ought to take place the place of any director retiring by rotation is not filled up, he shall, if willing, continue in office until the ordinary meeting in the next year, and so on from year to year until his place is filled up, unless it shall be determined at any such meeting on due notice to reduce the number of directors in office.

By a notice dated June 27, 1947, the fifty-first ordinary general meeting of the company was convened, it being stated that the meeting was for the following purposes :

(i) To receive the directors' report and accounts ; (ii) to declare a dividend ; (iii) to re-appoint auditors ; (iv) to elect directors.

The directors' report, which accompanied the notice, under the heading " Election of Directors," stated :

The director retiring by rotation under the articles of association is Mr. W. Grundt [i.e., the plaintiff in this action] who, being eligible, offers himself for re-election.

The resolution for the plaintiff's re-election was proposed by the chairman, seconded by the managing director, and on a show of hands, was declared by the chairman to have been lost. No poll was demanded on that resolution. The plaintiff, however, contends that, by the operation of art. 102, he continues in office and will do so until the ordinary meeting next year and so on from year to year until his place is filled up, unless it shall be determined at any such meeting, on due notice, to reduce the number of directors in office. During the argument, I was referred to two authorities, in which articles similar to art. 102 were considered. In my view, the first duty of the court is to construe the relevant articles of the particular company before considering the impact of any other decision on those articles, but, before proceeding to do that, I would refer to one passage of the judgment of ROMER, J., in *Robert Batcheller & Sons, Ltd. v. Batcheller* (1). Towards the end of his judgment, ROMER, J., said ([1945] 1 All E.R. 531) :

Articles of association are for the use of business men and are not lightly to be construed, if any other interpretation be fairly permissible, in such a way as to lead to absurdity.

With that statement I am respectfully in complete agreement.

The plaintiff was not re-elected, the resolution put to the meeting for his re-election being defeated. It does not appear to me to be of any materiality how many or how few votes were cast at the meeting. Under the articles, those who attended the meeting were empowered to take any decision open to them, and one thing appears clear on the evidence and that is that the general meeting in question said definitely that it did not want the plaintiff to remain in office as a director. If, however, on the true construction of the articles, the meeting has failed to achieve that object, effect must be given to that consequence. The question is : On the true construction of the relevant articles, does that result follow ?

It appears to me that the scheme of the relevant articles is perfectly simple. Article 68 sets out what business an ordinary meeting is to be competent to transact, apart from special business, of which special notice must be given. The ordinary business is :

... to receive and consider the profit and loss account, the balance sheet and the reports of the directors and of the auditors, to elect directors in place of those retiring in rotation, and auditors, and vote their remuneration, to declare dividends and to transact any other business which [under the articles] ought to be transacted at an ordinary meeting.

Counsel for the plaintiff argued that, on a true construction of that article, there was an imperative direction to the ordinary meeting to elect directors in place of those retiring in rotation. In my view, however, the article cannot bear that construction. The matter may be tested by referring to another item of ordinary business, "to declare dividends." Obviously, the article does no more than confer power on the meeting, if so advised, to declare a dividend, and, by parity of reasoning, that article, taken alone, does no more than require the meeting to elect directors in place of those retiring in rotation, if thought fit. That construction appears to be borne out by art. 99, which, provision having been made for the retirement of directors by rotation, states :

The company at any general meeting at which any directors retire may fill up the vacated offices by electing a like number of persons to be directors.

The crux of this matter appears to me to be contained in the opening words of art. 102, which are : " If at any general meeting at which an election of directors ought to take place . . .," because it is only if that condition applies at a general

meeting that the remainder of the article has any application. Therefore, it is necessary, first, to determine whether or not an election of directors ought to have taken place at the general meeting in question. As I have pointed out, under art. 88 it is provided :

Until otherwise determined by the company in general meeting, the number of the directors shall be not less than three nor more than five.

There must, therefore, until there is a determination by the company, be at least three directors, but there need not be as many as five. Before the meeting of July 9, 1947, there were five directors of the company. After the plaintiff's retirement there were four. On a consideration, therefore, of the provisions of the articles, I am of the opinion that at the general meeting in question there were not present circumstances which created a position in which an election of directors ought to have taken place. It appears to me that the only occasion on which an election of directors ought to take place, within the meaning of that phrase in art. 102, is when the number of directors, through a director retiring by rotation or any other circumstance, is reduced to less than the minimum for the time being provided, namely, three, in the absence of a determination by the company. That is borne out by the closing words of art. 102 :

... unless it shall be determined at any such meeting on due notice to reduce the number of directors in office.

If that is the correct construction of the article, there follows the consequence which the general meeting sought to bring about, namely, that the plaintiff should not be continued in office. The contrary construction must bring about the exactly contrary result, and, in my view, would lead to an absurdity, because, in view of the provisions of art. 101, by which : " No person not being a retiring director shall, unless recommended by the board for election, be eligible for election to the office of director " unless extended notice has been given, it would never be possible for the shareholders assembled at a general meeting effectively to provide that a particular director should not continue in office. When I am faced with these two alternative constructions and I find it possible to adopt a construction which avoids that absurdity, then, in my judgment, I am doing that which I ought to do and that which commended itself to ROMER, J., in *Robert Batcheller & Sons, Ltd. v. Batcheller* (1) in the passage to which I have referred.

I, therefore, come to the conclusion on the true construction of these articles that, at the general meeting in question, the position did not obtain in which an election of directors ought to have taken place ; that art. 102 had no application ; and that, therefore, the plaintiff does not continue in office. Taking that view of the articles, as I do, there is no need for me to refer further to the authorities, and, in view of the circumstance that there does appear to be a certain difficulty in reconciling *Holt v. Catterall* (2), a decision of MAUGHAM, J., with the decision of ROMER, J., in *Robert Batcheller & Sons, Ltd., v. Batcheller* (1), it would not be desirable or even right that I should embark on any consideration of those two authorities. In the result, I refuse the declaration and the action fails, with the usual consequences as to costs.

Order accordingly.

Solicitors : *Nordon & Co.* (for the plaintiff) ; *Linklaters & Paines* (for the company).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

COMPTOIR D'ACHAT ET DE VENTE DU BOERENBOND
BELGE S.A. v. LUIS DE RIDDER, LIMITADA.

[COURT OF APPEAL (Lord Greene, M.R., Asquith, L.J., and Croom-Johnson, J.), July 16, 17, 18, 31, 1947.]

Contract—Failure of consideration—Recovery of money paid—Sale of goods—Provision for payment against delivery order—Payment on receipt of delivery order containing undertaking and guarantee by sellers' agent—Delivery rendered impossible owing to enemy occupation of place of delivery.

By a contract dated Apr. 24, 1940, a Belgian company agreed to buy a quantity of rye to be delivered at Antwerp. The contract, which was expressed to be on c.i.f. terms, provided that payment was to be against bill of lading, and/or delivery order and policy, and/or certificate and/or letter of insurance at Antwerp. On Apr. 30, 1940, in accordance with the usual practice between the parties during a long period, the purchase price was paid by the buyers on receiving a delivery order addressed to the cargo agents of the sellers. This delivery order contained (a) a statement that the bearer had been given a share in a certificate of insurance covering a certain quantity of rye ("War and S.R. and C.C. risks clause included") and (b) an undertaking by the sellers' agent to honour the delivery order according to the terms of the bill of lading. The right to delivery of insurance documents was waived by the buyers. The property in the goods remained throughout in the sellers. Owing to the German invasion of Belgium, the ship carrying the rye did not proceed to Antwerp, but, by an arrangement between her owners and the sellers, as charterers, and without notice to the buyers, she was diverted while at sea to Lisbon, where the cargo was sold by the sellers. The buyers claimed from the sellers the return of the amount paid by them on the ground that the consideration for the payment had wholly failed:—

HELD [ASQUITH, L.J., *dissenting*]: although a bill of lading, with other documents, was not tendered, which would be the usual course on a normal c.i.f. contract, the fact that the sellers exercised the option given to them by the sale contract to tender a delivery order instead did not convert the sale contract from being a c.i.f. contract into an arrived or ex ship contract; but the buyers had obtained one of the things stipulated for in the contract, *viz.*, a delivery order containing an undertaking and a guarantee by the sellers' agents, and, since this was of value when given, there had not been a total failure of consideration, even though the undertaking subsequently became valueless; and, therefore, the buyers were not entitled to recover the money which they had paid.

Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd. ([1942] 2 All E.R. 122) considered.

Decision of MORRIS, J. ([1947] 1 All E.R. 118) affirmed.

[AS TO FAILURE OF CONSIDERATION, see HALSBURY, Hailsham Edn., Vol. 7, pp. 283, 284, para. 394; and FOR CASES, see DIGEST, Vol. 12, pp. 224-233, Nos. 1859-1925.]

Cases referred to:

- (1) *Re Denbigh Cowan & Co. and Atcherley (R.) & Co.*, (1921), 90 L.J.K.B. 836; 125 L.T. 388; 39 Digest 580, 1834.
- (2) *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; [1943] A.C. 32; 111 L.J.K.B. 433; 167 L.T. 101; Digest Supp.
- (3) *Lamert v. Heath*, (1846), 15 M. & W. 486; 4 Ry. & Can. Cas. 302; 7 L.T.O.S. 186; *sub nom.*, *Lambert v. Heath*, 15 L.J.Ex. 297; 42 Digest 796, 52.

APPEAL by the buyers from a judgment of MORRIS, J., dated Dec. 13, 1946, and reported [1947] 1 All E.R. 118, on a Special Case stated by an umpire.

By a written contract dated Apr. 24, 1940, made in Antwerp, Luis de Ridder, Ltd. (acting by their Antwerp agents, Belgian Grain and Produce Co., Ltd.) agreed to sell to the claimants, Comptoir d'Achat et de Vente du Boerenbond Belge, S.A., about 500 tons of Plate rye for shipment by S.S. Julia:

... at the price of \$4.025 per 100 kilos c.i.f. Antwerp on the terms conditions and rules contained in Form No. 41 of the London Corn Trade Association ... Any special condition applying hereto shall be treated as if written on such form.

The contract further provided :

Payment to be made by nett cash on first presentation of and in exchange for first arriving copy/ies of bill/s of lading . . . and/or delivery order/s and policy/ies and/or certificates and/or letter/s of insurance at Antwerp . . .

In over 900 transactions between the parties during the 10 years before the date of the contract the practice had been for the buyers to pay to the Belgian Grain Co. the amount named in the provisional invoice on receiving from them a delivery order addressed to F. van Bree S.A., cargo agents of the sellers. A On the arrival of the vessel carrying the shipment in question the buyers handed this delivery order to Carga S.A., their own cargo superintendents at Antwerp. Carga S.A. then presented the delivery order to F. van Bree S.A., who issued against it a release authorising the delivery to Carga S.A. of the goods. After Carga S.A. had received this release, their representatives and those of F. van Bree S.A. attended together on the steamer and drew samples of the shipment. B The goods, however, could not be actually delivered until the captain's release had been obtained, and this was issued to F. van Bree S.A., and was never physically in the buyers' hands. On Apr. 30, 1940, the sellers presented to the buyers a delivery order for the rye and on the same day the buyers paid to the sellers the purchase price. The delivery order contained, *inter alia*, (a) a statement that the bearer of the order had been given a share in a certificate of insurance covering a certain quantity of rye (" War and S.R. and C.C. risks C clause included "), and (b) an undertaking to honour the delivery order according to the terms of the bill of lading. The certificate of insurance was delivered to F. van Bree S.A., and neither on this occasion nor in any other transaction between the parties did the certificate pass through the buyers' hands. D Owing to the German invasion of Belgium, the Julia never arrived at Antwerp, but she was diverted to Lisbon where she discharged her cargo and the rye was sold by the sellers at a price less than the sum which the buyers had paid. The sellers offered to account to the buyers for the proceeds received from the sale at Lisbon, but the buyers claimed that the contract had been rendered impossible of performance by reason of the occupation of Belgium and had been unilaterally broken by the sellers and that the buyers were entitled to reimbursement in full of the sums paid under it. This claim was repudiated by the sellers, and on Sept. 7, 1945, the buyers demanded arbitration under the contract. E The arbitrators being unable to agree on an award, the umpire appointed by them was requested to make his award in the form of a Special Case. The umpire found (a) that the property in the rye had not passed to the buyers ; (b) that the parties had intended to make a c.i.f. contract. He held that the written contract was on its face a c.i.f. contract to be performed by the sellers by the tender of documents in accordance with the terms thereof, and he rejected the buyers' contention that the sellers' election to tender a delivery order rendered the contract one under which they were under an obligation to deliver the actual goods F at Antwerp. Subject to the decision of the High Court, he declared that the buyers were not entitled to recover the sum paid by them to the sellers on Apr. 30, 1940, nor any interest thereon. MORRIS, J., upheld the umpire's award, and the Court of Appeal now dismissed the appeal of the buyers from his decision.

Willink, K.C., and *E. W. Roskill* for the appellants, the buyers.

Devlin, K.C., and *Naisby, K.C.*, for the respondents, the sellers.

Cur. adv. vult.

July 31. The following judgments were read.

LORD GREENE, M.R. : The question raised by this appeal is not easy of solution. The answer to it depends in the last resort on the interpretation of the contract between the parties. That contract, dated Apr. 24, 1940, was for the sale by the respondents, as sellers, to the claimants, as buyers, of about 500 metric tons of Plate rye for shipment per S.S. Julia "afloat" as per bill or bills of lading "dated accordingly," at the price of \$4.025 per 100 kilos "c.i.f. Antwerp," on the terms, conditions, and rules contained in Form No. 41 of the London Corn Trade Association. Attached to and forming part of the sold note was the following clause :

Payment to be made by nett cash on first presentation of and in exchange for first arriving copy/ies of bill/s of lading (the other copy/ies of bill/s of lading to follow as soon as received) and/or delivery order/s and policy/ies and/or certificate/s and/or

letter/s of insurance at Antwerp by first rate cable transfer to New York, unless the vessel carrying the goods arrives before the said time, in which case payment is to be made on arrival of vessel at port of discharge. Buyers to remain responsible for the payment of the cable. Insurance: losses to be paid in currency of this contract. Import licence if required to be obtained by buyers.

A A good deal of time was spent in discussing whether the contract was, or was not, a "c.i.f. contract." This question is nothing but a restatement of the question: What is the true meaning and effect of the contract? In the sense that the sale was on a cost, insurance, and freight basis, the contract was unquestionably a c.i.f. contract. On the other hand, a feature of the normal c.i.f. contract is absent. There is no absolute obligation on the sellers to deliver to the buyers the customary documents enabling them to obtain delivery from the ship, if the goods arrive, or to recover from underwriters, if they are lost.

B The rye sold was part of a larger parcel of 1,120 metric tons comprised in a bill of lading issued to the sellers at Bahia and dated Apr. 18, 1940, *i.e.*, six days before the sale contract was made. Similarly, the policies effected by the vendors covered a quantity of rye exceeding that sold to the buyers. Both the bill of lading and the policies remained throughout in the possession of the sellers or their agents. In this state of affairs, the sellers exercised that branch of the option in regard to documents contained in the attached clause (set out above) which entitled them to demand payment in exchange for a delivery order and certificates of insurance. This statement is not, however, quite accurate, since the certificates of insurance were never handed, nor were they even produced to the buyers. No complaint, however, is or can be made of this irregularity. The sum to be paid by cable transfer to New York against the delivery order was stated in a provisional invoice, handed by the sellers' Antwerp agents, Belgian Grain & Produce Co., Ltd., to the buyers on Apr. D 29, 1940, to be \$4,999.33, *i.e.*, cost *plus* proportion of insurance, but exclusive of freight, which was not to be paid by the buyers until the arrival of the vessel. The delivery order, dated Apr. 30, 1940, was handed to the buyers against payment by them of this sum of \$4,999.33. It is the sterling equivalent of this sum that the buyers seek to recover as on a total failure of consideration.

E The circumstances which led to the failure of the buyers to obtain delivery of the goods purchased need not be set out in this judgment. It is sufficient to say that the property in them remained in the sellers throughout and the purchase price obtained by the sellers in Lisbon clearly belonged as such to them. The question whether or not in the circumstances any claim in damages arose against the sellers does not arise in these proceedings and I say nothing about it. If no such claim arose and the judgment now under appeal stands, the result will be that the sellers will be entitled to retain both the \$4,999 and the purchase price received by them on the Lisbon sale. This apparent injustice F was strongly relied on by counsel for the buyers as pointing to the conclusion that the parties cannot have intended such a result. The answer to this argument is that the parties never contemplated the events which, in fact, happened and, accordingly, never considered what the result would be if they did happen. If the injustice does result, it results from the peculiar nature of the contract into which the parties entered and the fact that, to defeat the buyers' claim G in these proceedings, it is sufficient if the consideration for the payment did not wholly fail.

H It is important at the outset to have one consideration clearly in mind. If this contract had been what I have called a normal c.i.f. contract—had an appropriate bill of lading and other appropriate documents been handed to the buyers in the usual way, the buyers could not have recovered from the sellers as on a total failure of consideration, for the simple reason that delivery of the documents would have stood for delivery of the goods. The buyers would have obtained the usual rights against ship and underwriters. If failure to obtain the goods had arisen in circumstances in which they were unable to claim against either the ship or the underwriters, this would not have entitled them to recover from the sellers as on a total failure of consideration. This appears to me to be elementary. The difficulty in the present case is that the delivery order, unlike a bill of lading, conferred no rights against the ship, and the certificates of insurance, even if they had been handed to the buyers, would have given them no rights against the underwriters. There was nothing which

was in law equivalent to delivery of the goods or transfer of rights under the policies. The property in the goods, the rights under the bill of lading and the policies, remained in the sellers throughout. This situation is not affected by the fact that the sellers were under certain obligations relating to the exercise of those rights for the benefit, *pro tanto*, of the buyers, but as I have pointed out, no question arises here as to any breach of those obligations, since we are not concerned with any claim for damages for breach of contract.

The main argument presented to us on behalf of the sellers may, I think, be stated, without undue simplification, to be as follows. Having regard to the true interpretation of the contract, the documents in exchange for which (instead of a bill of lading and policies) the sellers at their option were entitled to call for payment must be regarded, as between the parties, as taking the place of the usual documents, in spite of the fact that the rights conferred by them were different from those which the buyers would have obtained on delivery of the usual documents. Moreover, it was said, the delivery order was, in any case, a document of commercial value and, in addition, was one which conferred on the buyers what they had not got under the sale contract itself, namely, direct and independent contractual rights against the sellers' Antwerp agents. The fact (assuming it to be the fact) that in the circumstances those rights are valueless cannot, it was said, alter the fact that the buyers obtained them in exchange for the money which they now seek to recover, with the result that the allegation of total failure of consideration must necessarily fail.

Before I examine these contentions, I must say something about the delivery order itself. It was written on a printed form signed on behalf of the Belgian Grain & Produce Co., Ltd., and addressed to F. Van Bree S.A., of Antwerp, the cargo agents of the sellers. The main part of the document was in the form of a request to Van Bree to release against it to the buyers or to bearer 500,000 kilos of rye *ex* the bill of lading. It also contained a statement to the effect that the Belgian Grain and Produce Co., Ltd., gave a share to the bearer of the delivery order of \$4,973 in a certificate of insurance for \$7,117 covering 700,000 kilos rye in bulk (why 700,000, was not explained, but it is not material), "War and S.R. & C.C. risks clause included." Above this text there was printed the following undertaking:

We undertake to honour the present delivery order according to the clauses and conditions of the bill of lading, and the bearer has all the rights and obligations of the original document which we hold for his inspection.

Below this undertaking was printed the statement "Insurance approved for" and the figure of "\$4,973" was filled in in typescript. Below this figure and intended, apparently, to apply to both the undertaking and the statement, appeared a signature on behalf of Van Bree. At the foot of the form was printed:

To be presented on arrival of the steamer at Messrs. F. Van Bree S.A. Antwerp for signature (*visa*) and release (*laissez suivre*) after payment of the freight of \$15,250, at the offices of the the Belgian Grain & Produce Co., Ltd. [the figure of \$15,250 being inserted in typescript].

There followed the words "Freight paid the . . ." The document, signed both by Belgian Grain and Van Bree, was duly handed to the buyers by Belgian Grain. MORRIS, J., took the view that in the hands of the buyers it was of commercial value and that, accordingly, its delivery to them made it impossible to say that there was a total failure of consideration, even though, in the events which had happened, it did not enable the buyers or any other holder to obtain the goods. I am not sure whether, in the absence of any finding to that effect in the case, we should be justified in treating the delivery order as a document of commercial value, in the sense that it could be dealt with for value, however much we may suspect that it was. I prefer to consider its effect as regards the legal rights conferred by it on the buyers themselves. This I will do in a moment, but before doing so I will return to the contract itself.

Stress was laid, and rightly laid, by counsel for the sellers on the words "in exchange for" contained in the clause attached to the sold note, which is quoted earlier in this judgment. This expression, he said—and I agree with him—would be singularly inappropriate if all the clause was intended to do was (as

counsel for the buyers argued) to fix the time for payment. Moreover, the expression is used in reference to alternative sets of documents, one of such sets (namely, bill of lading *plus* policies) being a set in reference to the delivery of which the expression is particularly appropriate, as connoting an effective *quid pro quo* for the payment. If the expression bears this connotation in relation to the latter set, it might be expected to bear the same connotation in relation to the other sets comprised in the option. Here it may be pointed out that the clause appears to give more than two alternatives (namely, bill of lading *plus* policies and delivery order *plus* certificates of insurance) since under it the seller could demand payment against bill of lading *plus* certificates or delivery order *plus* policies. Reliance was also placed by counsel for the sellers on the fact that the parties themselves use the expression c.i.f. in reference to their contract, and he argued that this tended to confirm the view that, whatever might be the documents against which payment was to be made, they were intended to be regarded in the same way, so far as consideration for the payment was concerned, as the customary documents would be regarded under a normal c.i.f. contract. In support of this, reference was made to *Re Denbigh Cowan & Co. & Atcherley (R.) & Co. (1)*. The answer of counsel for the buyers to these arguments was that the *prima facie* obligation of the sellers under the sale contract to procure the delivery of the goods from the ship, if they arrived, remained the same after as it was before the handing over of the delivery order to the buyers. The delivery order was, he said, a mere piece of machinery, and control of the goods themselves, as well as the ownership of them, remained in the sellers throughout. No one but the sellers could secure the carrying out of the instructions of the delivery order. The substance of the consideration for which the buyers paid the money was, he said, the delivery of the contract goods, and, although the handing over of the bill of lading under an ordinary c.i.f. contract would have operated as the equivalent of delivery, no such effect could be given to the handing over of the delivery order. On the facts, therefore, the contract for present purposes must be treated as operating as an arrival or ex-ship contract.

I do not myself accept these answers as sufficient to dispose of the arguments of counsel for the sellers. There is, however, in my opinion, another reason for rejecting the claim of the buyers that there was a total failure of consideration. Having regard to the facts stated in the agreed amended paragraphs of the award, a delivery order in the form of the order in the present case must, I think, be treated as the appropriate document contemplated by the attached clause in the sold note. Now, the delivery order on its face contains an undertaking by Van Bree to honour the order according to the bill of lading stated to be held by Van Bree for the inspection of the bearer of the order. It also contains their signature to the statement that the sum for which there was approved insurance was \$4,973, a statement which appears to me to be intended as a guarantee that the insurance had been effected and that the buyers' proportion was the amount stated. Whether or not the document also contains undertakings by Belgian Grain & Produce Co., Ltd., I need not inquire. Here, therefore, is a document containing a personal undertaking and a guarantee by the local agents of the sellers. The sale contract, construed as above mentioned, obliged the sellers to hand over a document of this kind and they did so. By virtue of the handing over of the document, the buyers obtained something that they did not have before, namely, the personal obligation of the sellers' local agent—obviously a thing of value to them. All that they had before was the sellers' liability to hand over against payment a document containing that obligation. The actual handing over was the discharge of that liability and, in my opinion, makes it impossible to say that there was an entire failure of consideration. On this view, the delivery order was, not a mere piece of machinery, but an implementation of the sellers' obligation to produce what was, in effect, an undertaking and a guarantee of the buyers' rights by Van Bree.

I have not so far mentioned an objection to this point of view raised by counsel for the buyers. It was this. The handing over of the delivery order did not, he said, result in the undertaking by Van Bree of any obligation enforceable by the buyers, since there was no consideration for any such undertaking. I do not agree. The money was paid against the handing over of the delivery order containing the undertaking by Van Bree and, since, as I interpret

the sale contract, the buyers were not bound to pay the money without having a document containing an undertaking by Van Bree, there was, in my opinion, ample consideration to support that undertaking. In the events which have happened, the undertaking and guarantee by Van Bree were not effective to enable the buyers to obtain the goods which they were buying, but the obtaining of that undertaking and that guarantee, given, as they were, by a third party, was one of the things stipulated for by the contract. It was of value at the time when it was given, and the fact that it was obtained makes it impossible to say that there was a total failure of consideration even though, if it be the case, Van Bree's undertaking subsequently became valueless. The crucial time was, in my view, the moment when the delivery order was handed to the buyers. Subsequent events may, or may not, have given rise to a claim for damages, but they could not produce a total failure of consideration *ex post facto*.

I have confined my remarks to those features of the case which appear to me to be conclusive and I have not thought it necessary to add to the length of this judgment by discussing matters which, if I am right, only touch the fringes of the case. I would dismiss the appeal.

ASQUITH, L.J. : The issue raised by this award in the form of a Special Case is crystallised in para. 16 of the award which reads as follows :

The question of law for the decision of the court is whether upon the facts as found and upon a true construction of the contract the buyers are entitled to recover from the sellers the sum of £1,243 12s. 2d., together with interest thereon at the rate of 4 per cent. per annum from Apr. 30, 1940.

The buyers contended that they were entitled to recover the sum involved as paid on a consideration which had wholly failed. Whether they can succeed in this contention depends on the answer to two other questions, *viz.*, (i) What was the consideration moving from the sellers under this contract against the payment made by the buyers on Apr. 30, 1940 ? (ii) Did it fail, and if so, did it fail totally, or only in part ?

The sellers argued that the transfer by their agents to the buyers on Apr. 30, 1940, of a delivery order against the payment in question was performance either of the whole consideration moving from the sellers or at least of some part of it, and that, in either of these events, the buyers' claim fails. The buyers for their part contended in this court (we gather that the argument below ran not quite on the same lines ; it came near to contending that the contract was one for "arrived" or "ex-ship" goods) that the consideration for which the payment was made was a promise by the sellers either to transfer to the buyers, or to exercise for the benefit of the buyers, a complex of rights referred to later, and that, if those rights, owing either to the conduct of the sellers themselves, or to the frustration of the adventure, never materialised, or became capable of being exercised, there was a total failure of consideration for the payment. It is necessary to be more concrete and precise. Counsel for the buyers sought to spell out from the contractual documents a contract of the following tenor : "The sellers say to the buyers : 'As consideration for your promise to pay £x in the circumstances and manner defined by this contract, we promise to sell to you 500 tons of rye (i) already shipped in the Julia at Bahia Blanca for her contractual destination [I would stress these words] on terms which will make available to you the usual rights against a ship in that trade, and (ii) covered by insurance against the usual insured perils, which, in case the goods shall be (or shall have been) lost by such perils, shall be available for your benefit.'" In my view, that was, in truth, the substance of the contract. The sellers could (so the argument continues) perform their obligations by tendering against payment the orthodox c.i.f. documents, *viz.*, a bill of lading and policy (documents giving the buyers direct rights against the ship and the underwriters respectively), or, at their option, a delivery order *plus* a certificate or letter of insurance (or, presumably, any commutation or permutation of these documents, *e.g.*, a delivery order *plus* a policy of insurance). In fact, the sellers tendered in this case a delivery order and could have tendered, in addition, but did not, certificates of insurance against war and marine risks. The failure to tender any certificate and any defect in the delivery order purely *qua* document were waived by the buyers. Hence we must approach the case on the footing that documents of the kind called for by the contract were presented.

It was argued that in a case such as the present, in which the documents tendered gave the buyers no direct remedy against the ship or the underwriters, the sellers' obligation was to exercise the direct rights which they, as bill of lading holders and assured, possessed, for the benefit of the buyers, namely, it was an obligation to cause the ship to deliver the goods to the buyers if the goods arrived, and, if they had perished by perils insured against, to pay the buyers a proportionate share of the insurance moneys. Much argument was directed to the question whether a contract giving the sellers an option to present orthodox c.i.f. documents, or other specified documents, could properly be described as a c.i.f. contract. The crucial question seems to me to be, not what label can properly be attached to such a contract, but what the actual terms of these contracts were. It may be illuminating to consider what the position would have been if the sellers had elected to present what I have called orthodox c.i.f. documents, a bill of lading and a policy (*plus*, no doubt, an invoice).

B Supposing they had done this, but had failed to ship goods answering to the contract, and the buyers, in ignorance of this omission, had paid against the documents, there can, I think, be no question that the buyers could have recovered such payments as money paid on a total failure of consideration, the documents, on the facts assumed, having proved waste paper. Let us go on, however, to assume that, as in the present case, contract goods had been, in fact, shipped. What, in that event, would have been the position if, after the presentation of orthodox c.i.f. documents, the sellers, acting in breach of their contract, had been consenting parties to the diversion of the ship from the contractual voyage and destination to a voyage and destination totally unauthorised by the contract, or, indeed, if such a deviation had occurred without the privity of the sellers, *e.g.*, through frustration? The first effect, clearly, would have been to reduce the policy covering the goods in transit to the contractual destination (unless it happened to cover, in addition, goods consigned to the substituted destination, of which there is no evidence in this case) to waste paper; the second would, in my view, have been to affect similarly the bill of lading. A bill of lading covering goods shipped in a ship bound for Antwerp had been obtained by the sellers and would on the assumed facts have been tendered in respect of goods which shortly after the time of the tender, through the sellers' act, became goods in a ship bound for Lisbon. Such a bill of lading would have ceased to be a bill of lading in respect of goods answering to the contract, which, as the sold note shows, was a contract for goods as per bill of lading, the bill of lading being expressed to be in respect of goods in a ship bound for Antwerp. The law on this matter is strict, *e.g.*, a bill of lading, expressed to be for goods shipped on the 21st of a month, is not a good bill of lading in respect of goods which were, in fact, shipped on the 22nd of that month. In that case, it seems to me, the bill of lading would, shortly after payment against it, have ceased to be one which covered goods of the contract description. Goods in a ship bound for port X are not of the same description as goods, otherwise identical, bound for port Y. Why, in principle, the result, in the circumstances assumed, should differ from the result when contract goods have never been shipped at all—when, for instance, the contract called for peas, and what was shipped was beans—I am not clear. By an act on the part of, or consented to by, the sellers, the goods have become both non-contract goods and uninsured goods. To regard the tender of the bill of lading and policy, each of which, by the sellers' action, has become an empty husk, as either the whole or any part of the consideration moving from the sellers seems to me unjustified. Nor, if this be so, do I see (turning from the case imagined to the actual case) how the sellers' position can in this respect be bettered by the circumstances that they elected, in exercise of their option, to present a delivery order rather than a bill of lading. The delivery order offered in this case did not, in my judgment, give the buyers either against the ship, or against either of the agents of the sellers (Belgian Grain or Van Bree), or against the sellers themselves, any rights which the buyers did not already possess under the contract for sale.

H

The so-called "undertaking" signed by Van Bree in this document was, I think, signed by them merely as agents for the sellers and there is no particular reason why they should suddenly assume the character of principals. All that that undertaking does, in my view, is to repeat or recite an obligation, already

incumbent on the sellers under the contract, to be performed by them through Van Bree. Nor can I see any consideration moving from the buyers to Van Bree as distinct from the sellers. The document was, in my view, a mere cog-wheel in the machinery for enabling the sellers to perform obligations already contracted by themselves and for fixing the time of such performance, and by the subsequent action of the sellers it was rendered abortive and null even for this limited purpose. The most solid argument against this view and one powerfully developed by counsel for the sellers resides in the words "in exchange for" in the conditions indorsed on the sale note. According to these conditions :

Payment [is] to be made by nett cash on first presentation of and in exchange for . . . bill/s of lading . . . and/or delivery order/s . . .

The sellers contended that the payment was, according to this language, to be a payment not only exigible on presentation of the delivery order and not otherwise, but a payment for the delivery order which, therefore, was at least part of the consideration for the payment. The buyers contended that this language meant no more than that the sellers, to obtain payment, must both present and hand over the delivery order. Payment was to be against and not for it. In my view, the buyers are right on this point, and the words "in exchange for" relate, not to a commercial exchange, but merely to a physical transfer of the documents against a "physical" transfer of the money. This construction does not involve the consequence that the words "in exchange for" are redundant, adding nothing to "on presentation of." If they were, redundancy in a commercial instrument would be no novelty, but there is a difference between the two things. "Presentation" can be affected by merely showing a document to another, without delivery of it. "Exchange" involves necessarily, in addition, delivery.

If I am wrong on this somewhat verbal point—i.e., if "in exchange for" necessarily connotes an act of commercial exchange stipulated for—there was, in my view, no commercial exchange in fact. What was "exchanged" for money was, in fact, tendered by the sellers void and a nullity. If this consideration is relevant and decisive in cases where contract goods are not shipped at all, I cannot see why it should be less so when the goods shipped have by the sellers' act ceased to be contract goods after tender of the documents and payments against them. This would, I think, be quite clear if the diversion of the goods by the sellers had occurred before the tender of the documents, and I feel that the same result ought to follow if, by diverting the goods after tender of the documents, the sellers rob them of all meaning and value. In advancing this view, I am compelled to dissent from that of the MASTER OF THE ROLLS and of CROOM-JOHNSON, J., and I do so, I need hardly say, with profound diffidence. I am somewhat fortified by the reflection that my conclusion, if it should prove right, avoids a consequence which the contrary conclusion entails, namely, that a seller, by breaking, and, indeed, repudiating, his bargain, should acquire the right to be paid twice over for the same goods and to retain both sets of proceeds. It has been suggested that, if the buyers had framed their action differently—in damages for breach of contract—they might have recovered something from the sellers, but it is not very clear how such an action could be framed or whether, if it were, more than nominal damages could be recovered, having regard to the fall in the market by the time the goods reached Lisbon. For these reasons, in my view, the appeal should be allowed.

CROOM-JOHNSON, J. [read by LORD GREENE, M.R.]: The essential facts in this case are comparatively simple. On or prior to Apr. 18, 1940, the sellers, an Argentine company carrying on business as exporters and shippers of grain from the River Plate, shipped on board a Greek vessel, called the *Julia* (which they had chartered for the purpose by a charterparty dated Feb. 27, 1940), at Bahia Blanca, a cargo of wheat and/or maize and/or rye which included 1,120 tons of rye in bulk to be carried to Antwerp, no alternative port or ports being named in the charterparty, and to be there delivered subject to payment of freight in cash in New York concurrently with discharge. The master of the vessel, on Apr. 18, 1940, signed bills of lading in triplicate in respect of the said 1,120 tons of rye to the order of the seller's agents at Antwerp, the Belgian Grain and Produce Co., Ltd. (hereinafter called "Belgian Grain"), he or they paying freight for the said goods in accordance with the said charterparty,

all the terms, conditions and exceptions of which charterparty were incorporated in the said bill of lading. The Julia duly sailed and while she was on voyage with the rye on board, Belgian Grain on behalf of the sellers entered into a contract in writing, dated Apr. 24, 1940 (hereinafter called "the sale contract") at Antwerp with the buyers, a Belgian *societe anonyme*, to sell to them about 500 tons of the said rye as per bill or bills of lading at a price expressed in dollars, U.S. currency, c.i.f. Antwerp. On Apr. 29, 1940, Belgian Grain sent to the buyers a provisional invoice for payment in New York for the 500 tons calculated at the contract price, less freight, as per delivery order, *plus* war risks insurance, for a net sum of \$4,999.33, U.S. currency (equivalent to £1,243 12s. 2d.), the delivery order being described as "delivery order 600." On Apr. 30, 1940, the buyers presented to the sellers delivery order 600 dated in Antwerp on that day, signed by Belgian Grain and addressed to F. Van Bree, Ltd. (hereinafter called "Van Bree"), another Belgian *societe anonyme* who carry on business as cargo superintendents at Antwerp. Van Bree are regularly employed and paid by the sellers or by Belgian Grain to handle shipments of cereals, and were so employed in connection with the shipment now in question. The delivery order instructed Van Bree, subject to payment of freight, to release to the buyers the said 500 tons of rye *ex* bill of lading for 1,120 tons. On Apr. 30, 1940, the buyers duly paid the amount of the provisional invoice to or for the account of the sellers in manner requested by them, and Van Bree handed the delivery order to the buyers. On May 10, 1940, the Germans invaded Belgium and shortly afterwards occupied Antwerp while the Julia was at sea. The Julia, after the invasion and occupation, did not proceed to Antwerp on the chartered voyage, but, by arrangement between her owners and the sellers as charterers, without any notice to the buyers and without any direction of any government or other authority, went to Lisbon, where she discharged her cargo. In June, 1940, the sellers sold in Lisbon the parcel of rye in question *ex*-ship for a price less than the sum which the buyers had paid. By arrangement between the sellers and the owners of the Julia, new bills of lading were signed by the master of the ship in respect of the rye, showing Lisbon as the destination, and on those the rye was delivered at Lisbon as the destination. The sellers surrendered to the shipowners one of the original (Antwerp) bills of lading and handed them a letter undertaking to surrender the other (two) bills of lading when they reached their hands and indemnifying them against any claim thereunder.

On those facts coming to the knowledge of the buyers, they claimed from the sellers repayment in full of the sums paid, on the basis that the sale contract had been rendered impossible of performance by the occupation of Belgium and had been unilaterally broken by the sellers. The sellers refused to pay and, a dispute having thus arisen between the parties, they proceeded, in and after 1945, to an agreed arbitration by two arbitrators and an umpire under the provision for arbitration contained in the sale contract. Ultimately, the umpire made a final award in the form of a Special Case for the opinion of the court, and subject thereto he found that the buyers' claim failed. The questions raised by the case were argued before MORRIS, J., who upheld the award. The claimants, the buyers, appeal.

No claim was made in the arbitration based on the arrangements made by the sellers with the owners of the vessel after the invasion of Belgium or on their dealings with the 500 tons of rye in Lisbon, either by way of damages or to recover the moneys received by the sellers on their sale in Lisbon. There is no express finding in the award that the sale contract was frustrated, either at any particular time or at all, or whether the completion of the transaction became impossible by reason of the acts of the sellers themselves subsequent to the invasion. The short answer to the claim made by the buyers was that there had, in any event, been no total failure of consideration, but that the payment made by the buyers was in exchange for, and in respect of, the documents which were tendered to them under the sale contract by the sellers, which documents the buyers accepted. The *onus* of proof, in my judgment, was on the buyers to prove a total failure of consideration for the payment which they made. The umpire found by his award that the sale contract was a c.i.f. contract to be performed by the sellers by the tender of documents in accordance with the terms thereof. That does not mean that the sale contract was not a contract for the sale of goods, but that delivery of the goods was to

be made in a particular way, namely, by delivery of documents. The judge upheld that finding and I agree with him. The sale contract on its face described the goods as per bills of lading and the price of the goods as being c.i.f. Antwerp, which *prima facie*, I think, means what it says. Bearing that in mind, is there anything in the other terms of the sale contract, on their proper construction, to lead to any other conclusion? Those terms are to be found in a sold note and certain clauses attached thereto and forming part of the terms incorporated therewith, which include the following:

Payment to be made by nett cash on first presentation of and in exchange for first arriving copy/ies of bill/s of lading . . . and/or delivery order/s and policy/ies and/or certificate/s and/or letter/s of insurance at Antwerp . . . Insurance: losses to be paid in currency of this contract . . . Bills of Lading: If bills of lading refer to charterparty or last bill of lading concerning the freight or destination or whatsoever or if the bills of lading are apparently in contradiction with the clauses or conditions of the sale contract buyers are nevertheless obliged to take up the documents if sellers guarantee the execution in accordance with the clauses and conditions of the contract. War deviation clause: Buyers agree to accept documents containing the Chamber of Shipping war deviation clause and/or any other recognised official war risk clause.

The London Corn Trade Association terms, conditions and rules contained in Form No. 41 (rye terms) also apply to the sale contract. In that document the contract price is said to include "freight and insurance direct or indirect" and payment is said to be:

. . . in exchange for shipping documents. If shipping documents have not been sighted at time of vessel's arrival at port of discharge seller must provide documents entitling buyer to obtain delivery of the grain and payment must be made in exchange for same, such payment to be made without prejudice to buyer's rights under the contract. Policies certificates: Seller to give all policies and/or certificates of insurance—on the parcel all duly stamped. Average: All average to be for seller's account.

Without examining further the terms incorporated, they seem to me to be appropriate, and only appropriate, to a c.i.f. contract. In addition, the award finds that the whole course of dealing in La Plata cereals between the parties for 10 years prior to the date of the sale contract, and covering at least 900 transactions, was known as "c.i.f. business" and the forms of contract as a "c.i.f. contract." The terms of the provisional invoice also seem to me to be consistent, and only consistent, with the same view. The method of working out the actual physical delivery of the grain after payment of the freight and the arrival of the vessel, as set out in the revised para. 8 of the award, are not, in my judgment, inconsistent with the notion that the sale contract was a c.i.f. one.

It was contended that, inasmuch as a bill of lading (with other documents) was not tendered, which would be the usual course on a normal c.i.f. contract, the fact that the sellers exercised the option given to them by the sale contract to tender a delivery order instead converted the sale contract from being a c.i.f. one into an arrived, or ex-ship, contract. I know of no authority for that proposition, nor can I see any reason to lead me to what I think would be such an artificial result. I cannot believe that the draftsman of these elaborate terms and conditions or the parties to the sale contract intended such a revolutionary or fundamental change to result from the exercise of such an option, the reason for the inclusion of which, as a matter of business, I think, is obvious. The sale was expressed to be "Julia afloat as per bill or bills of lading," and examination of the bill of lading would show that the 500 tons of rye were to come out of a large bulk. Accordingly, without splitting, the bill of lading could not be tendered and the inclusion of the option for the tender of a delivery order seems to me to be intended to meet precisely that difficulty. Similarly, the relevant certificates of insurance for \$7,177 covered 700 tons of rye, the sellers having sold two other parcels each of 100 tons (delivery orders 601 and 602). The option to tender certificates and letters of insurance is also provided for in the payment clause to which I have already referred. Accordingly, the relevant bill of lading was deposited by Belgian Grain with Van Bree, who, as marine superintendents engaged in the transaction, indorsed the delivery order with an undertaking to honour it in accordance with the clauses and conditions of the bill of lading which they held for the inspection of the buyers or bearer. As to insurance, Belgian Grain in the delivery order purported to "give a share" ("interessons" in the original) "to the bearer of \$4,973

U.S.A. in a certificate of insurance for \$7,117 covering 700 tons of rye in bulk," which may possibly be covered by the expression "letters of insurance." I take that to mean that they undertook to hold for account of the bearer \$4,973 out of the \$7,117. This was approved by indorsement on the delivery order by Van Bree. A delivery order in that form being (according to the award) part of the usual course of business, I expect there would be no difficulty in working out the physical delivery of the goods once the claimants, as buyers, had paid the appropriate share of the freight. Whether in those circumstances the tender of such a delivery order would be a good tender so far as insurance was concerned, if objection had been made to it, I do not examine, since the buyers made no such objection and because, according to the award, it was conceded by the buyers at the hearing of the arbitration that no objection could be taken to the documents tendered and, in para. 17 of the award, it is found that they were a good tender.

I find it difficult to find that those business documents are of no value. They entitled the buyers, on payment of the freight to Belgian Grain, to demand from Van Bree, the sellers' sub-agent, the subsequent documents referred to in the revised para. 8 of the award and to put themselves in train to obtain delivery of the goods. The judge has found that "such delivery orders doubtless possessed commercial value." It was objected before us that there was no finding in the award to that effect and no evidence to justify the judge's finding. I should have thought that the delivery order, being (as the result of the finding in the award) the equivalent of the documents stipulated for in the sale contract, on the face of it did possess commercial value, but, in my judgment, it was not for the sellers to prove that, but for the buyers, who say that they have had no consideration for their payment: see *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* (2), per LORD ATKIN ([1942] 2 All E.R. 132): "has paid money and received nothing"; per LORD RUSSELL OF KILLOWEN (*ibid.*, 133): "has received some part of the consideration"; per LORD MAC MILLAN (*ibid.*, 135):

In return for their money . . . have received nothing whatever . . . by way of fulfilment of any part of the contract.

It was contended before us on the form of the delivery order that the buyers obtained no additional rights thereunder to what they had under the sale contract, and no separate rights against Van Bree, and, accordingly, that the acceptance of the delivery order could not amount to any consideration for the payment. Inasmuch as, in my judgment, under the sale contract the sellers were bound to tender documents and the buyers to receive and pay in exchange for them if a good tender, it is impossible to say that they were in no better position than they were before the tender, payment and exchange. I agree with the trial judge that, if the sellers, pursuant to the option given to them by the sale contract had presented to the buyers a bill of lading and a policy of insurance and payment had been made, it could not have been contended that thereafter the payment could have been recovered as money paid on a consideration which had wholly failed, unless the goods after arrival were rejected as not being goods contractually prescribed. The payment made would, to that extent, be conditional, but no condition is imported that the vessel should safely arrive at the port of destination. To import such a condition would, as the judge remarks, be out of tune with the conception of a contract on c.i.f. terms. Having regard to the findings in the award, I can see no material distinction to be drawn between the result of a tender and acceptance of a bill of lading with a policy of insurance and the result of the tender and acceptance in fact made in this case. I further agree with the judge that the property in the rye (500 tons) did not pass to the buyers as there was no appropriation of the 500 tons, but that the risk did.

Whether the sellers owed any further or other duty to the buyers under the sale contract, whether the sellers' course of dealing with the vessel and later on with the goods gave the buyers any other remedy than the one sought (whether sounding in damages or not), or whether the sellers were accountable to the buyers for the money received by them in Lisbon are problems which do not arise for our decision. I should have thought, without deciding it, that there was a good deal to be said in favour of the view that the sellers cannot

retain the Lisbon money as well as the buyers' payment without paying at least damages to the buyers. On the other hand, if they can, it is but one more example of the imperfection in the English remedy of recovering money the consideration for which has failed; see *per* LORD WRIGHT ([1942] 2 All E.R. 141), in the *Fibrosa* case (2). LORD WRIGHT goes on to remark:

It is further imperfect because it depends on an entire consideration and a total failure.

The buyers have sought a particular remedy and it is, in my view, no argument in favour of the rightness of their cause in law to say, as the buyers have done before us, that to hold against them will be to leave the sellers for the present with money for their goods twice over. That remains to be proved.

I do not find it necessary, in the view that I take, to examine the doctrine of frustration of contract or to consider reported cases in which it has been applied. Subsequent impossibility of performance of a contract, or frustration, as it has come to be called, is only one instance in which the particular remedy sought in this case may be demanded: see *per* LORD WRIGHT ([1942] 2 All E.R. 138), in the *Fibrosa* case (2). The cause of action itself has long been recognised by the common law of England and what has to be proved by the party who seeks that remedy is not in doubt. The buyers got at least a part of what they contracted to pay for, *cf.*, *Lamert v. Heath* (3). On these grounds and for these reasons I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Richards, Butler & Co.* (for the buyers); *Thomas Cooper & Co.* (for the sellers).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

RUSTPROOF METAL WINDOW CO., LTD. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.J.J.), June 30, July 1, 2, 31, 1947.]

Revenue—Excess profits tax—Income or capital—Lump sum payment for licence to use patented process—Finance (No. 2) Act, 1939 (c. 109), s. 12 (1).

A company granted to F., Ltd., a licence to use a patented process in return for (a) what was expressed to be the payment by F., Ltd. to the company of the "capital sum of £3,000" and (b) royalties. The payments were expressed to be in consideration of the granting of the licence, which was non-exclusive and limited to the use of the process in connection with the making of a specified number of ammunition boxes for the Director of Navy Contracts under one contract. The company undertook in return for reasonable remuneration to give F., Ltd., reasonable assistance and supervision and F., Ltd., agreed "to use its best endeavour to keep secret the manner of using the said invention . . ."

HELD: a lump sum paid for a non-exclusive licence to use a patented process was not of a capital nature although it had not been arrived at by reference to royalties or return for specified quantitative future user, and, therefore, the £3,000 was a receipt in the nature of income and a profit arising from the company's trade or business for the purpose of excess profits tax.

[AS TO PROFITS FOR PURPOSES OF EXCESS PROFITS TAX, see HALSBURY, *Hailsham Edn.*, Supplement, Vol. 28, title Revenue, para. 1041a; and FOR CASES, see DIGEST, Supp., title Revenue, pt. XI.]

Cases referred to:

- (1) *Mills v. Jones*, (1929), 142 L.T. 337; 14 Tax Cas. 769; Digest Supp.
- (2) *Desoutter Bros., Ltd. v. Hanger & Co., Ltd. and Artificial Limb Makers, Ltd.*, [1936] 1 All E.R. 535; Digest Supp.
- (3) *Nethersole v. Withers (Inspector of Taxes)*, [1946] 1 All E.R. 711; 175 L.T. 108.
- (4) *Inland Revenue Comrs. v. British Salmson Aero Engines, Ltd., British Salmson Aero Engines, Ltd. v. Inland Revenue Comrs.*, [1938] 3 All E.R. 283; [1938] 2 K.B. 482; 107 L.J.K.B. 648; 159 L.T. 147; 22 Tax Cas. 29; Digest Supp.

APPEAL by the Crown from an order of ATKINSON, J., dated June 27, 1946, allowing an appeal by the company from a decision of the Special Commissioners of Income Tax. ATKINSON, J., held that the lump sum paid by the licensee under a licence agreement in respect of a patent owned by the company was of a capital nature. The Court of Appeal now reverse his decision, holding that the payment was income. The facts appear in the judgment of LORD GREENE, M.R.

Cyril King, K.C., and Bucher for the company.

A *The Solicitor-General (Sir Frank Soskice, K.C.) and R. P. Hills for the Crown.*

Cur. adv. vult.

July 31. LORD GREENE, M.R., read the following judgment. The matter in controversy between the parties relates to a sum of £3,000 paid to the respondent company under an agreement under seal dated Dec. 30, 1939, which I will call "the licence agreement." The Special Commissioners rejected the company's contention that this was not an income receipt and had been improperly included as such for the purpose of the assessment to excess profits tax against which the company was appealing. The decision of the commissioners was reversed by ATKINSON, J., who held that this sum was a capital receipt. Our task is to decide which of these two decisions is right.

C To decide a case which raises the vexed question whether a receipt is of an income or of a capital nature it is necessary to examine the facts with care, and I must, accordingly, state as concisely as I can those which appear to me to bear most closely on the question. The original trade of the company, which was incorporated in 1935, was the manufacture of rustproof metal window frames. After 1939, the company was increasingly engaged in war production, particularly the manufacture of ammunition boxes for the Admiralty. In 1935 the company had purchased letters patent relating to a galvanizing process which were assigned to it on Jan. 31, 1936. The process was suitable for the treatment of the ammunition boxes required by the Admiralty. The licence agreement was made at the request of the government who were anxious to have other sources of supply for ammunition boxes treated in accordance with the process. A company called Fisher & Ludlow, Ltd. (whom I will call "the licensee") had made a contract dated Nov. 8, 1939, with the Director of Navy Contracts for the manufacture of ammunition boxes. This contract was not before us, but from its terms as stated in the licence agreement it appears that it was for the manufacture of 75,000 boxes. The object of the licence agreement was to grant to the licensee the right to use the patented process in the manufacture of these boxes. The parties to it were the company (called "the licensor") and the licensee. The second recital was in the following terms:—

F The licensor has agreed to grant to the licensee such licence to use the said invention as is herein contained in consideration of (a) the payment by the licensee of the capital sum of £3,000 and (b) the royalties hereinafter reserved and made payable.

G The licence agreement then proceeded to witness that, in pursuance of the said agreement and in consideration of the sum of £3,000 then paid by the licensee to the licensor (the receipt whereof the licensor thereby acknowledged), and of the royalties thereby reserved and made payable, and of the covenants and agreements on the licensee's part thereafter contained, the licensor:

H "... hereby grants unto the licensee full licence and authority to make use and exercise the said invention under the said letters patent within the United Kingdom and the Isle of Man for all purposes connected with the manufacture of ammunition boxes (but not of any other articles or products) during such period as may be required for the application of the said invention to not more than 75,000 ammunition boxes to be manufactured by the licensee under contract No. C.P.57394/39 dated Nov. 8, 1939, and made, between the licensee and the Director of Navy Contracts or until the said contract shall be determined for any reason whatsoever whichever period shall be the shorter but so that under no circumstances shall this licence continue after Aug. 9, 1951.

The £3,000 referred to in the recital and the witnessing part is the £3,000 in question in this appeal.

So far, there are certain points to be noted. (1) The consideration expressed for the grant of the licence consists of (a) £3,000, (b) royalties; (2) these

payments are described as the consideration for the grant of the licence alone; (3) the parties describe the £3,000 as a "capital sum"; (4) the licence is strictly limited in character. It is a non-exclusive licence. It is limited both in space and in time—it is limited to the use of the patented process in connection with ammunition boxes, and those boxes are not only limited in number to 75,000, but are confined to the boxes which are the subject-matter of the licensee's contract with the Director of Navy Contracts.

There follow a number of covenants contained in numbered paragraphs. Paragraph 1 contains the licensee's covenant to pay at quarterly intervals a royalty of threepence per box. It is followed by a proviso to the effect that, if the licensee's contract with the Director should be determined by the government before all the 75,000 boxes had been treated with the process, the licensor should pay to the licensee a sum bearing the same proportion to £1,000 as the number of the boxes not so treated should bear to 75,000. Paragraph 2 contains a covenant by the licensor to erect at the licensee's works at the licensee's expense the plant and machinery necessary for the treatment of ammunition boxes with the process, with provisions as to what was to happen to the plant and machinery at the expiration or determination of the licence. The concluding sentence of this paragraph is as follows:

During the continuance of this licence and at all times hereafter the licensee shall use its best endeavour to keep secret the manner of using the said invention and any further invention or discovery falling within the scope of cl. 12 hereof and the methods of applying the same and the licensee shall not disclose any information whatsoever regarding the same to any person firm or company other than the licensor.

The inventions or discoveries falling within the scope of cl. 12 are inventions or discoveries made by the licensee during the continuance of the licence. In connection with this provision para. 6 should be mentioned in which the licensee covenants not to challenge the validity of the patent and not, after the termination of the licence and during the subsistence of the patent, to use the patent or any special or secret information or methods of user in connection therewith disclosed by the licensor to the licensee. In para. 9 the licensor covenants in return for reasonable remuneration to give to the licensee reasonable assistance and supervision. Paragraph 11 contains the common covenant by the licensor during the continuance of the licence to communicate to the licensee any new inventions it may make or acquire relating to the galvanising of metal as applicable to ammunition boxes and permit the licensee to use the same within the territory covered by the licence without further payment. In para. 12 the licensee covenants to disclose to the licensor any addition to or improvement in the said invention which it shall make or discover during the continuance of the licence. Paragraph 14 provides for the cessation of royalty payments in the event of the patent being declared by the court to be invalid, but any right to recover "the said capital sum of £3,000 or any part thereof" is expressly excluded.

It was argued by counsel on behalf of the Crown that the decision of the Special Commissioners on a question of this kind ought not to be disturbed unless it could be said that they had misdirected themselves in law. This, I think, is to put the matter too high. Great weight should, no doubt, be given to their view, but the courts have on many occasions acted on the principle that the decision of commissioners on the question whether a receipt is of a capital or an income nature is open to review and I propose so to treat it in this case. It is a question which is to be answered on a consideration of all the relevant facts. Counsel for the company called attention to the facts that the parties themselves in the agreement call the £3,000 a capital sum and that a contrast is drawn in the agreement itself between that sum and what are called royalties. They then argued that a lump sum paid in respect of the future user of a patent which is not based on the calculation of a royalty of so much per article manufactured in accordance with the patent must necessarily be of a capital nature. A lump sum paid for the right to use a patent as distinct from a lump sum built up of payments of royalty based on actual user cannot, it is said, in its nature be income in the hands of the licensor. In the present case, they said, the sum of £3,000 was payable whether or not a single ammunition box was treated with the process under the licence and the provision for payment by the licensor to the licensee in the event of a deter-

mination of the licensee's contract by the government which is contained in para. 1 is limited to £1,000 at the most. It is better to state the proposition submitted in counsel's own words which were as follows :

In the case of a lump sum paid for a non-exclusive licence, unless it can be found to have been arrived at by reference to royalties or returns for specified quantitative future user, such lump sum must be of a capital nature.

- A It must be remembered that, although royalties in the sense of payments received by the patentee of a stated sum for each article or for a number of articles produced by the licensee in accordance with the invention will in general (if not always) be of an income nature, it does not follow that a payment received for the permitted user of a patent which does not fall within that definition is not an income receipt in the hands of the patentee. The tax is concerned with income whatever its nature may be, provided of course, in the
- B case of excess profits tax it is a receipt of a trade or business with which that tax is concerned. If a receipt is an income receipt, it matters not that it is not a royalty in the sense above stated or is not arrived at on a royalty basis, for example, by a mere aggregation of royalty payments. If I may say so with respect, ATKINSON, J., appears to have attributed some magic force to the word "royalty" and to have thought that, unless the consideration for a licence was a royalty in the above sense or was built up of royalties, it must necessarily
- C be of a capital nature. Returning to the argument of counsel, I cannot understand why it should be said, as the proposition implies and was specifically argued, that a sum received in respect of the right to use a patent which is payable whether or not the patent is, in fact, used and without reference to any question of user, must necessarily be a capital receipt. A sum received in consideration of the grant of the right to use a patent, whether user does
- D or does not take place, is surely just as capable of being an income receipt as a sum received in consideration of the grant of the right to use any other kind of property, for example, a motor car. Whether or not it is an income or capital receipt must, I should have thought, be ascertained by reference to all the relevant circumstances and not by some fixed rule of law such as is suggested.

- E Leading counsel for the company contended, in the first place, that his proposition, besides being based on sound reasoning (a statement with which I do not agree), is to be extracted from the decision of the House of Lords in *Mills v. Jones* (1). I am quite unable to agree. That case was decided on the simple ground that once it was found (as the commissioners had found) that the amount of future user included in the sum awarded was negligible, there was an end of the case. No proposition such as that contended for by counsel here is involved in the decision. He next argued that his proposition was
- F established by the decision of MACKINNON, J., in *Desoutter Bros., Ltd. v. J. P. Hanger & Co., Ltd.* (2), and that this decision had been approved by this court in *Nethersole v. Withers* (3). I do not read the judgment of this court in the *Nethersole* case (3), as affirming or approving any such proposition. The object of the reference made to the *Desoutter* case (2), was to show that a certain principle suggested for deciding this class of case could not be accepted, since
- G decided cases showed that it had not been acted on. The *Desoutter* case (2), was one of those cases. The next case referred to for this purpose in the *Nethersole* judgment (3), was *Inland Revenue Comrs. v. British Salmson Aero Engines, Ltd.* (4), a decision of this court in which again the court had not proceeded on the suggested principle. The reference in the *Nethersole* case (3), to the fact that in the *Desoutter* case (2), the sum in question had no reference to actual user was, I think, merely intended to refer to what was a characteristic
- H of that case. It cannot, I think, have been intended to lay down or approve any rule to the effect that where the payment has no reference to actual quantified user it must necessarily be a capital payment. That the receipt of a sum which is based on actual user points more strongly (and it may be conclusively) to its being of an income character is true. The fact that a sum received has no reference to actual user, but is merely paid for the right to use is, no doubt, a relevant matter to be taken into account along with any other relevant consideration, but that this court in the *Nethersole* case (3), never intended to say that it was a conclusive fact is, we think, clear from what it

said was decided by the *Salmson* case (4). The passage is as follows ([1946] 1 All E.R. 716):

This decision is a clear authority, so far as this court is concerned, that a lump sum payment received for the grant of a patent licence for a term of years may be a capital and not a revenue receipt; whether or not it is so must depend on any particular facts which, in the particular case, may throw light upon its real character, including of course, the terms of the agreement under which the licence is granted. If the lump sum is arrived at by reference to some anticipated *quantum* of user it will, we think, normally be income in the hands of the recipient. If it is not, and if there is nothing else in the case which points to an income character, it must, in our opinion, be regarded as capital.

If I have any comment to make on this language, it is that the concluding sentence possibly puts the point too high in favour of capital. It is, however, qualified by the crucial words "if there is nothing else in the case which points to an income character." Lastly, the proposition of leading counsel for the company is clearly inconsistent with the *Salmson* case (4), itself. The sums which the court in that case held to be of an income nature were paid for the right to use the patent. They had no reference to, and were not based on, any particular *quantum* of user, and were payable whether or not any user did, in fact, take place.

The other main argument submitted by counsel for the company was one which ATKINSON, J., appears to have accepted. As counsel put it to us it was, if I correctly understood it, to the following effect. The case is not, he said, a simple case of a grant of a non-exclusive licence granted for a lump sum. There is in it the element of the secret knowledge of the licensors as to the application of the process to ammunition boxes. He argued, in the first place, that the £3,000 was, on the true construction of the licence agreement, the consideration paid by the licensees for the communication to them of this secret knowledge, and that it was, therefore, a capital receipt. This argument cannot, in my opinion, be accepted. It is quite impossible to link the £3,000 in this way with the alleged communication of secret knowledge. Counsel then argued that, as the agreement contemplated that, in using the licence, the licensees would have communicated to them, or would acquire, information of a secret nature as to the use of the patented process, the result would be to diminish the value of the patent, and that the effect of the licence would, therefore, be to diminish the value of the company's capital asset, namely, the patent. The £3,000, therefore, cannot be said to be wholly an income receipt. ATKINSON, J.'s appreciation of this argument was as follows. The case, he said, was one of a secret process of which the company had a monopoly both in fact and in law. At the expiration of the period of the patent, the company, but for the licence, would be the only people with the necessary knowledge of how to use and apply the process. After this licence the monopoly would be no longer theirs since there would be a rival firm, namely, the licensee, knowing just as much about it as they knew themselves. This he said, showed that the value of their business asset, that is, the patent, would have been greatly depreciated by the grant of the licence.

With the greatest respect, I am unable to agree with this. There was no evidence that there was anything special about this patent, nor is it correct to speak of a patented process as a secret process. Disclosure in the specification is a condition of validity. If the suggestion is that there was some secret concerning the right way to use the patent which did not appear in the specification, the result would, of course, be, that, if this secret method of user was the best way of using the patent known to the patentee at the date when his complete specification was left at the Patent Office (Patents and Designs Act, s. 25 (2) (j)), the patent would be bad. We are not entitled to make any such assumption. If the suggestion is that the company had, and was proposing to communicate to the licensee, some secret method of using the patent which it had invented or acquired since the lodging of the specification, there is no evidence that any such secret method existed, nor does the licence itself contain any suggestion that it did. Lastly, the suggestion may mean that the licensee, by the mere fact of using the patent and being shown how to use it by the company, would be in a better position than somebody starting to use the patent for the first time without having the

benefit of practical instruction or experience. This, no doubt, would normally be so, although such an advantage might be of little value. There are many patents which are applied more efficiently after some experience of their practical application or some practical instruction by the patentee than they could be by a person who had merely read the specification, but the acquisition of practical knowledge of this kind is not the same thing as the acquisition of the knowledge of a secret process. It is nothing more than what normally happens in the case of a licence. A person who has used the patent is likely to be more knowledgeable and efficient in its use than a person who has not, but the acquisition of this practical knowledge by a licensee cannot, as it appears to me, be said in any sense to effect a depreciation of the value of the patent, nor can practical instruction given to the licensee be said to depreciate any business asset of the licensor. The only person to whom such practical knowledge can be of use is a person entitled to use the invention comprised in the patent. During the currency of the patent no one but the patentee or a licensee from him is entitled to use the patent. It is clear, therefore, that during the currency of the patent the fact that this practical knowledge has been acquired by or communicated to the licensee cannot in anyway affect the value of the patent. After the expiration of the patent the patented process can be used by the public, and the presumption must, I think, be, in the absence of evidence to the contrary, that the specification contains the necessary directions as to its use. That a member of the public using the process would be in a better position, momentarily at any rate, to use it to the best advantage if he had obtained some practical knowledge than an uninstructed beginner may be conceded, but this is true in the case of many, if not most, patents. The argument, in fact, goes too far, for it would mean that there was an element of capital depreciation of a business asset in many, or, perhaps, most, grants of licences. Every patentee who has granted a licence will find that, on the expiration of the patent, his licensee is, or may be for a time, at any rate, in a better position to compete with him than other members of the public who, on the expiration of the patent, are minded to use the invention, and the more licences he has granted, the more such privileged competitors he will have, but I have never before heard it suggested that this implies that the licensor has suffered a capital loss. On the contrary, if there is in any case any substance in the suggestion that a licence puts the licensee in a better position to compete with the licensor after the expiration of the patent, it can be no more than a necessary incident of the grant of the licence and a necessary consequence of the exploitation of the patent for profit during the period of its validity.

That what I have said represents the real position is, I think, recognised by the parties themselves. In para. 6 of the licence agreement the licensee covenants that it will not after the termination of the licence "*and during the subsistence of the said letters patent*" make any further use of the invention "or any special or secret information or methods of user in connection therewith disclosed by the licensor to the licensee." The company, therefore, so far as use of secret information by the licensee is concerned, did not stipulate that it should not be used after the expiration of the patent. In para. 2 there is a perpetual covenant by the licensees to use their best endeavours to keep secret the manner of using the invention. This does not appear to me to assist the argument in any way. The inventions or discoveries the manner of using which the licensees by the same paragraph covenant to keep secret *after* the expiration of the patent are, as I have already said, inventions or discoveries, not by the licensors, but by the licensees.

The argument, therefore, fails to convince me. I will now turn to the real question in the case, namely, whether, having regard to all the relevant circumstances, the receipt is of a capital or of an income nature. In my opinion, it is of an income nature and the Special Commissioners came to the right conclusion. The licence is a non-exclusive licence and the company's right to exploit the patent by the grant of other licences is, therefore, unimpaired. It is granted for a specific purpose only, namely, to enable the licensee to fulfil a particular contract. The right which it confers is to use the invention for a number of boxes up to the limit of 75,000. It is not, therefore, even a right to use it for an unlimited number of boxes. The time during which the licence is to continue is limited to the time required for the application of the process

to the contractual number of boxes. There seems to me to be no capital element in a receipt of this nature in those circumstances. The only considerations on the other side, once the company's arguments above discussed are rejected, are that the parties themselves call the £3,000 a capital payment and the agreement separates the £3,000 from the payments which are described as royalties. I cannot attach to these considerations sufficient importance to outweigh those on the other side. The fact that parties call the £3,000 a capital sum cannot make it a capital sum if it is not. The word "capital" is a mere label attached to the £3,000 with an eye, no doubt, to tax considerations. The fact that the agreement separates the £3,000 from the royalties is nothing more than a drafting necessity having regard to the fact that the latter are based on the actual number of boxes treated with the process while the former is paid for the right to apply the process to any number of boxes up to 75,000. If a patentee negotiating with an intending licensee who wishes to obtain the right to manufacture up to a stated number of articles in accordance with the patent states his terms to be a lump sum down and a royalty of so much per article I can see no reason why the mere division of the price into those two separate elements should by itself necessarily produce the result that the sum down must be regarded for tax purposes as a capital receipt. Such, however, is the argument, but I cannot accept it. In my opinion the appeal succeeds, and the decision of the Special Commissioners must be restored.

COHEN, L.J. : I have had the opportunity of reading through the draft of the judgment that the MASTER OF THE ROLLS has just delivered, and I agree so entirely with the reasons that he has stated that I do not desire to add any reasons of my own for agreeing that the appeal should be allowed.

ASQUITH, L.J. : I also agree.

Appeal allowed.

Solicitors : *Lewis and Lewis and Gisborne & Co.* (for the company);
Solicitor of Inland Revenue (for the Crown).

[*Reported by J. A. CROCKETT, Esq., Barrister-at-Law.*]

PLATER v. CONSETT IRON CO., LTD.

[COURT OF APPEAL (Tucker, Somervell and Evershed, L.JJ.), July 24, 25, 1947.]

Workmen's Compensation—Compensation—Amount—Partial incapacity—Difference between current and pre-accident earnings—Down-grading of war-time "dilutee"—Workmen's Compensation Act, 1925 (c. 84), s. 9 (3) (i).

In 1944 a workman, employed as a fitter, met with an accident arising out of and in the course of his employment, as a result of which the sight of his right eye was seriously impaired. On his return to work, he was employed, because of his injury, as a fitter on the floor only, but his earnings were not thereby materially affected. The workman was, however, a "dilutee," and, accordingly, at the end of the war, pursuant to agreements between the Iron and Steel Trades Employers' Association and the Amalgamated Engineering Union, he reverted to his original grade of fitter's mate. A fitter's mate must work overhead as well as on the ground, and this the workman, in view of his disability, declined to do. He was, therefore, employed by the employers as a labourer, and as a result his earnings were less than those of a fitter's mate.

HELD : the down-grading of the workman was due to a change in the economic position of the labour market just as much as a rise or reduction in wages or an alteration in working hours. For the purposes of assessing compensation, the influence of such economic factors should be ignored, and the workman was, therefore, entitled to be compensated for his partial incapacity on the basis of the difference between his present *bona fide* earnings and his pre-accident earnings as a fitter.

Sharplin v. W. B. Bawn & Co., Ltd. ([1947] 1 All E.R. 436) followed.

[AS TO AMOUNT OF COMPENSATION IN CASES OF PARTIAL INCAPACITY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 914-917, paras. 1258-1260; and FOR CASES, see DIGEST, Vol. 34, pp. 414-418, Nos. 3364-3392.]

Cases referred to :

- (1) *Sharplin v. Bawn & Co., Ltd.*, [1947] 1 All E.R. 436.
- (2) *Blakemore v. Delta Mill* (1919), *Ltd.*, (1935), 28 B.W.C.C. 193; *sub nom. Delta Mill* (1919), *Ltd. v. Blakemore*, 104 L.J.K.B. 459; Digest Supp.
- (3) *Jones v. Amalgamated Anthracite Collieries, Ltd.*, [1944] 1 All E.R. 1; [1944] A.C. 14; 113 L.J.K.B. 49; 170 L.T. 78; 36 B.W.C.C. 195; Digest Supp.
- (4) *Lyon v. Taylor Bros.*, (1928), 21 B.W.C.C. 415; Digest Supp.
- (5) *Godden v. Yeomans & Partners, Ltd.*, (1947), *unreported*.

A APPEAL by the workman and cross-appeal by the employers from an award of His Honour JUDGE RICHARDSON, at Consett County Court, dated Jan. 13, 1947, by which the workman was awarded 3s. 1½d. per week, representing one-half of the difference between his present wage as a labourer and the wage which, but for his injury, he would have earned as a fitter's mate. The facts are summarised in the headnote and appear in the judgment of TUCKER, L.J.

B *Beney, K.C.*, and *R. M. H. Everett* for the workman.
Fenwick, K.C., and *Gordon V. Rogers* for the employers.

C **TUCKER, L.J. :** This is an appeal by a workman from an award made by His Honour JUDGE RICHARDSON sitting as an arbitrator under the Workmen's Compensation Act in the Consett County Court on Jan. 13, 1947, whereby he awarded the workman a sum of 3s. 1½d. a week plus the appropriate supplementary allowances. The judge's award was given before this court had delivered judgment in the case of *Sharplin v. Bawn & Co., Ltd.* (1). The contention of the workman is that, in view of that decision, the county court judge should have given an award at an increased rate, that is to say, he should have deducted from the sum of £8 16s. 4d. which the workman was earning prior to this accident his actual present earnings of £6 5s. 8d. and made an award on that basis which would, of course, have resulted in a sum considerably in excess of the county court judge's award of 3s. 1½d.

D In 1944 the workman was in the employment of the respondents doing the work of a fitter. The accident occurred on Apr. 9, 1944, whereby he received an injury to his eye which resulted in double vision. The judge has found as a fact that, as a result of that accident, it is unsafe for the workman to work at heights. He was totally incapacitated until Aug. 6, 1944, and was paid compensation on that basis. He resumed work at the same wages, but only on the floor level after that, and claimed for partial incapacity as from Aug. 6, 1944. The judge found that it was reasonable for him to be unwilling to work at heights. Until Feb., 1946, he actually earned £8 15s. 9d. as against his pre-accident wage of £8 16s. 4d., a difference which in argument has been ignored, but in Feb., 1946, he was what is called "down-graded" from a fitter to a fitter's mate. **E** Before the war he had been a fitter's mate, but during the war he had been permitted to work as a fitter, although he had not acquired the necessary qualifications by training or apprenticeship to entitle him to the status of a fitter. On being down-graded to a fitter's mate he was unable to do the work of a fitter's mate, because being a fitter's mate necessitated working at heights now and again, as the mate would have to go where the fitter went. So he became a labourer at a wage of £6 5s. 8d. The judge has found partial incapacity, but he said that, if the workman had been able to go back and do fitter's mate work, **F** he would have earned £6 11s. 11d.

G It was by virtue of an agreement made between the appropriate trades union and employers' federation that the workman, although not qualified as a fitter, was allowed during the war to do a fitter's work, and it was by virtue of the same agreement that he became down-graded at the termination of the war. That agreement was in evidence and, we are told, was before the county court judge, **H** but I think it did not assume nearly so much importance as it has in the course of this appeal, because at that time the decision in *Sharplin v. Bawn & Co., Ltd.* (1) had not been given. The first agreement is dated Feb. 10, 1941, and is between the Iron and Steel Trades Employers' Association and the Amalgamated Engineering Union on behalf of its members, and it provides that :

In order to supplement skilled man-power in the industry, where it can be shown that skilled men are not available and production is prejudiced, it is agreed that an alternative class of worker may be employed on jobs hitherto done by such skilled men under reservations to be mutually agreed.

Paragraph 5 provides :

The procedure for operating this agreement shall be as follows :—(a) An application for a change of practice shall be referred to a joint sub-committee representative of the employers and local representatives of the union, the agreement of the union being subject to confirmation by its executive. (b) Failing agreement by the joint sub-committee, or confirmation by the union executive, the matter shall be referred for consideration by the executive bodies, *i.e.*, representatives of the association and the executive council of the union. (c) Changes made under this agreement shall be registered by the employer on a standard form and a copy of such registration supplied to the worker or workers affected and to the local representative of the union and the executive council of the A.E.U.

There was a supplementary agreement of the same date whereby it was provided :

The principles underlying the relaxation agreements are as follows :—1. For the purpose of upgrading, skill is the primary consideration but in cases of men being of equal skill members of the A.E.U. shall have preference . . . 5. All relaxees shall become members of the A.E.U., but this does not mean that they should leave the union they at present belong to, assuming they are in a union. 6. The jobs to be relaxed shall be described in detail. A mere statement of general fitting is insufficient.

Ultimately, the registration form was filed in accordance with the agreement relating to this particular man, Samuel Plater, and it stated :

Existing class of labour on the date of application, skilled, and class of alternative labour desired : millwright's mate's to be upgraded to maintenance fitter for electric overhead cables.

Counsel for the employers has drawn our attention to the fact that these events did not rest solely on those agreements, because the Restoration of Pre-War Trade Practices Act, 1942, gave legislative force to such agreements. Section 1 of that Act provides :

(1) Where during the war period (whether before or after the commencement of this Act) any trade practice obtaining immediately before that period in any undertaking has been departed from in that undertaking, the employer shall, subject to the provisions of this Act, be under an obligation :—(a) to restore or permit the restoration of the trade practice before the expiration of two months from the end of the war period; and (b) to maintain or permit the continuance of the trade practice for eighteen months from the date when the restoration is effected or the end of the war period, whichever is the later . . . (3) Where, with a view to accelerating the production of munitions of war, any trade practice obtaining in an undertaking on the 30th day of April, 1939, was departed from after that date and before the beginning of the war period in pursuance or in consequence of a written agreement between an organisation of employers and a trade union, sub-section (1) of this section shall apply as if the trade practice had obtained in the undertaking immediately before the war period and had been departed from in the undertaking during that period.

In my view, this appeal depends solely on the question whether or not on its facts this case can be distinguished from *Sharplin's* case (1). The Workmen's Compensation Act, 1925, s. 9, provides :

(1) The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained . . . (3) The rules for calculating the weekly payment in the case of partial incapacity shall be :—(i) if the maximum weekly payment would, had the incapacity been total incapacity, have amounted to twenty-five shillings a week or upwards, the weekly payment in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident.

In *Sharplin v. Bawn & Co., Ltd.* (1) the earnings of the workman at the time of the arbitration had fallen by reason of a reduction in working hours consequent on the winding up of war contracts. That was the sole reason for the fall in the man's wages, and it became necessary for the court to review a great number of the previous cases which had arisen under these sub-sections, and, in particular, to see whether it was possible to reconcile some of the statements in *Blakemore v. Delta Mill* (1919), *Ltd.* (2), and a more recent case in the House of Lords, *Jones v. Amalgamated Anthracite Collieries, Ltd.* (3). Those cases were fully discussed in argument and in the judgment of the court, and I only desire to read one or two passages from the judgment in *Sharplin's* case (1) to show

what the decision of this court was on the facts of that case in the light of those two decisions of the House of Lords. In the judgment of the court it was stated ([1947] 1 All E.R. 439), in referring to *Blakemore's* case (2) :

The principle there laid down by the House of Lords, in our view, concludes this appeal in favour of the workman. The argument of counsel for the employers involves the conclusion that the principles laid down in *Blakemore's* case (2), which we regard as binding on this court, ought, in the light of *Jones' case* (3), to be regarded as *dicta* not necessary for the decision. We will deal with this argument when we come to *Jones' case* (3). In the Court of Appeal in *Blakemore's* case (2) the MASTER OF THE ROLLS, and possibly SLESSER, L.J., decided the case on its special facts, but the House of Lords, in our view, based its decision on clear principles, deliberately laid down, which, therefore, are binding on this court. We will try to summarise them. The words "is earning or is able to earn" are strictly alternative. The words "is earning," are to be applied when the workman is earning as much as he reasonably can, or, as it is sometimes put, is "*bona fide* earning." If he is doing this, then the first alternative applies, and the fact that this amount is affected by general economic conditions such as slackness of trade is irrelevant for the purpose of applying s. 9 (3). In short, "is earning" is a statement of actual fact and means what it says, unless the workman's will to earn is in fault. LORD THANKERTON pointed out that, if what we may call the thesis of *Lyon's* case (4) was right, the words "is earning" were unnecessary. The workman's actual earnings would be merely an item of evidence in deciding what he is able to earn, and the phraseology of the Act of 1897 in which the words were "is able to earn" need not have been altered. LORD THANKERTON says (28 B.W.C.C. 208) : "In my opinion, the Act provides a simple method though it may not be a logical one, as the actual earnings of the workman are presumably conditioned by the existing economic position of the labour market an element which falls to be excluded in assessing the amount which he is able to earn."

Later, the judgment turns to *Jones v. Amalgamated Anthracite Collieries, Ltd.* (3), on which the employers were relying. Having mentioned the facts in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (3), and the judgments of MACKINNON, L.J., and GODDARD, L.J., in the Court of Appeal, it proceeds to deal with DU PARCQ, L.J.'s judgment and proceeds as follows :

DU PARCQ, L.J., while recognising that a reduction of wages through a general economic depression did not prevent the actual earnings being still the proper testing figure, held, in effect, that the pay and allowances being wholly unrelated to his capacity or incapacity for work were not what he was "earning" within the meaning of the section. The House of Lords also declined to take the figure of pay and allowances as the figure of what the workman was earning within the meaning of the section, but this decision was not on the basis that the pay and allowances were not earnings. LORD THANKERTON had no doubt that they were earnings within the meaning of s. 9 (3) . . . [Then a passage from his speech is cited] . . . LORD THANKERTON goes on to say that the same principle would apply if the second injury was not an industrial accident and was entirely unconnected with the first injury. He was not, of course, laying down an exhaustive statement of the law of successive accidents in relation, for example, to industrial disease which have given rise to difficult problems. The passage we have quoted is, however, of importance as showing the basis of the *ratio decidendi* in *Jones' case* (3). VISCOUNT SIMON and LORD MACMILLAN also referred to this analogy. LORD RUSSELL based his opinion on very general grounds and among them counsel for the employers particularly relied on certain statements which might be read as expressing a general principle, and so read lend support to his argument, but, if taken in their generality, cannot, in our respectful opinion, be reconciled with *Blakemore's* case (2). That case was cited and is referred to in LORD THANKERTON's opinion, and both he and LORD RUSSELL were parties to the *Blakemore* decision (2). The expressions of opinion in *Jones' case* (3) to which counsel for the employers has called attention cannot, in our view, be read as intended to overrule or throw doubt on the *ratio decidendi* in *Blakemore's* case (2). The conclusion we come to on the construction of the section in principle and on authority is as follows. If the workman is *bona fide* earning what he reasonably can earn, it is not open to the employer to diminish the "difference" between this figure and his pre-accident earnings—actual or as adjusted under the Acts—by showing that the whole or part of the reduction is due to changes in the "economic position of the labour market" between the two dates . . . Such changes are constantly taking place, and, if the legislature had intended the definite provisions of the section about actual earnings to be modified by economic fluctuations, express words would and could easily have been found to make that intention clear. There may, however, be other causes unconnected with the injury which require, as LORD THANKERTON suggested, an allocation of the total reduction or, as LORD RUSSELL suggested, a consideration of what the workman is able to earn. A second accident

or injury is one such cause. Conscription, which, of course, affected a very large number of people, is another. It is not necessary in order to decide the present cases to attempt a formula which would cover all such possible causes.

We, in this court today, are bound by the decision in *Sharplin's* case (1), and the interpretation or the reconciliation of *Blakemore's* case (2) with *Jones' case* (3), as there stated. In my view, the only thing open to us is to consider whether or not, on its facts, this case can be distinguished from *Sharplin's* case (1), on the ground that there was no change in the economic position of the labour market, which was the phrase used in that case and applied to the facts then under consideration. Counsel for the employers has necessarily criticised the decision in *Sharplin's* case (1), and formally taken the objection that it was wrongly decided, although, of course, he appreciates that this is not open to him in this court. I should also refer to *Godden v. Yeomans & Partners, Ltd.* (5), of the judgment, dated Mar. 12, 1947, in which case we have been supplied with a copy. There *Sharplin's* case (1), was applied to a case where it was shown on the facts that the reduction of working hours was due to an agreement made between the trades union of which the applicant was a member and the appropriate employers' organisation. That carried the matter a little beyond the facts as stated, at any rate, in the judgment in *Sharplin's* case (1), in which it did not appear precisely how the reduction of working hours had come about.

It seems to me that in the present case the up-grading and the down-grading of the workman was a process which took place in the economic sphere—that it was a phase, if I may say so, in the economic position of the labour market, or an incident in the ups and downs of the labour market, just as much as a rise or a reduction in wages or an alteration in working hours, that being what had occurred in *Sharplin's* case (1), and I cannot see that the fact that legislative sanction has been given to agreements of the kind with which we are concerned alters the position. It would have been the duty of the employers and the workman to abide by the agreement which had been entered into whether or not this Act of Parliament had been passed. In my view, the facts of this case are really indistinguishable from those in *Sharplin* (1). We being bound by the decision in *Sharplin* (1) and also by that in *Godden* (5), the appeal succeeds because the award should have been based on the difference between the wages which the workman was actually earning and his pre-accident wage.

SOMERVELL, L.J. : I agree. If, at one time, owing to scarcity of labour, a man earned so much, and at a later date, when his actual earnings came to be considered under the Act, he was earning less because labour was less scarce, that would plainly be due to a "change in the economic position of the labour market." That phrase which appears in the decision of this court in *Sharplin's* case (1), was taken from a sentence in LORD THANKERTON'S speech in the *Blakemore* case (2). In the present case what occurred happened more formally, but that really is the background of the situation. As the agreement shows, the increased wages which the workman was enabled to earn as a fitter during the war years was due to the fact that many men were serving in the forces and qualified skilled fitters were not available for the work which was required to be done. It may well be that by Feb., 1946, there was not a surplus of qualified skilled fitters, but many must have come back and, undoubtedly, by that date the agreement was treated as coming to an end. Whether that was by the agreement or whether it was by virtue of a date being fixed under the Restoration of Pre-War Trade Practices Act does not, I think, appear in the evidence, but I will assume that it was the date fixed under the Act. It was, at any rate, by that time felt that qualified fitters were back in sufficient numbers to bring the war practice to an end and revert to the pre-war practice. The fact that it was done in that way does not, in my opinion, begin to take it out of the words which we have to construe and apply, namely, "changes in the economic position of the labour market." I agree that what happened here falls within those words and this case is governed by the decision in *Sharplin's* case (1).

EVERSHED, L.J. : I also agree. As has been stated by my Lords, the circumstance that the workman at the date of the accident was working as a maintenance fitter arose out of the agreement of Feb., 1941. That agreement was a relaxation of a trade practice, that is to say, of a restrictive practice

applicable to this branch of industry, such relaxation agreements being entered into for the purposes of the war effort. The relaxation, arising out of the agreement and fortified by the Act of Parliament to which my Lord referred, came to an end in Feb., 1946, and, if I may use a military metaphor, the workman then ceased to have the acting rank of a maintenance fitter and reverted to his substantive position of a fitter's mate. It so happened that while acting as a fitter he was able to work on the ground. The reversion to

- A his position of fitter's mate would have made it necessary for him to work aloft, and for that reason he became, by virtue of the accident, unable to perform the work of a fitter's mate and had to undertake work as a labourer. The whole basis of the argument of counsel for the employers, both on the appeal and on the cross-appeal, is that, had it not been for the intervention of this "down-grading," on the facts as found, the workman could still have worked as a fitter and earned as a fitter the same, or substantially the same, wages, as he was earning at the date of the accident or immediately before it. On that ground, he says, this case must be distinguished from *Sharplin's* case (1), and brought within the exception, of which *Jones' case* (3), was cited as an example, where a man is, by some intervening circumstance, taken altogether out of the sphere of the trade or trades in which he would earn his living in the ordinary way. If that were right, then, says counsel, it must follow that the present wages earned cannot be treated as being within the formula in *Sharplin's* case (1), "the amount the workman is *bona fide* earning." The court is then compelled to see what he is able to earn and the answer to that, says counsel, is the fitter's rate of substantially the same sum as immediately before the accident, with the result that, not only does the appeal fail, but the cross-appeal succeeds, because there would be no more room for taking the fitter's mate's figure of £6 11s. 11d. into account than the labourer's rate of £6 5s. 8d. For the reasons which have already been given, it seems to me that the circumstances of the present case are in *pari materia* with other trade incidents of which the restriction of working hours or the opportunity for overtime were examples in *Sharplin's* case (1) and in *Godden's* case (5), and that the present matter is distinguishable in principle from a case where the applicant is taken out altogether from the sphere of the trade or trades in which he could earn his living. The appeal succeeds and the cross-appeal fails.

Appeal allowed, cross-appeal dismissed.

Solicitors: *W. H. Thompson* (for the workman); *Gregory, Rowcliffe & Co.*, agents for *Cooper and Jackson*, Newcastle-upon-Tyne (for the employers).

[Reported by R. L. ZIAR, ESQ., Barrister-at-Law.]

F ANGLO-SAXON PETROLEUM CO., LTD. AND OTHERS v. DAMANT. ANGLO-SAXON PETROLEUM CO., LTD. AND OTHERS v. REGEM.

[COURT OF APPEAL (Scott, Bucknill and Asquith, L.JJ.), April 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30, May 1, 2, 5, 6, 7, 8, June 3, 1947.]

G Shipping—Salvage—Negligence—Duty of salvor—Degree of care and skill—Salvage department of navy.

Crown Practice—Petition of right—Crown acting as salvor—Merchant Shipping (Salvage) Act, 1940 (c. 43), s. 1 (1).

- H A salvor is under a duty to use reasonable skill and care, the breach of which entails liability. A salvage company professing to render salvage services is also under a duty to provide suitable equipment to such an extent as may be reasonable in the circumstances of each case, and the same measure of duty applies to a salvage department of the Royal Navy. The degree of "diligence" owned by a salvor is to be measured by the degree of skill and care which is requisite in the circumstances to safeguard the interests of the potential plaintiff, and there is nothing in the maritime law of salvage which involves that a lesser measure of duty is required. The principles as to standard of care recognised by the Court of Admiralty are the same as those of courts of common law.

Dictum of SIR CHARLES BUTT, P., in *The Dwina* ([1892] P. 58, 61) referred to.

A petition of right does not lie against the Crown when acting as salvor. The only cases in which a petition of right is open to the subject are where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service. An action against a salvor for negligence or misconduct sounds in tort.

Dictum in *Feather v. Reginam* (1865) (6 B. & S. 257, 294) applied.

On a true interpretation of the sub-section, the Merchant Shipping (Salvage) Act, 1940, s. 1 (1), which confers on the Crown the right to claim for salvage services does not also impose a corresponding liability where the services are rendered negligently.

[AS TO CARE, SKILL AND KNOWLEDGE OF SALVORS, see HALSBURY, Hailsham Edn., Vol. 30, p. 902, para. 1215; and FOR CASES, see DIGEST, Vol. 41, pp. 872, 873, Nos. 7480-7495.]

AS TO NATURE AND SUBJECT-MATTER OF PETITION OF RIGHT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 688-692, paras. 1176, 1177; and FOR CASES, see DIGEST, Vol. 16, pp. 236-242, Nos. 317-371.

FOR THE MERCHANT SHIPPING (SALVAGE) ACT, 1940, s. 1 (1), see HALSBURY'S STATUTES, Vol. 33, p. 473.]

Cases referred to:

- (1) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (2) *The Dwina* [1892] P. 58; 61 L.J.P. 71; 66 L.T. 862; 41 Digest 873, 7493.
- (3) *Admiralty Comrs. v. Valverde (Owners)*, [1938] 1 All E.R. 162; [1938] A.C. 173; 107 L.J.K.B. 99; 158 L.T. 281; Digest Supp.
- (4) *Windsor & Annapolis Ry. Co. v. R. & Counties Ry. Co.*, (1886), 11 App. Cas. 607; 55 L.J.P.C. 41; 55 L.T. 271; 51 J.P. 260; 16 Digest 239, 346.
- (5) *Feather v. R.*, (1865), 6 B. & S. 257; 35 L.J.Q.B. 200; 12 L.T. 114; 29 J.P. 709; 16 Digest 236, 319.

APPEALS from judgments of ATKINSON, J., dated July 30, 1946.

On May 9, 1943, the tanker *Delphinula*, carrying a cargo of benzine, grounded on a rocky reef just outside Alexandria harbour. The salvage department of the Royal Navy, stationed at Alexandria, undertook the whole of the salvage operations, which were delegated by the admiral in charge of naval administration at the port to the nominated defendant in the action, Captain Damant, who was in charge of that department. Attempts were made, in the first place, to tow the *Delphinula* free of the obstruction on which she was stranded by means of tugs, but these failed, and an alternative plan, *viz.*, the transfer to tankers or lighters of sufficient of her cargo to lighten and refloat her was rejected by the admiral and Captain Damant because it would involve additional delay having regard to the shortage of these craft and the small likelihood of their availability and suitable weather coinciding. On May 11, Captain Damant decided to adopt a third and admittedly dangerous plan, *viz.*, to discharge a sufficient quantity of the benzine cargo into the sea through the holed bottom by means of air compressors and thereby to lighten the ship and enable her to float clear of the rock, after which she could be towed into the harbour. The necessary air compressors were requisitioned, but they did not arrive until May 16 and on May 17 a considerable amount of benzine was pumped into the sea. On May 18, two tugs, which had habitually been used, *inter alia*, for ferrying personnel and providing meals for the salvage crew, were drawing alongside the *Delphinula* when there was a flash and an explosion and the tugs and the *Delphinula* were enveloped in flame. The *Delphinula* became a total loss and more than half of her cargo was lost.

In an action by the owners of the tanker and her cargo, ATKINSON, J., held the salvage department liable for negligently failing to take proper precautions in the course of their salvage efforts to guard against an obvious danger, and he awarded damages to the owners of ship and cargo. He held that an alternative claim by petition of right was in essence an action of tort and barred by the *maxim*, "The King can do no wrong." Captain Damant now appealed from the decision in the action for damages, and the owners cross-appealed from

that in the petition of right. Both appeals were dismissed.

Sir William McNair, K.C., and J. B. Hewson for Captain Damant in the action and for the Crown on the petition of right.

Devlin, K.C., and S. Knox Cunningham for the owners, plaintiffs in the action and petitioners on the petition of right.

Cur. adv. vult.

- A June 3. SCOTT, L.J., read the judgment of the court, in which he recited the facts and continued: The question of the measure of duty resting on a
 B salvor was much discussed in argument, it being contended for Captain Damant that, though in our maritime law a salvor may properly have his salvage remuneration reduced if he is guilty of misconduct which causes unnecessary damage to the property which is the object of the salvage efforts, he is under no
 C substantive duty of skill and care, a breach of which will make him liable in damages if the result of his intervention is totally to destroy the rest and leave
 D nothing out of which to make an effective salvage award. We can see no rational ground for that argument. We, accordingly, hold in accord with the learned judge that a salvor does come under some measure of duty to use reasonable skill and care, the breach of which entails liability. In the case of a salvage company professing to render salvage services, we think there is also a duty to
 E provide suitable equipment to such an extent as may be reasonable in the circumstances of each case. We see no reason why the same measure of duty should not be applied to the salvage department at Alexandria as to a salvage company, and, therefore, to Captain Damant under the orders he received from the admiral, but war difficulties and the duty of the admiral to have regard to war needs in the use he made of otherwise available tugs, tankers and other salvage equipment, no doubt affected the degree in which the salvage department had power to provide such equipment. It could not justly be
 F blamed for inability caused by the war, for the duty is to use such skill and care as is reasonable in the circumstances. For the latter reason we recognise that the owners were well advised not to put forward a claim on the footing that the admiral was to blame for failing to provide tanker barges to take the cargo out of the *Delphinula* by pumping it into tankers alongside, even though that could, but for war circumstances, have been done quite safely, as we were
 G advised by our assessors, *viz.*, by light canvas pipes—a way of lightening the *Delphinula* greatly preferable to jettisoning it by compressors.

- As an alternative to no duty of care involving liability for breach, counsel for Captain Damant submitted that to salvors there ought to be applied a lesser measure of duty. For this he relied on expressions in old Admiralty judgments which appear to support a view that *crassa negligentia* or gross negligence is requisite to create any such liability. We do not think it necessary to discuss
 F those cases. The famous passage in LORD ATKIN's opinion in *Donoghue v. Stevenson* (1) ([1932] A.C. 580) has been criticized as too wide, but not its essential principle, *viz.*, that the duty of "diligence"—which word we use as correlative of "negligence"—is to be measured by such degree of skill and care as is requisite in the circumstances (which the actor knows, or would know if he thought about it) to safeguard the interest of the potential plaintiff—the actor's "neighbour" in LORD ATKIN's passage: see the admirable discussion of the topic in
 G WINFIELD'S TEXTBOOK OF THE LAW OF TORTS, 2nd ed., pp. 441-443, 594-595. We can see nothing in the law of maritime salvage as known in our courts of admiralty to take the salvor out of the general category of persons to whom the common law principle applies. The present action is, of course, by reason of the Judicature Acts, just as much "in Admiralty" as "at common law" and *vice versa*. It follows, doubtless, that the principles of duty and liability
 H recognized by our Court of Admiralty must apply just as much as those of our courts of common law, but the converse proposition is equally true. And we can see no justification in law for the contention advanced by counsel that when a salvor causes damage to the owner of the property which he is endeavouring to save, by some act or omission which would in a court of common law constitute negligence, the Court of Admiralty should let him off any part of the damages on the footing that the standard of care it exacts is lower than that of the King's Bench Division. The phrases about "*crassa negligentia*," etc., in the older Admiralty reports cannot, we think, be treated as establishing a lower standard

of duty than at common law. The standard, in our view, is still that of reasonable care and skill in the circumstances of the particular case, and, indeed, the Admiralty Court itself recognized this principle in *The Dwina* (2). In that case there was a counterclaim for damage to the salved ship caused by the salvors' negligent navigation. SIR CHARLES BUTT, P., said during the argument ([1892] P. 61):

No doubt allowances are to be made in favour of those engaged in rendering salvage services which would not be allowed in the case of an ordinary collision; but if the salvor is negligent, his negligence need not amount to gross negligence to render his owners liable to the salved vessel.

In the judgment he held that the salvors had been guilty of negligent navigation, which caused £400 worth of damage, and deducted the whole of that sum from the award which he would have made had they not caused it.

That being Captain Damant's duty, two questions call for answer: (1) Was there a breach? (2) Did the breach cause loss to the whole extent of the damages which the learned judge has allowed, or to any, and what, less or greater extent? In our opinion, the answer to the first question is "Yes." [HIS LORDSHIP reviewed the evidence and arguments on the issue of liability and said that, in the opinion of the court, Captain Damant was under a duty to adopt the least dangerous method of salving ship and cargo which was practicable in existing circumstances, and that he had not done so. He reviewed the damages, said they must be reduced, and continued:]

We will now deal shortly with the petition of right, although our judgment in the action makes it only contingently relevant. The petition alleges, first, a contract, and, secondly, as an alternative, a duty as salvor to use reasonable skill and care. In the further alternative, there is alleged an express or implied agreement to indemnify the suppliants against loss. We see no trace of any such contract or express or implied agreement in the admitted facts of the case, and are, therefore, against the suppliants on those claims.

It remains to consider the contention that a petition of right lies against the Crown when acting as salvor. By our unwritten law, whether it is called "the common law" in its widest sense, or "admiralty law," the Crown had as salvor no rights: see *The Valverde* (3). Whether, when acting gratuitously as *parens patriae* in performance of a constitutional duty to the nation at large, and, therefore, to all His Majesty's liege subjects, the King could incur a liability for negligence committed by the Crown servants has never been considered by the courts and was not argued before us, but we assume that the maxim "The King can do no wrong" would apply *a fortiori*.

There is only one aspect of the claim which we think deserves consideration and that is the true interpretation of the Merchant Shipping (Salvage) Act, 1940, s. 1 (1) which is as follows:

Where salvage services are rendered by or within the aid of any ship, aircraft or other property whatsoever belonging to His Majesty, His Majesty shall be entitled to claim salvage for those services, and shall have the same rights and remedies in respect of those services as any other salvor would have had if the ship, aircraft or property had belonged to him.

It is clear that, if persons in the employ of any "other salvor" were guilty of misconduct the reduction in value of the salved property thereby caused would be taken into consideration in the decision on the amount of the salvage award, and also, if we are right in the preceding judgment, that a claim would lie on counterclaim or by cross-action or even independent action for damages. Is a comparable right of claim vested by the sub-section in the owner of the subject-matter of the salvage services where the services are rendered by the Crown under the sub-section? In other words, does the enactment which confers on the Crown the right of claim also impose a statutory liability where the *res* is not salved? In justice it should, but is that a liability we can construe out of the words used, or is it merely a just corollary to the main enactment which was intentionally or unintentionally omitted by Parliament? The maxim that the King is not bound by a statute unless named cannot apply *simpliciter* to the interpretation of a statute where he is named, but on the whole, though not without a little doubt in the mind of one of us, we think it would be wrong to read that liability into the sub-section. We treat the possible implication in

the statute of a duty as the only alternative basis for a petition of right because we do not think that one can exist at common law. Counsel for the owners invited us to say that the cause of action, if not in implied contract, was also not in tort. Even if, as the argument assumes, the dichotomy between contract and tort is not absolute and there are causes of action which sound in neither, we should hold that an action against a salvor for negligence or misconduct clearly sounded in tort. Apart from this the following passage (approved by the Privy Council in *Windsor & Annapolis Railway Co. v. R. & Counties Ry. Co.* (4) (11 App. Cas. 614)) from *Feather v. R.* (5) (6 B. & S. 294) seems fatal to the suggestion of a common law liability :

We concur with that court [the Court of Common Pleas] in thinking that the only cases in which the petition of right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service.

This enumeration purports to be exhaustive, and the present claim cannot be brought within any of the enumerated heads. Without the implied term in the sub-section we must therefore uphold the Crown's demurrer, and dismiss the petition with costs.

Appeals dismissed.

Solicitors : *Treasury Solicitor* (for Captain Damant) ; *Walton & Co.* (for the owners).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

H. E. GREEN & SONS v. MINISTER OF HEALTH.

[KING'S BENCH DIVISION (Denning, J.), July 29, 30, 1947.]

Public Health—Housing—Compulsory purchase order—Houses for “working classes”—Intended allocation outside those classes—Additional amenities serving beneficial purpose to residents in neighbouring areas—Housing Act, 1936 (c. 51), ss. 73, 80.

Section 73 of the Housing Act, 1936, gives a local authority power “to acquire any land . . . as a site for the erection of houses for the working classes,” and s. 80 provides that, subject to the consent of the Minister of Health, the land may be used also for shops, recreation grounds and other buildings which “will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided.”

In 1938, a firm of builders acquired a plot of land with the idea of developing it for housing and they, or their predecessors, contributed to the cost of a main sewer that was put in by the local authority to drain part of that plot and other land. They prepared a lay-out plan and obtained a licence to develop the land. Preparatory to building, they put in systems of sewers and roads, and, in addition, in agreement with the local authority, they made two of the roads wider than they otherwise would be, so as to serve omnibus routes, and they put in a larger storm sewer than they otherwise would have done, so as to take away water from other areas. The outbreak of war, by which time they had built 22 houses, put a stop to further work, but the project and plan were kept afoot and in 1943 the licence to develop was renewed. After the war the local authority made a compulsory purchase order in respect of the land, in order to use it as a site for the erection of houses of a type suitable for the working classes, but then to allocate the houses to various applicants irrespective of actual occupation, according to a priority list, and to put up nurseries, a health centre and other amenities which would be available, not only to the residents on that particular area, but also to residents in neighbouring areas. The Minister of Health confirmed the order :—

HELD : on a true interpretation of s. 73 of the Act, the local authority had power to acquire any land as a site for the erection of houses “of a type suitable for the occupation of the working classes,” and there was no limitation as to the individuals who were eventually to occupy the houses ;

on a true interpretation of s. 80, the fact that the additional amenities would also serve a beneficial purpose for other persons did not make it any the less a beneficial purpose for the persons on the housing estate; and, consequently, the local authority had not exceeded their powers under the Act.

Per cur.: The use in statutes of the expression "working classes" is inappropriate to modern social conditions.

[FOR THE HOUSING ACT, 1936, ss. 73, 80, see HALSBURY'S STATUTES, Vol. 29, pp. 620, 624.]

MOTION to quash a compulsory purchase order made by a local authority under the Housing Act, 1936, s. 73, and confirmed by the Minister of Health. The motion was dismissed.

Havers, K.C., and *Maurice Ahern* for the applicants.

The Attorney-General (Sir Hartley Shawcross, K.C.), *Rowe, K.C.*, and *H. L. Parker* for the Minister of Health.

DENNING, J.: The applicants are aggrieved by a compulsory purchase order which has been made by the corporation of Bristol in respect of their land. They desire to question the validity of it on the ground that the compulsory purchase is not empowered by the Housing Act, 1936. On this question, I cannot consider the policy of the social legislation, but only the statutory powers. The sole question for me is whether or not the statutory powers enable the corporation to make this compulsory purchase, but I have to find the relevant facts in order to determine that question. The facts are that the applicants are partners in a building business in the city of Bristol. In 1938 the firm acquired a piece of land near Fishponds in Bristol, with the idea of developing it for housing, and they, or their predecessors, contributed to the cost of a main sewer that was put in by the corporation of Bristol to drain part of the land and other land. The firm prepared a lay-out plan and obtained a licence to develop the land. They put in a system of sewers and a system of roads, preparatory to building houses. In addition, in agreement with the corporation, they made two of the roads wider than they otherwise would be, so as to serve bus routes, and put in a larger storm sewer than they otherwise would have done, so as to take away water from other areas. Before the war, they had finished some 22 houses, and had started erecting others. In 1939 the war came and put a stop to any further housing, but the project and plans were still kept afoot. In 1943, the licence for development was renewed, but at that time there was no possibility of housing work being done. In Sept., 1945, when the applicants were about to start work erecting houses on this site, for which they had done all this work, the corporation stepped in and made a compulsory purchase order under the Housing Act, 1936. The validity of it was challenged in this court, and it was quashed, by reason of the contravention of s. 75 of the Housing Act, 1936. That section was repealed, and straightway the corporation made another compulsory purchase order to acquire this piece of land. That order has been confirmed by the Minister, and the question which I have to determine is whether that order is within the powers of the Act.

The question depends primarily on the proper interpretation of s. 73 of the Act, which gives the local authority power "to acquire any land . . . as a site for the erection of houses for the working classes." Much has been said in this case as to the meaning of "working classes." The Act does not contain a definition. These words, "working classes," have appeared in a number of Acts for the last hundred years. I have no doubt that a hundred years ago, the expression had a meaning which was reasonably well understood. "Working classes" fifty years ago denoted a class which included men working in the fields or the factories, in the docks or in the mines, on the railways or on the roads, at a weekly wage. The wages of people of that class were lower than those of most of the other members of the community, and they were looked upon as a lower class. That has all now disappeared. The social revolution in the last fifty years has made the words "working classes" quite inappropriate today. There is no such separate class as the working classes. The bank clerk or the civil servant, the school teacher or the cashier, the tradesman or the clergyman, do not earn wages or salaries higher than the mechanic or the electrician, the fitter or the mineworker, the bricklayer or the dock labourer; Nor is there any social distinction between one or the other. No one of them is

of a higher or a lower class. In my opinion, the words "working classes" used in the Acts are quite inappropriate to modern social conditions. Nevertheless, the expression is used in an Act in 1936, and I must do my best to interpret it. It certainly includes the classes of persons who, fifty years ago, would have been included in that term. It includes all the persons who are, for a special purpose, mentioned in sched. XI to the Act of 1936. It includes "mechanics, artisans, labourers and others working for wages." It includes "hawkers, costermongers and persons not working for wages, but working at some trade or handicraft without employing others." Besides those, "working classes" includes a large number of other persons not specified in sched. XI. That large number is left quite indefinite in the Act, and is, I suspect, incapable of definition, but for practical purposes the difficulty of interpretation may not be important. It is to be noticed that in the early part of this Act, dealing with the question of sanitary conditions, and so on, reference is made not only to a house which is occupied by persons of the working classes, but also to a house which is "of a type suitable for occupation by persons of the working classes." That type of house, "a type suitable for occupation by persons of the working classes," is a perfectly clear and well ascertainable type, because, if one takes a category of persons such as those mentioned in sched. XI, a type of house suitable for occupation by such persons can be quite easily and definitely ascertained. That gives the clue to the later s. 73. In my judgment, the proper interpretation of s. 73 is that the local authority has power to acquire any land as a site for the erection of houses of a type suitable for occupation by the working classes, in other words, houses of a working class type, *i.e.*, houses suitable for mechanics, artisans, craftsmen, clerks, etc. Indeed, if land is acquired for the erection of such houses and they are erected on it, the ordinary consequence will be that they will be occupied by persons of the category which the legislature had in mind. It may be that some of the houses will be occupied by persons not in the category of "working classes," but that does not restrict the power to acquire the land. To come within the power to acquire, the purpose must be to erect houses of that type, but there need not be a limitation as to the individuals who are eventually to occupy them. This view is confirmed by reference to s. 79. In s. 79 (1) (b), which is parallel to s. 73 (c) (i), the phrase "houses suitable for the working classes" is parallel to "houses for the working classes." The legislature treats the two phrases as interchangeable. So, also, in s. 79 (1) (d) is quite general. It makes it clear that the powers of the corporation, after the house is built, are not restricted to the letting or selling to members of the working classes, if such a class could be defined.

To turn now to the facts, I find on the evidence that the corporation of Bristol, when they made a compulsory purchase order to acquire this land, intended it to be a site for the erection of houses of a type suitable for the working classes. That was the primary object, but I am equally satisfied that they did not mean to restrict themselves in their subsequent letting of them to any narrow definition of who is a member of the working classes. They have a "points scheme" by which they allocate houses to the various applicants on a list. They consider the needs of each individual, matters largely personal to him, what family he has, what accommodation he has, what accommodation he needs, what was his war service, and general conditions of that kind. Those considerations are all taken together in determining whether or not a council house should be allotted to him, and in what priority, but his actual occupation—whether he is within the working classes or not—is not a matter of prime consideration. Indeed, if a person applied who was outside what some people might say was the working classes, I am satisfied that the corporation would adhere to their points scheme, and allot him a house according to his priority in that scheme. The scheme itself contains a list of occupations of possible applicants, by way of example. It starts off: "Doctor of medicine; doctor of law; engineer; analytical chemist; school teacher; trained nurse; cashier; motor salesman"—all those, one may say, are not of the working classes. It goes on: "carpenter"—I suppose of the working class; "shopkeeper"—doubtful; "bus conductor; docker; hawker; builder's labourer"—all those, one would say, are clearly within the working class; "old age pensioner"—I suppose he might be; "retired" is another category. There is nothing in this points scheme which in any way limits the allocation of houses to persons

within a limited class, such as the "working class." I am satisfied that the corporation intended to use the site to put up houses of a working class type. In the allocation of them, they are going to go by their points scheme, but, if my interpretation of the Act is correct, that is a matter which they are perfectly entitled to do.

The next question is whether the order is invalid because, in addition to houses being put up on this land, the corporation propose to put up nurseries, a health centre, a youth centre, shops, a public house, etc. It is truly said that, in providing or contemplating the provision of those amenities, the corporation intend that they should be available, not only to the persons living in the houses that are going to be put up on this estate, but also for persons from the neighbouring areas. It is said that that makes the proposal invalid. This contention depends on the true interpretation of s. 80. That section contemplates that, providing the Minister consents, the land may be used, not only for houses, but also for shops, recreation grounds, and other buildings, which "will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided." It is said that if this proposed health centre, shops, etc., are connected with the requirements of persons in addition to those on this estate, that makes it outside the powers of s. 80. I do not think that is a correct interpretation. The fact that it will also serve a beneficial purpose for other persons does not make it any the less a beneficial purpose for the persons on this housing estate. I see no reason for introducing the limitation which is suggested, and I do not think the proposed development is invalid. It is said: "Garages, at all events, could not be suitable for the working classes," but it seems to me that persons like mechanics, etc., who would undoubtedly be within the working classes, would need garages, and there is nothing invalid in that proposal. Finally, it is said the corporation ought not to be allowed to go back on all that has happened in the past. They ought not to be able to go back on the arrangements which have been made—the sewers have been put in, road space for bus routes provided, the development licence granted, etc. I see no reason for saying that they cannot do it. Most of those works took place before the war. The last licence was in 1943. Much water has passed under the bridges since then. New conditions have arisen, and housing difficulties may be such that, as a matter of social policy, compulsory purchase may be the right course in the new situation. It is not for me to consider that. I have only to judge whether there is any invalidity in point of law in what the corporation have done, and I can find none.

The truth is that this case is a conflict between, on the one hand, the hardship to the individuals who have worked well, and who could, I have no doubt, build their houses well, and, on the other hand, the interests of the community. It is said on behalf of the corporation that there is a labour force in Bristol in the hands of the corporation who could be put immediately on to housing work on this land, that this points system could be operated so as to secure a fair allocation of these houses, that these communal developments (nurseries, etc.) are such that the whole thing can be made part of one larger scheme of social development, whereas the same could not be done if it remained in private hands. That conflict gives rise to questions of social policy and are not for me to determine. They are for the corporation, the local authority, subject always to the consent and approval of the Minister. It is a matter, really, for the citizens of Bristol, through their elected representatives, and for the Minister. All I am concerned to see is whether the powers of the Act have been exceeded, and, on the interpretation I give, they have not, because I hold that the corporation seek, and sought, to acquire this site for the erection of houses of a type suitable for occupation by the working classes. They intend to let them, according to their points system, to the various applicants, and they intend to provide these nurseries, and other facilities, subject to the consent of the Minister, to serve a beneficial purpose in connection with these houses, and other people too. I find nothing in the Act to say that that is outside their powers, and, therefore, I do not quash the order.

Motion dismissed with costs.

Solicitors: *Robinson & Bradley*, agents for *Strickland & Fletcher*, Bristol (for the applicants); *Solicitor Minister of Health* (for the Minister).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

INLAND REVENUE COMRS. v. ROWNTREE & CO., LTD.

[KING'S BENCH DIVISION (Macnaghten, J.) July 24, 25, 1947.]

Revenue—Excess profits tax—Capital—Computation—“Borrowed money”—Proceeds of discounting bills—Finance (No. 2) Act, 1939 (c. 109), s.14(2), sched. VII, pt. II, para. 2 (1).

By s. 14 (2) of the Finance (No. 2) Act, 1939 : “The average amount of the capital employed in a trade or business in the standard period or any chargeable accounting period shall be computed in accordance with part II of sched. VII” to the Act. By para. 2 (1) of sched. VII, part II : “Any borrowed money . . . shall be deducted . . .”

In 1933 the respondent company needed money for the general purposes of its business and arranged with an acceptance house, E., that E. should accept bills drawn by the company up to £100,000, for a commission at the rate of 1 per cent. per annum. By the end of 1936 the credit limit had been raised to £400,000. The bills drawn by the company were sight bills payable at six months, and E., having accepted a bill, discounted it on the market as agents and on behalf of the company and remitted the proceeds to the company. The rate of discount was either 9/16ths or 19/32nds of 1 per cent. per annum, and thus, during the currency of the bill, the company had the use of the money so remitted to it through E. at the rate of less than 1½ per cent. per annum :—

HELD : the proceeds of the discounting of the bills accepted by E. were “borrowed money” within the meaning of para. 2 (1).

CASE STATED by the Special Commissioners of Income Tax who had held that the proceeds of the discounting of bills accepted by an acceptance house were not “borrowed money” within the meaning of sched. VII, pt. II, para 2 (1), to the Finance (No. 2) Act, 1939, for the purpose of the computation of capital in relation to assessment to excess profits tax. The income of the company's investments was not taken into account (sched. VII, pt. 1, para. 6). It was admitted that the value of the investments exceeded the amount of the company's borrowed money, even if the average proceeds of discounting the bills represented borrowed money (pt. II, para. 3). It was further agreed that, on the facts, s. 29 of the Finance Act, 1941, did not apply by reason of sub-s. 5. The Commissioners of Inland Revenue did not deduct the sum of £268,232—the average proceeds of discounting the bills—on the ground that these proceeds constituted “borrowed money” within sched. VII, pt. II, para. 2 (1) and (3). MACNAGHTEN, J., now allowed the appeal of the Commissioners of Inland Revenue.

The Solicitor-General (Sir Frank Soskice, K.C.) and R. P. Hills for the Crown. Cyril King, K.C., and J. H. Bowe for the taxpayer.

MACNAGHTEN, J. : This is an appeal by the Commissioners of Inland Revenue from a decision of the Special Commissioners in regard to an assessment to excess profits tax raised against the taxpayers, the respondent company. The excess profits tax was imposed by the Finance (No. 2) Act, 1939, and it is provided by s. 13 (3) of that Act that, if the average amount of the capital employed in a trade or business in any chargeable accounting period is greater or less than the average amount employed therein in the standard period, the standard profits for a full year shall, in relation to that chargeable accounting period, be increased or decreased, as the case may be, by the statutory percentage of such increase or decrease of capital. By s. 14 (2) it is provided that the average amount of capital employed in a trade or business is to be computed in accordance with pt. II of sched. VII to the Act, and sched. VII, pt. II, para. 2 (1), provides that, in making such a computation, “borrowed money” should be deducted. The company selected 1936 as its standard period. During that year they obtained large sums of “short” money by discounting bills of exchange, the average amount so obtained being £268,232.

In 1933 the company was in need of money for the general purposes of its business and decided to obtain what are called “acceptance credit facilities” from Erlangers, Ltd., an acceptance house of high repute in the city of London. Erlangers, Ltd., agreed to accept bills drawn by the company up to £100,000 for a commission at the rate of 1 per cent. per annum. By the end of 1936 the credit limit of £100,000 had been raised to £400,000. The bills drawn by the company on Erlangers, Ltd., were usually sight bills for £5,000, payable

at six months, and it was arranged that Erlangers, Ltd., having accepted a bill, should forthwith, as agents and on behalf of the company, discount it on the market with one or other of the companies and firms who carry on the business of bill discounters in the city. It was further agreed that Erlangers, Ltd., having discounted the bills as agents and on behalf of the company, should remit the proceeds to the company. During 1936 the rate of discount on the London Money Market for fine bills—and a bill accepted by Erlangers, Ltd., was, of course, a fine bill—was either 9/16ths or 19/32nds of 1 per cent. per annum. Thus, the company during the currency of the bill had the use of the money so remitted to it by the discount house through Erlangers, Ltd., as the company's agents. When the bill fell due and Erlangers, Ltd., became bound to pay the bill, the company had, of course, to provide Erlangers, Ltd., with the money due thereon, but, by making use of the "acceptance credit facilities" offered by Erlangers, Ltd., the company was able to obtain the use of money for the period of the bills at a rate of less than $1\frac{1}{4}$ per cent. per annum.

The question is: Was that money of which the company had the use "borrowed money" within the meaning of the provisions relating to excess profits tax? That it was borrowed money in the ordinary acceptance of the word there can be no doubt. It is said on behalf of the company that, for there to be a borrowing of money, there must be a lender as well as a borrower, and that nobody lent any money to the company. For the Crown it is said that the money of which the company had the use for the period of the bills was lent either by the discount house or by Erlangers, Ltd. I am unable to see how it can be said that the acceptance house lent any money. It is the function of an "acceptance house" to lend its name as acceptor, but it does not lend any money to anybody. The acceptance house need not have any money at all, if the person for whom the acceptance house accepts the bill fulfils his obligation of providing cash to meet the bill when it falls due. It was the discount house which provided the money of which the company had the use for the period of the bill and no longer. On behalf of the company, it is said that the transaction was not the lending of money, but was merely a purchase by the discount house of the accepted bill. So it was, if you disregard the transaction between the company and Erlangers, Ltd., but the company did not repay the money direct to the discount house. They repaid it through Erlangers, Ltd., whom they had to provide with the funds to meet the bill. In those circumstances, I have no doubt that the proceeds of the discount of the bills accepted by Erlangers, Ltd., were "borrowed money" within the meaning of those words in the provisions relating to excess profits tax, to be found in the Finance (No. 2) Act, 1939. Therefore, this appeal succeeds and must be allowed with costs.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *John D. Watson*, York (for the company).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

Reversed. C.A. [1948] 1 All E.R. 442.

ASSOCIATED LONDON PROPERTIES, LTD. v. WILLIAMS (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Macnaghten, J.), July 25, 28, 1947.]

Income Tax—Schedule A—Valuation of property—Air-raid shelter constructed by landlord—"Rent or other consideration"—Tenant to pay 8 per cent. of cost each year for 12 years—Finance Act, 1938 (c. 46), s. 17 (1).

In 1937 and 1938 a company let parts of certain premises to the Commissioners of Works by five separate leases each for 21 years. In 1940 the Commissioners of Works requested the company to construct an air raid shelter at the rear of the building, and on June 3, 1940, they agreed to pay the company, in each year during the 12 years from the date of the completion of the shelter, a sum equal to 8 per cent. of the capital cost of the shelter. The payments were to be made quarterly in advance, to be deemed additional to the aggregate rents reserved by the leases, and to be recoverable as rent payable under the leases.

HELD : if the additional payment made by the Commissioners of Works in respect of the air-raid shelter, was not rent, then it was "other consideration" within the proviso to s. 17 (1) of the Finance Act, 1938, and, therefore, the air-raid shelter should be taken into account in assessing the value of the premises for the purposes of income tax under sched. A.

[AS TO ANNUAL VALUE FOR SCHEDULE A TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 35-42, paras. 63-74; and FOR CASES, see DIGEST, Vol. 28, pp. 7-8, Nos. 17-28.]

CASE STATED by General Commissioners of Income Tax who had held that the value of an air-raid shelter should be taken into account in assessing, for the purposes of income tax under sched. A, the annual value of premises let by the appellant company. MACNAGHTEN, J., now dismissed the company's appeal, the facts of which appear in the judgment.

J. Millard Tucker, K.C., and Borneman for the company.

The Solicitor-General (Sir Frank Soskice, K.C.) and R. P. Hills for the Crown.

MACNAGHTEN, J. : The appellant company, Associated London Properties, Ltd., are the owners of a building called Great Westminster House, Millbank, London. It is a large building, and separate tenements in it are let to various tenants. In 1937 and 1938 five separate parts of the building were let to the Commissioners of Works and Public Buildings by five separate leases, each of the leases being for a term of 21 years.

In 1940, after the commencement of the war, the Commissioners of Works and Public Buildings requested the company to construct an air-raid shelter at the rear of the building, and, by an agreement, dated June 3, 1940, and made between the company, of the one part, and the commissioners, of the other part, the company agreed to do so and the commissioners agreed to pay to the company in each year during the period of 12 years from the date of the completion of the shelter a sum equal to 8 per cent. of the capital cost of the shelter. The capital cost of the shelter amounted to £36,117, and the annual payments to be made by the commissioners to the appellants amounted to £2,889. The payments were to be made quarterly on the usual quarter days, in advance, and the agreement provided that the sums so payable by the commissioners should be deemed to be in addition to the aggregate rents reserved by the leases held by the commissioners and should be recoverable as rent payable under the leases.

The Finance Act, 1938, s. 17, provides :

(1) In estimating for the purposes of income tax under sched. A the annual value of any building, no regard shall be had—(a) to any room or other part of the building which has been added at any time after the building was first assessed to tax, or was included in the building before it was so assessed, solely for the purpose of affording protection in the event of hostile attack from the air, and is not occupied or used for any other purpose; . . . Provided that this sub-section shall not apply if the building or any part thereof is let and the rent or any other consideration for the lease is greater than it would have been if the room or other part referred to in para. (a) had not been added or included . . .

The company is liable, as owner, to pay the sched. A tax, and the only question at issue is whether, in view of the provisions of the Finance Act, 1938, s. 17 (1) regard should be had, in fixing the value of the building, to the air-raid shelter. It is agreed that, if the air-raid shelter is disregarded, the valuation should be £39,186, but if, on the other hand, the shelter is to be regarded, the valuation should be £40,018. Clearly this shelter comes within the provisions of s. 17 (1) (a), but does the proviso take it out of the section?

The general commissioners held that regard should be had to the shelter. Before them the question seems to have been debated whether the payment of £2,889 for the shelter should be regarded as rent, but, to my mind, it does not matter whether it is rent or not. I am disposed to think it is rent. There is no difficulty about the parties to a lease, after the lease has been executed, agreeing that the rent should be increased or reduced. It is common for a tenant to ask a landlord to do something to the demised premises which is going to cost money, and to agree to pay during the rest of the term a percentage of the cost of doing the work. That appears to me to be exactly what was done here. If that is not the correct view, it would not seem to matter, because the words of the proviso are :

This sub-section shall not apply if the building or any part thereof is let and the rent or any other consideration for the lease is greater than it would have been if the room . . . had not been added or included [in the building.]

If this payment of £2,889 is not to be deemed rent, it is a consideration other than rent, and it is a consideration which is greater than it would have been if the room had not been constructed, because, if the room had not been constructed, not a penny of it would have been payable. I am, therefore, of opinion that the valuation of the house should be £40,018, and the appeal will stand dismissed with costs.

Appeal dismissed.

Solicitors: *Clifford-Turner & Co.* (for the company); *Solicitor of Inland Revenue* (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

THE MIM.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), July, 7, 8, 9, 10, 11, 31, 1947.]

Prize Law—Visit and search—Neutral ship ordered to British port for better examination—Reasonable suspicion.

In the absence of reasonable suspicion, a neutral ship, stopped on the high seas by one of H.M. ships under the belligerent right of visit and search, must be allowed to proceed. If she is detained, *e.g.*, by mistake, or for some ulterior reason unconnected with search, the Crown cannot rely on the belligerent right of visit and search as an answer to the owner's claim for loss.

A neutral ship was stopped on the high seas by one of H.M. ships under the belligerent right of visit and search, an armed guard was put on board, and she was ordered to a British port for better examination. The ship's papers appeared to be in order, but she had admittedly gone farther north than her usual course in order to avoid being stopped and she carried a cargo of grain which could not be examined at sea. The navigation of the ship to the British port was expressly retained by, and left without interference in the hands of, the master and officers of the ship. The ship was grounded and became a total loss.

HELD: the grounding and loss were due to the negligence of the master and officers of the ship, and such reasonable suspicion existed as to justify the action taken by the British ship and relieve the Crown from any liability.

[EDITORIAL NOTE.] Reference is made by HODSON, J., to *Willcocks et al. v. Union Insurance Co.* (1). There TILGHMAN, C.J., said (Binney's Reports, vol. 2, p. 578): "If a force insufficient to work the vessel is put on board by the captors, in consequence of the promise of the neutral crew to navigate her to the destined port, they are bound by such promise and must be considered, for the purpose agreed on, as the hands of the captor."

AS TO RIGHT OF VISIT AND SEARCH, see HALSBURY, Hailsham Edn., Vol. 26, p. 225, para. 517; and FOR CASES, see DIGEST, Vol. 37, pp. 608, 609, Nos. 495-499.]

Cases referred to:

- (1) *Willcocks et al. v. Union Insurance Co.*, (1809), Binney's Reports, Pennsylvania, Vol. 2, p. 574.
- (2) *Netherlands American Steam Navigation Co. v. Procurator General*, [1926] 1 K.B. 84; 95 L.J.K.B. 227; 134 L.T. 233; 37 Digest 649, 1014.
- (3) *The Bernisse, The Elve*, [1921] 1 A.C. 458; 90 L.J.P. 118; 124 L.T. 554; 37 Digest 608, 499.
- (4) *The Regina d'Italia*, (1919) (unreported), referred to in Hull's Digest of Prize Cases, p. 112.

ACTION for damages for the loss of a neutral ship and cargo, the ship having been run aground after being stopped on the High Seas and ordered to a British port for better examination. The action was dismissed.

Le Quesne, K.C., and *Porges* for the plaintiffs.

Naisby, K.C., and *J. V. Nesbitt* for the defendants.

Cur. adv. vult.

July 31. **HODSON, J.**, read the following judgment : The plaintiffs are the owners of the M.V. Mim and claim damages against H.M. Procurator General and others for the loss of their vessel which took place on Nov. 1, 1939, by grounding on Reefdyke, North Ronaldshay. The claim is in the alternative. First, it is alleged that the loss was due to the improper seizure or capture of the Mim and, secondly, that, even if there was no improper seizure or capture, that the loss was due to the negligent navigation of the vessel by the defendants.

A I propose to deal first with the allegation of negligence. The Mim was a Norwegian motor vessel belonging to the port of Tonsberg. At the material time she was manned by a crew of 31 hands all told. On Sept. 4, 1939, the Mim began loading a cargo of 8,010 tons of wheat in bulk at Freemantle, Australia. On Sept. 9, having loaded the cargo, she sailed for Falmouth for orders, via Cape Town and Las Palmas to take in bunkers. On Sept. 27 she arrived at Cape Town, and, after taking in bunkers, she sailed on Sept. 28 for Las Palmas, where she arrived on Oct. 14. After taking in further bunkers, she sailed from Las Palmas for Vaksdal under orders to proceed round the north of Scotland. On Oct. 31, 1939, she was stopped by H.M.S. Colombo, while navigating towards Norway in a position northward and westward of the Faroe Islands. She was boarded by a boarding officer and an armed guard comprised of one officer and six naval ratings. The boarding officer saw the ship's papers, including a certificate from the vice-consul at Las Palmas. This stated that the original charterparty relating to 8,010 tons of West Australian wheat *per* Norwegian M.V. Mim of Tonsberg, bill of lading dated Sept. 8, 1939, had been cancelled, and the cargo in question had been bought by the Norwegian Grain Monopoly, and that the Mim was going to discharge her cargo at Norwegian ports. Under the charterparty, which was dated Aug. 11, 1939, the destination did not include Norwegian ports. The cargo was, in fact, subject to a contract for sale which, in the events which happened, never took effect. The master reluctantly agreed to the requirement of the boarding officer that he should go to Kirkwall.

[HIS LORDSHIP reviewed the evidence and held that the navigation of the Mim was expressly retained by the master in his own hands ; that the grounding and loss of the ship was due to the negligence of those in charge of the navigation ; viz., her master and officers ; that there was no question of the navigation of the ship being taken out of their hands by the officer in charge of the armed guard who was left on board after the boarding officer had returned to H.M.S. Colombo, nor was there any such interference with their navigation as would make that officer responsible for endangering the ship ; and that the plaintiffs, therefore, failed in their claim in so far as it was based on the alleged negligence of the defendants in navigating the ship. He continued :] The alternative argument of the plaintiffs is that, even if the ship was lost through their negligence, they are entitled to recover since in the circumstances the ship's officers were the agents of the defendants who were wrongfully in possession of the ship and so responsible for her loss. I am not aware of any English case where this argument has been successfully advanced, although the research of counsel discovered an American case—*Willcocks et al. v. Union Insurance Co.* (1), decided in the Supreme Court of Pennsylvania in 1809—where, in somewhat parallel circumstances, the navigating crew were held to be, as it were, the hands of the captors who had seized the vessel.

G The first question is, however, whether the defendants seized the ship at all by placing an armed guard in her in the course of visit and search. In arguing that there was a seizure, the plaintiffs rely on the decision of the Court of Appeal in *Netherlands American Steam Navigation Co. v. H.M. Procurator General* (2). In that case a neutral ship was stopped on the high seas by one of H.M. Naval Patrol boats under the belligerent right of visit and search, an armed guard was put on board, and she was ordered to proceed to a British port for better examination. No formal notice of seizure was given on arrival at the port. She was searched, and, no contraband being found, she was released. It was held that those facts sufficiently amounted to a seizure or capture of the ship to give jurisdiction to the Prize Court to entertain a claim for compensation for her compulsory diversion and detention. The jurisdiction of the Prize Court is defined in the commission issued by the Crown at the outbreak of war. By this commission the court is "authorised and required to take cognisance of and judicially to proceed upon all and all manner of captures, seizures, prizes

and reprisals of all ships, vessels and goods that are or shall be taken, and to hear and determine the same," and the decision of the Court of Appeal was directed to that question. The court rejected the argument that a mere temporary detention in exercise of the right of visit and search was for the purpose of the definition inconsistent with capture. This use of the word "seizure" is, no doubt, in a sense wider than that normally used by international lawyers who speak of the centuries old right of belligerent warships to visit and search merchant ships, whether enemy or neutral, as a right existing before capture or seizure, the words "capture" and "seizure" being treated as synonymous. For example, in OPPENHEIM'S INTERNATIONAL LAW, 6th ed., vol. 2, p. 713, it is stated:

After a search at sea has brought nothing to light against the vessel, seizure should take place only in case of grave suspicion.

Nothing, however, in my opinion, in this case turns on whether or not the word "seizure" is appropriate to describe the events which happened from the time the *Mim* was stopped and an armed guard put in her. The question is whether the act of the Crown was wrongful or not. If it was not wrongful, the plaintiffs, having failed to prove negligence, cannot, in my judgment, recover compensation. The plaintiffs seek to draw distinction between the right of visit and search and the right of examination. It is not disputed that, according to modern practice, it is recognised that examination cannot take place at sea and that ships can properly be taken into port for that purpose, but it is argued that visit and search are not co-extensive, that visit may be right but search may not. It is said that the ship's papers were in order, and that, in fact, there was no suspicion, and that, therefore, from the moment when the boarding officer was satisfied, the ship ought to have been permitted to continue her voyage.

In *The Bernisse* (3) two neutral ships were stopped, and, although the officer who stopped them was satisfied that there was nothing connected with the papers or the cargoes of the ships which required further examination and never considered that there was reasonable ground for detaining the vessels or sending them for examination except the absence of a so-called "green clearance," the *Bernisse* was sent to Kirkwall and lost by enemy action. The Crown was held liable for the mistake which had been made. In giving the judgment of the Privy Council, SIR ARTHUR CHANNELL said ([1921] 1 A.C. 464):

... counsel for the respondents do further argue that even for a search reasonable ground of suspicion must be shown, and that where everything is in order on the papers, and there is no circumstance suggesting hidden contraband, even a search on the spot would be unjustifiable. In strictness this is, of course, correct, but so little suspicion is required to justify a search that their Lordships are not prepared to say that if a boarding officer were to state that finding a cargo to be in bulk he thought something might be hidden under it, and therefore directed a search, his conduct would be so unreasonable as to subject the Crown to a liability for damages. That case must be considered if it should arise. Here it does not appear to arise.

This statement of the law was given after argument in which a decision of LORD STERNDALE in *The Regina d'Italia* (4) was cited. I have been referred to a print of the judgment obtained from a transcript of the official shorthand-writer's notes. LORD STERNDALE, in speaking of the action of the naval officer who intercepted the *Regina d'Italia*, used these words:

It does not seem to me that it was necessary for him to have had any information about copper or rubber or anything else to justify him in visiting the ship and, according to modern practice, if he were not satisfied, bringing her into Gibraltar in order that she might be searched, because according to modern practice it is admitted by everybody that search at sea is impossible. Therefore, so far as his action in bringing her into Gibraltar and having her visited and searched is concerned, it seems to me that he did not want anything to justify it.

These words might seem to suggest that no suspicion was necessary to justify sending the *Mim* into Kirkwall for examination, and they were not criticised, or, indeed, referred to, in the judgment of the Privy Council in *The Bernisse* (3). The words "if he were not satisfied" do, however, in my view, indicate that the language of LORD STERNDALE, taken as a whole, is not inconsistent with the judgment of the Privy Council in *The Bernisse* (3).

The position, in my view, may be fairly stated thus. In the absence of reasonable suspicion the ship must be allowed to proceed. If she is detained, *e.g.*, by mistake, as in *The Bernisse* (3), or if she is detained for some ulterior reason unconnected with search, the Crown cannot rely on the belligerent right of visit and search as an answer to the plaintiffs' claim. The evidence of the boarding officer in the present case was that there was no examination of the hold, for that could not be done at sea. No question of mistake arises. It cannot be said that there was any ulterior object in sending her to Kirkwall. The purpose on the evidence can only have been that she might be examined. The charterparty had a wide range of ports of discharge, including Hamburg, and the production of the licence from the Norwegian vice-consul at Las Palmas did not relieve the boarding officer of the duty of requiring the *Mim* to go to Kirkwall where examination could take place in the light of all available information and intelligence. The boarding officer found a neutral ship which admittedly had come further north than her usual course to Norway to avoid being stopped. She had a cargo of grain on board which could not be examined at sea. He could hardly in those circumstances be satisfied, even if the papers which he had seen appeared to be in order. He did not say that he was satisfied and the evidence shows that he was not. In my judgment, such reasonable suspicion existed as to justify the action taken. If in such a case a ship could not lawfully be sent to a convenient port for examination, the belligerent right of visit and search would be of little value. Therefore, the alternative claim of the plaintiffs also fails and the petition will be dismissed with costs.

Petition dismissed with costs.

Solicitors: *Sinclair, Roche & Temperley* (for the plaintiffs); *Treasury Solicitor* (for the defendants).

[*Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.*]

Re ARMSTRONG WHITWORTH SECURITIES CO., LTD.

[CHANCERY DIVISION (Jenkins, J.), July 2, 3, 4, 7, 30, 1947.]

Companies—Winding-up—Voluntary winding-up—Distribution of assets—Future liabilities—Contingent claims—Possible claims for workmen's compensation—Declared distribution of assumed surplus—Balance of declared distribution remaining in liquidator's hands—Duty of liquidator—Extent of duty to communicate personally with creditors whose claims have not been admitted—Companies Act, 1929 (c. 23), ss. 247, 261—Companies (Winding-up) Rules, 1929, r. 104 (1) (2).

A company which went into voluntary liquidation in Sept., 1943, was, at the time, purely an investment company, but it had previously employed a large number of workmen and, until 1933, it had acted as its own insurer in respect of its liability for workmen's compensation. It had a filed record comprising between 16,000 and 17,000 cases of accidents which had occurred between 1918 and 1933 and were possible subjects of further claims, with the names and addresses of the workmen concerned. In 1938, insurance cover was effected for 141 of these cases—*i.e.*, those in which compensation was being actually paid, or the last payment was of recent date, or there was a probability of recurrence of the injury which would give the workman a right to future compensation. In Sept., 1943, the liquidator caused an advertisement for creditors, under the Companies (Winding-Up) Rules, 1929, r. 104 (2), to be inserted in various newspapers, calling on the creditors to send him particulars of their debts or claims on or before Nov. 1, 1943, but, apart from this general advertisement, he took no steps to ascertain the company's position as regards liability in respect of the recorded cases of accidents sustained by former workmen while in the company's service and not covered by insurance. In 1944 and 1945, the "B" shareholders were paid a return on their shares out of the assumed surplus available for distribution, and on Oct. 15, 1945, a first and final return of capital was declared on the "A" shares, but, owing to various difficulties, only a certain number of the "A" shareholders had been paid up to date. In the meantime (*i.e.*, after Oct., 1945), claims for compensation had been

submitted by some of the workmen who had sustained injuries before 1933 and whose accidents had been recorded in the company's files and were not covered by insurance. None of these men had seen the advertisement in the papers. The question was whether these claims (if otherwise maintainable) had been defeated by reason of the declared distribution of the assumed surplus and the fact that some of the shareholders had already been paid:—

HELD: (i) although none of the claimants might be able to establish any actual accrued liability of the company at the commencement of the winding-up, each had grounds for asserting a contingent claim against the company for which (under the Companies Act, 1929, ss. 247 and 261) he was entitled to have provision made out of the assets before any distribution among the shareholders.

(ii) it was the duty of the liquidator to take all steps open to him on the information in his possession to ascertain whether any one of the former workmen who might have a contingent claim against the company under the Workmen's Compensation Acts made any such claim; the provision in the Companies (Winding-Up) Rules, 1929, r. 104, as to notice by advertisement did not absolve him from communicating individually with those persons; and the provision in the rule requiring the liquidator to give notice to the last known address of each person who, to his knowledge, claimed to be a creditor of the company did not limit his duty of personal communication to cases in which he actually knew that the person concerned claimed to be a creditor, but included cases in which he knew that the person concerned might claim to be a creditor and, by writing to that person, he could find out whether he did so claim or not.

(iii) since the shareholders were not entitled to anything until all debts had been paid, the rights of the claimants had not been defeated by reason of the fact that there had been a declared distribution of the assumed surplus, and the fact that there had been a partial distribution among the shareholders before the workmen's claims had been put in did not defeat those claims as regards assets remaining undistributed at the time the claims were received, notwithstanding that, by reason of the admission of the claims, some of the shareholders would have been overpaid at the expense of others.

[As to DISTRIBUTION OF ASSETS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 773, 774, para. 1326; and FOR CASES, see DIGEST, Vol. 10, pp. 699-1001, Nos. 6938-6948.]

Cases referred to:

- (1) *Pulsford v. Devenish*, [1903] 2 Ch. 625; 73 L.J.Ch. 35; 10 Digest 1000, 6943.
- (2) *James Smith & Sons (Norwood), Ltd. v. Goodman*, [1936] Ch. 216; 105 L.J.Ch. 70; 154 L.T. 113; [1934-5] B. & C. R. 283; Digest Supp.

ADJOURNED SUMMONS by the liquidator in the voluntary winding-up of a company for directions as to the disposal of a balance of some £15,000 remaining in his hands. Of this balance £3,500 had been allocated as the remuneration of a deceased liquidator and the remainder (£11,703 13s. 5d.) represented the undistributed balance of a sum of £79,998 14s. 10d. allocated in the account to the return of capital to the "A" shareholders. After the distribution had been declared, but before all the shareholders had been paid, claims for compensation under the Workmen's Compensation Acts were made by former employees of the company whose names and addresses were in the possession of the company as persons who might have future contingent claims against the company, but who had not been personally informed of the date on or before which they were to give notice of their claims. The question for determination was whether these claims (if otherwise maintainable) had been defeated by the course of events in the winding-up and it was held that they had not. The facts appear in the judgment.

J. G. Strangman and *G. R. F. Morris* for the present liquidator.

Ungoed-Thomas, K.C., for the personal representatives of a deceased liquidator.

Denis Chetwood for a representative of the unpaid "A" shareholders.

Pain for the workmen.

Our adv. vult.

July 30. **JENKINS, J.**, read the following judgment. This is an application by Mr. Alfred Turner Hetherington, the present liquidator in the voluntary winding-up of Armstrong Whitworth Securities Co., Ltd., for directions as to the disposal of a balance of between £15,000 and £16,000 now remaining in his hands as such liquidator, having regard to claims for workmen's compensation which have been made by four former employees of the company and to the possible existence of other similar claims.

- A** The company was incorporated on Jan. 31, 1896, under the name of "Sir W. G. Armstrong & Co., Ltd." (changed on Mar. 3, 1897, to "Sir W. G. Armstrong Whitworth & Co., Ltd."), and for many years carried on an extensive business as armament manufacturers, engineers and shipbuilders. In consequence of a scheme of amalgamation with Vickers, Ltd., arranged in 1927, the company, as from Dec. 31, 1927, transferred a substantial part of its undertaking to a new company called "Vickers Armstrongs, Ltd." In 1928 the company
- B** carried out a scheme of reorganisation under which (*inter alia*) substantially the whole of what remained of its undertaking after the transfer to Vickers Armstrongs, Ltd., was transferred to two new operating companies, named respectively "Sir W. G. Armstrong Whitworth & Co. (Engineers), Ltd.", and "Sir W. G. Armstrong Whitworth & Co. (Shipbuilders), Ltd.", part of the undertaking so transferred being subsequently made over to a third new operating
- C** company named "Sir W. G. Armstrong Whitworth & Co. (Ironfounders), Ltd." The effect of these transactions was that the company became, as from Jan. 1, 1929, a holding company owning all the shares in the three operating companies and carrying on no other business apart from a small laboratory and experimental establishment at Slough in Buckinghamshire. To mark this alteration in the company's position, on July 6, 1929, its name was changed to its present name of Armstrong Whitworth Securities Co., Ltd. In 1934 and
- D** 1937 the company disposed of its holdings in the three operating companies, and, accordingly, by the end of 1937 it no longer had any interest as shareholder or otherwise in any of the undertakings it had formerly carried on. It had also disposed of the laboratory and experimental establishment at Slough some years prior to the commencement of the winding-up and had thus become purely an investment company. During the period from its incorporation
- E** down to the transfer to Vickers Armstrongs, Ltd., at the end of 1927, the company employed an average of some 30,000 employees. This number was reduced to some 5,000 as a result of that transfer, and still further reduced in consequence of the transfers at the end of 1928 to the new operating companies, after which time the company only employed office staff, apart from the few employees required for the laboratory and experimental works during such time as the company continued to carry them on. The total of reported accidents to employees of the company during the whole of its career of active
- F** operations is estimated at over 50,000, and down to June 1, 1933 (when it had already ceased active operations, apart from the small laboratory and experimental establishment above referred to) it acted as its own insurer in respect of its liability for workmen's compensation.

- The company's method of dealing with compensation cases is described in the affidavit evidence of Mr. Hetherington, and the company's former compensation officer, Mr. T. A. Wright, who were both cross-examined before me on their affidavits. Mr. Hetherington was employed for many years on the administrative staff of the company, and from the commencement of the winding-up down to Mar. 11, 1946, he acted as whole time assistant to the first liquidator, Mr. James Hawson, who had previously been a director and chief controller of the company. Mr. Wright was employed by the company from 1900 to Aug. 2, 1937, and from May, 1918, onwards he held the appointment of compensation officer to the company.
- H** From the evidence of these two witnesses, it appears that the records of accidents prior to 1918 are no longer in existence. In May, 1918, Mr. Wright instituted, and thereafter carried on, a system under which every accident involving injuries to a workman employed by the company was reported to him and recorded by means of a filing system with a separate folder for each case. Some of the company's works and yards had separate labour officers who kept their own records, but these records were taken over by Mr. Wright, as to some in or about Jan., 1929, and as to the remainder in or about Nov., 1934, so far as they concerned accidents which had occurred down

to Dec. 31, 1927, and were considered "live" (*i.e.*, possible subjects of further claims) at the time of taking over. The cases so taken over by Mr. Wright were incorporated by him in the filing system mentioned above, with a separate folder for each case. Each folder in Mr. Wright's system would contain a report of the accident (including the name and address of the workman), and, if no claim was made by the workman, nothing more. In the event of a claim by the workman (*i.e.*, in the majority of cases) the folder would also contain a claim form signed by the workman, and a medical report. In the event of a declaration of liability under the Workmen's Compensation Acts being signed, the folder would also contain that document or a copy of the original filed at the county court. In the event of a lump sum being paid in settlement, this would also be recorded in the folder. Any weekly compensation payments were not, however, so recorded, the records of these being kept in separate books, most of which have since been destroyed. I understood from Mr. Wright that the number of reported accidents in respect of which claims were made was substantially over 50 per cent. of the total number reported, and that the proportion of claims followed by declarations of liability was probably rather less than 25 per cent. of the total number of claims. During the period 1918-1936 it was Mr. Wright's practice to make an annual review of all his accident cases "to determine," as he put it, "whether they should be treated as 'live cases' or whether I should write them off as no longer likely to crop up again," and report on the position to the directors. In 1933 the company effected an insurance against liability in respect of injuries to its employees occurring after June 1, 1933. In 1938 Mr. Wright (who had left the company's employment the previous year) assisted Mr. Hawson in the preparation of a list of "outstanding" cases with a view to obtaining insurance cover for them. As a result, a list of 141 cases was settled and insurance cover was obtained for these for a premium of £64,000. This list included all cases in which compensation was actually being paid or the last payment was of fairly recent date, and also all cases in which from the nature of the injury "it appeared" (in Mr. Wright's words) "that there was a reasonable prospect of recurrence of the injury which would give the workman a right to future compensation." Numerically, the 141 cases thus covered by insurance represented a minute fraction of the total, since the records of accidents from May, 1918, onwards, comprise between 16,000 and 17,000 individual cases, each with its separate folder as already described.

The company was put into voluntary liquidation by a special resolution passed on Sept. 16, 1943, and by the same resolution Mr. Hawson was appointed liquidator. The winding-up is a members' voluntary winding-up. At the date of this special resolution the capital of the company was £8,912,500 divided into 31,929,740 "A" ordinary shares of 1s. each, of which 10,256,250 had been issued and were fully paid up, and 14,632,026 "B" ordinary shares of 10s. each, of which 4,700,000 had been issued and were fully paid up. This capitalisation was the result of a reorganisation under which 10s. "B" shares had been issued to the company's bankers (who still held the whole of the issued shares of this class at the commencement of the winding-up) and the issued capital as existing prior to the reorganisation had been converted into 1s. "A" shares of which there appear to have been 25,951 holders at the commencement of the winding-up. The surplus assets distributable amongst the members in a winding-up were divisible between the holders of the issued shares of the two classes in the proportions of 90 per cent. to the "B" shareholders and 10 per cent. to the "A" shareholders. In Sept., 1943, Mr. Hawson, as liquidator, caused an advertisement for creditors under the Companies (Winding-Up) Rules, 1929, r. 104, in the usual general form, to be inserted in the following newspapers, THE TIMES, THE DAILY TELEGRAPH, THE MANCHESTER GUARDIAN and THE NEWCASTLE JOURNAL, calling on the creditors of the company on or before Nov. 1, 1943, to send in to him particulars of their debts or claims, and, if so required by him, to come in and prove their said debts and claims, and stating that, in default thereof, they would be excluded from the benefit of any distribution made before such debts were proved. So far as Mr. Hetherington (who acted as assistant to Mr. Hawson during the latter's tenure of office as liquidator) is aware, no steps, apart from this general advertisement for claims, were taken by Mr. Hawson to ascertain the company's position as regards

liability in respect of upwards of 16,000 recorded cases not covered by insurance of accidents sustained in the company's service by former employees of the company, and there is no evidence before me that he took any steps to do so apart from the advertisement. I must, therefore, assume that he did not, and, indeed, the contrary is not suggested by any of the parties to the present proceedings.

On Nov. 3, 1944, Mr. Hawson gave notice to the "B" shareholders of a first return of 2s. 9d. per share on the "B" shares payable on Nov. 9, 1944, and this return (absorbing £646,250 of the assumed surplus available for distribution among the members) was, on or about the latter date, paid by him to the "B" shareholders accordingly. On Oct. 1, 1945, Mr. Hawson gave notice to the "B" shareholders of a second and final return of 3.695805d. per share on the "B" shares, payable on Oct. 15, 1945, and to the "A" shareholders of a first and final dividend of 1.872d. per share on the "A" shares, payable on or after Oct. 15, 1945. The second and final return to the "B" shareholders (absorbing a further £72,376 3s. 8d. of the assumed surplus) was paid, accordingly, on or about Oct. 15, 1945. The payment of the first and final return to the "A" shareholders (representing the balance, namely, £79,998 14s. 10d. of the assumed surplus) obviously presented more difficulty owing to the large number of shareholders concerned. On Oct. 15, 1945, it was found that the company only had 1,200 cheques, so that only that number of "A" shareholders could, in the first instance, be paid. It took, under war conditions, four to six weeks to obtain the necessary supply of cheques. Then there was delay on the part of many of the "A" shareholders in the production of their share certificates, without which payment could not be made, and there were also "A" shareholders who could not be traced. In these circumstances the process of making the first and final return to the "A" shareholders was protracted over several months. Owing to the cheque difficulty it seems that only a small proportion of the total of £79,998 14s. 10d. representing this return can have been actually distributed by Oct. 31, 1945 (the date of the final meeting referred to below), but the actual figure is not in evidence, and I do not think anything turns on it. By Feb. 4, 1946, some £60,071 16s. 6d. had been distributed amongst "A" shareholders. A further £8,223 4s. 11d. was distributed between Feb. 4, 1946, and Mar. 11, 1946, leaving a balance on the latter date of £11,703 13s. 5d., representing the return on 1,500,472 "A" shares, the holders of which, numbering 7,798, had not at that date surrendered their certificates, or had not then been traced. No further distribution has since been made.

The final meeting of the members of the company under the Companies Act, 1929, s. 236, was held on Oct. 31, 1945. The account laid before and approved by that meeting provided for the payment to Mr. Hawson of the sum of £3,500 for his remuneration as liquidator, and showed as the balance available for distribution among the members the amounts to which I have already referred, namely, £79,998 14s. 10d. for the "A" shareholders, and £718,626 3s. 8d. for the "B" shareholders, making a total of £798,624 18s. 6d. The slight discrepancy between these proportions and the strict proportions of 90 per cent. to the "B" shareholders and 10 per cent. to the "A" shareholders is accounted for by the fact that a Board of Trade fee of £1,326 10s. was by agreement thrown wholly on the "B" shareholders' interest in the assumed surplus. A copy of the final account and return of the holding of the meeting appear to have been duly sent to the Registrar of Companies and registered by him on Nov. 7, 1945. In the ordinary course, therefore, the company would, by virtue of s. 236 (4) of the Act, have been deemed to be dissolved on Feb. 7, 1946, but the date of dissolution has been deferred from time to time by successive orders of the court—in the first instance, on account of the fact that certain foreign patents, the beneficial interest in which had been disposed of by the company, were still registered in the company's name and could not at present be effectively assigned owing to war conditions, and latterly on account of the workmen's compensation claims to which the present summons relates. The latest of these orders was made on Apr. 22, 1947, and defers the dissolution of the company until Nov. 7, 1947. Mr. Hawson died on Mar. 11, 1946, and his personal representatives are respondents to the present application. By an order made on June 28, 1946, Mr. Hetherington was appointed liquidator in his place, the office of liquidator having remained

vacant during the intervening period of between three and four months. Since the death of Mr. Hawson no further distribution has been made, so that there now remain in the hands of Mr. Hetherington as liquidator the sum of £3,500 allocated in the account to Mr. Hawson's remuneration and the sum of £11,703 13s. 5d. representing the undistributed balance of the £79,998, 14s. 10d. allocated in the account to the return of capital to the "A" shareholders, and these sums are included in the total balance of between £15,000 and £16,000 to the disposal of which the present application relates. A number of the unpaid "A" shareholders have, in the meantime, presented their certificates, and one of those who have done so has been joined as a respondent to represent the interests of the unpaid "A" shareholders. Between the commencement of the winding-up and Oct. 31, 1945, one claim for compensation under the Workmen's Compensation Acts was made by a former employee of the company, named Barkess, and this claim was settled by Mr. Hawson for a lump sum payment of £300. Since Oct. 31, 1945, six such claims have been made, of which two have been withdrawn. None of the four other cases was covered by the insurance effected in 1938, Mr. Wright's explanation being that they had been written off by him as not being, in his opinion, likely to recur. Each of the four cases was recorded in one of the separate folders referred to above, and it is not disputed that each of the four men concerned has lived at the same address (*i.e.*, the address appearing in the folder relating to his case) since the time of his accident. It is further not disputed that none of them saw the advertisement for creditors issued by the liquidator in Sept., 1943.

[After dealing with the facts regarding the four claims, HIS LORDSHIP continued:] It is not apparent that any of the four claimants could show that at the commencement of the winding-up the company was under any actual accrued liability to him for compensation. In order to make this out, it would not be enough to show merely that at the commencement of the winding-up the claimant was still suffering from the injury, or the after effects of the injury, caused by the accident. It would be necessary to prove total or partial incapacity for work resulting from the injury, either during some period preceding the winding-up and not covered by compensation already paid by the company, or during a period current at the commencement of the winding-up. The evidence does not prove this as regards any of the claimants. On the contrary, so far as the evidence at present before me goes, each of them appears since the initial period of incapacity to have been in full work (apart from causes unconnected with the relevant accident), at all events down to a date subsequent to the commencement of the winding-up. On the other hand, it is not in dispute that, given an injury caused to a workman by an accident arising out of and in the course of his employment, duly reported and made the subject of a claim for compensation within the prescribed period (all of which prerequisites admittedly exist in the four cases before me), the employer is liable to pay compensation at any distance of time whenever total or partial incapacity for work resulting from the accident occurs or recurs. This seems to me to involve the conclusion that each of the four claimants in the present case, although he might not be able to establish any actual accrued liability on the company at the commencement of the winding-up, at all events, had grounds for asserting a contingent claim against the company for which he was entitled to have provision made out of the assets before any distribution amongst the shareholders: see Companies Act, 1929, ss. 247 and 261.

The question with which I am concerned in the present proceedings is not, however, the extent of the provision (if any) which ought to have been made for each of the four individual claims before me, if it had been asserted before any distribution among the shareholders had taken place, but whether such claims (assuming them to be otherwise maintainable) have been defeated by the course of events in the winding-up. It is contended on behalf of the personal representatives of the deceased liquidator and on behalf of the representative unpaid "A" shareholder that the claims in question have been so defeated, and in support of this contention reliance is placed on the Companies (Winding-Up) Rules, 1929, r. 104. Rule 104 (1) empowers a liquidator to:

... fix a certain day, which shall be not less than 14 days from the date of the notice, on or before which the creditors of the company are to prove their debts or claims, and to establish any title they may have to priority under s. 264 of the Act,

or to be excluded from the benefit of any distribution made before such debts are proved, or as the case may be from objecting to such distribution.

Rule 104 (2) provides :

A The liquidator shall give notice in writing of the day so fixed by advertisement in such newspaper as he shall consider convenient, and in a winding-up by the court [as therein mentioned] and in any other winding-up [which is the present case] to the last known address or place of abode of each person who, to the knowledge of the liquidator, claims to be a creditor or preferential creditor of the company and whose claim has not been admitted.

B It is said that the four claimants in the present case were not persons who to the knowledge of the deceased liquidator claimed to be creditors of the company, on the ground that, although it is clear on the evidence that he, in fact, knew—and, in any case, he must, I think, as liquidator be deemed to have known—of the existence and general nature of the information contained in the 16,000
C or 17,000 individual folders comprised in the company's accident records, consultation of those records would not have informed him that the claimants, or any of the other former employees named therein, actually claimed to be creditors of the company, but merely that they would or might be entitled to claim to be creditors of the company if they were still alive and could show the actual occurrence of total or partial incapacity for work resulting from the
D injuries caused by their respective accidents, or such a prospect, or possibility, of future total, or partial incapacity, resulting as aforesaid, as would suffice to support a contingent claim. Accordingly, (it was said) the deceased liquidator was under no obligation, under the Companies (Winding-Up) Rules, 1929, r. 104 (2), to give notice of the day fixed under r. 104 (1) to the respective last-known addresses or places of abode of the four claimants, and he had fully satisfied the requirements of r. 104 (2), so far as they and all the other victims of recorded accidents were concerned, by means of the notice by advertisement
E given in Sept., 1943. It was, therefore, contended that, by virtue of r. 104 (1), the deceased liquidator was entitled at any time after Nov. 1, 1943 (the day fixed by the advertisement), to proceed to distribution among the shareholders without regard to any possible liability to the workmen, and that the effect of the distribution, as actually carried out by him, was to defeat their claims, not merely to the extent of the assets actually distributed before notice of such claims was received by him, but also as against assets remaining in hand at the time of receipt of such notice, but earmarked or appropriated in account for the purpose of completing the distribution previously begun. It was submitted that, so soon as a liquidator, having become entitled to distribute among the shareholders, has declared a distribution of so much per share and has partly effected it by making the appropriate payments to some of the shareholders, the assets remaining in his hands, to the extent necessary to complete the
F distribution thus commenced, become fixed with a trust in favour of the shareholders who have not yet received their proportion of the distribution, so as to oust the claim of a creditor coming in between the commencement of the distribution and its completion. Otherwise, it was said, the distribution would be disturbed, as the shareholders who had received their proportion before the belated creditor came in would be overpaid at the expense of those who had not.

G I cannot accept this contention. It seems to me to ignore the cardinal principle that, in a winding-up, shareholders are not entitled to anything until all debts have been paid. If it was right, it would have equal application if the creditor's claim came in after the liquidator had paid away to shareholders only a minute fraction of the amount of the declared distribution. Indeed, one form in which the argument was put to me actually was that the amount of a declared distribution ought to be treated as having been actually paid
H away by the liquidator on the date of declaration, which would defeat a creditor afterwards coming in even though the whole of the assets intended to be distributed then actually remained in the liquidator's hands. No case has been cited to me in which it has been held that r. 104 has the effect, as between creditors and shareholders of a company, of defeating the claim of a creditor, put in after a partial distribution among the shareholders, so far as regards the assets remaining undistributed at the date when the claim is received. No doubt, admission of the creditor's claim produces the result that some of the shareholders will have been overpaid at the expense of others, but the remedy (if

any) of the latter must, in my judgment, be in the nature of a claim for contribution against the former, and is not to be found in the exclusion of the creditor, who claims against any undistributed assets by title paramount. Thus, even on the assumption that the deceased liquidator was fully entitled to distribute as he did without taking any steps to ascertain the position regarding workmen's compensation claims beyond the advertisement pursuant to r. 104, the four claims in question, to the extent to which they can be substantiated, must, in my judgment, be provided for out of the balance now remaining in hand. On the same assumption, recourse could not, in my opinion, be had to the sum allocated to the deceased liquidator's remuneration or against his estate, either to satisfy the three claims notified after Mar. 11, 1946, or to compensate the unpaid "A" shareholders in respect of the loss suffered by them in consequence of the whole of any provision for these claims having to be made out of their proportion of the assumed surplus.

I find myself, however, unable to hold that the deceased liquidator did fully perform his duty as regards the ascertainment of the company's liabilities, accrued or contingent, for compensation to former employees of the company (including the four claimants now before the court) shown by the company's records in his possession to have been injured prior to the commencement of the insurance effected in 1933 in accidents arising out of and in the course of their employment by the company and not covered by the insurance effected in 1938. He had in his possession, in the folders to which I have referred, the names and addresses at the dates of their respective accidents of all such persons from May, 1918, onwards (with the exception of those cases which were considered not to be "live" when Mr. Wright took over from local compensation officers in 1929 and 1934 the records relating to employees at certain of the company's works and yards), and, in every case in which compensation had been paid, the claim form signed by the workman and medical report, and also, in every case in which a declaration of liability had been filed, a copy of such declaration. He must, in my judgment, be taken to have known, as liquidator—and there is no doubt on the evidence that he did actually know in his previous capacity—that the company's records included these facts and documents. He must further, in my judgment, be taken to have known that, in every case in which a declaration of liability had been filed, and also in every case in which there had been no such declaration but weekly compensation had been claimed and paid so as to fix the company with an admission of liability, the company was under a continuing liability to pay compensation for total or partial incapacity for work resulting from the injury caused by the accident, whenever such incapacity might occur or recur. He, therefore, must, in my judgment, be taken to have known that he had the names and addresses (at the dates of the relevant accidents) of a large number of former employees of the company each of whom had, at all events, a contingent claim against the company for compensation unless he had in the meantime died or had so completely recovered from the effects of his accident as to make any further total or partial incapacity for work resulting from the injury out of the question. In such circumstances, it seems to me that his duty as liquidator was to take all steps reasonably open to him on the information in his possession to ascertain whether any of the former employees concerned did make any such claim. The obvious step open to the deceased liquidator on the information in his possession was to send a notice to each such employee at the address shown in the folder relating to his case, informing him of the liquidation and asking him whether he made any claim. I decline to accept the suggestion that the number of cases involved rendered this course impracticable. A far larger number of shareholders were communicated with personally in the course of the winding-up. The deceased liquidator got in a total of upwards of £822,000 assets of the company which it was his statutory duty under the Companies Act, 1929, s. 247, to apply in satisfaction of the company's liabilities before any distribution among the shareholders. The fact that the company's operations had been extensive and, consequently, that the ascertainment of the company's liabilities accrued or contingent to ex-employees injured in accidents sustained in the company's service would have involved a considerable amount of correspondence, work and expense could not absolve him from taking proper steps to ascertain those liabilities. Nor can I accept the suggestion that personal communication

with the former employees concerned would have been fruitless because the addresses in the records were not necessarily their present addresses. In each of the four cases before the court communication with the former employee concerned at the address recorded in his folder would, in fact, have reached him, and I have no doubt that in many other cases notices sent to the recorded addresses would have been similarly received. In recorded cases in which notices sent to the recorded addresses produced no reply, and also in unrecorded cases (*i.e.*, those occurring before May, 1918, and those omitted as no longer "live" from the records taken over by Mr. Wright in 1929 and 1934) the statutory advertisement under the Companies (Winding-Up) Rules, 1929, r. 104 would, no doubt, be appropriate, but I decline to regard the provisions of r. 104, as to notice by advertisement, as absolving a liquidator from individual communication with persons named, with their addresses, in the company's records, and appearing from those records to be persons who have or may have claims accrued or contingent against the company. I also decline to regard the provision in that rule requiring the liquidator to give notice to the last known address or place of abode of each person who, to the knowledge of the liquidator, claims to be a creditor of the company as limiting his duty of personal communication to cases in which he actually knows that the person communicated with does claim to be a creditor, as opposed to cases in which he knows that the person concerned may claim to be a creditor and he is in a position to find out whether such person does so claim or not by writing to him. The observations on the duty of a liquidator as regards the ascertainment of claims against the company contained in *Pulsford v. Devenish* (1) and *James Smith & Sons (Norwood), Ltd. v. Goodman* (2) appear to me to be much in point, and, for the reasons above stated, I think that the deceased liquidator in the present case failed adequately to discharge such duty.

It follows from the view I have formed as to the conduct of the deceased liquidator that two further questions arise, namely:—(i) What further steps should now be taken to find out whether there are any other, and, if so, what, accrued or contingent claims to compensation on the part of any of the former employees of the company, particulars of whose cases are included in the company's compensation records? (ii) Whether the unpaid "A" shareholders may not be entitled to claim against the sum retained to provide the deceased liquidator's remuneration and, if necessary, against his estate, to make good any loss they will have sustained through the discharge of the whole of any payments or provision to which the four claimants now before the court, and any other former employees of the company in similar cases, may be found entitled, out of those "A" shareholders' proportion of the assets, instead of out of the assets as a whole? The second of these questions is not now before me, and I say nothing about it, except that the sum retained to provide the deceased liquidator's remuneration must be kept in hand until the position both as regards the compensation claims and as regards possible claims by these "A" shareholders has been cleared up. On the first question, I was asked in the course of the hearing to give directions in the event of my forming the conclusion I have now reached. Subject to any suggestions counsel may have to make (for the point has not so far been argued), I think that the present liquidator should now take the steps which, in my judgment, the former liquidator ought to have taken in the first instance, that is to say, he should send a circular letter (in a form to be settled in chambers if necessary) to every former employee of the company (other than the four claimants now before me, the 141 persons covered by the insurance effected in 1938, cases which occurred after the commencement of the insurance effected in 1933, and cases finally settled by lump sum payments) who appears from the company's compensation records to have sustained an accident while in the company's service and in whose case either (a) a declaration of liability was filed, or (b) it appears from the company's records that there was resulting total or partial incapacity for work in respect of which weekly compensation was claimed and paid, addressed to such former employee at his address as stated in the company's records, informing him of the liquidation of the company and instructing him, if he considers he has any further claim against the company for compensation in respect of total or partial incapacity for work (actual or prospective) resulting from the injury caused by the accident, to send particulars of such claim to the

liquidator at a specified address by a specified date.

Order accordingly. Costs of the liquidator, of the respondent shareholder, and of the four respondent workmen, to be taxed as between solicitor and client and paid as part of the expenses of the liquidation.

Solicitors: *Allen & Overy* (for the present liquidator); *Peacock & Goddard* (for the personal representatives of the deceased liquidator); *Wallace Harden* (for the unpaid "A" shareholder); *W. H. Thompson* (for the workmen).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.] A

ROLLO AND ANOTHER v. MINISTER OF TOWN AND COUNTRY PLANNING

[KING'S BENCH DIVISION (Morris, J.)]

ROLLO v. MINISTER OF TOWN
AND COUNTRY PLANNING.
([1947] 2 All E.R. 488).
Affirmed. C.A. . . . [1948] 1 All E.R. 13

Town and Country Planning—New town to be proposed new town—Consultative sched. I, para. 1.

On July 10, 1946, three weeks before the New Towns Act, 1946, became law, a meeting took place between representatives of the Minister of Town and Country Planning and those of the local authorities concerned at which the Minister proposed to "outline the main factors which . . . led him to consider the Crawley-Three Bridges area especially suitable to be the site of the new town . . ." On Sept. 7, 1946, the Minister published a draft Order designating a certain area at Crawley as the site of a proposed new town, and accompanied the draft with a statement that: "At this preliminary stage the intention is that the proposed new town of Crawley shall, when fully developed, be self-contained in that accommodation will be provided for a total population of about 50,000 and that a proper balance will be maintained between industrial and residential development." In a subsequent affidavit the Minister deposed that this statement contained all the information which he considered necessary for indicating the size and character of the proposed town. On Oct. 7, 1946, a second meeting was held between representatives of the Minister and the local authorities at the latter's request, "to explain the considerations which the Minister had in mind in arriving at the boundaries of the area." Objections were raised to the proposed order and on Nov. 4, 5 and 6, 1946, a public local inquiry was held.

HELD: (i) the statement which, by sched. I, para. 1, to the Act, must accompany the publication of the draft Order is to be such a statement as the Minister, not the court, considers necessary for indicating the size and general character of the proposed new town, and, therefore, the requirements of sched. I, para. 1, in this respect had been complied with.

Semle: if, in any case, the Minister gives all the information which he has, the statutory requirement will not be satisfied unless that information is all he considers necessary for the specified purpose.

(ii) in considering whether or not there has been "consultation," within s. 1 (1) of the Act, between the Minister and local authorities it is necessary to look at the substance and reality of what occurred and to determine whether the local authorities have had proper opportunity of expressing their views and tendering advice.

(iii) the consultation between the Minister and local authorities prescribed by s. 1 (1) of the Act need not take place before the preparation of the draft Order; it is sufficient if it takes place before the Minister makes a final Order; and the proceedings of July 10 and Oct. 7, taken together, constituted fulfilment of the Minister's obligation to consult under s. 1 (1).

Semle: "consultation" within s. 1 (1) could take place before the passing of the Act.

(iv) "consultation" within s. 1 (1) need not be concerned with the selection of a site, it can consist of consideration of a chosen site.

(v) a statement by a local authority that it is not interested in a proposal to designate a site does not relieve the Minister of his obligation to consult that authority, nor does the attendance of representatives of a local authority at a local inquiry after objecting to a scheme, and the urging of certain contentions at the meeting. If a local authority does not contend that it has not been consulted, it is open to another interested party to put forward that contention.

A [FOR THE NEW TOWNS ACT, 1946, s. 1 (1) and sched. I, para. 1, see HALSBURY'S STATUTES, Vol. 39, pp. 664 and 682 respectively.]

Cases referred to :

- (1) *Re Stevenage New Town (Designation) Order*, 1946, *Frankin v. Minister of Town and Country Planning*, [1947] 2 All E.R. 289.
- (2) *Robinson v. Minister of Town and Country Planning*, [1947] 1 All E.R. 851.

B APPEAL by two residents of Crawley, under the New Towns Act, 1946, against the Crawley New Town (Designation) Order, 1947, made by the Minister of Town and Country Planning. The appellants submitted that the Minister had failed to give sufficient information in regard to the proposed new town, and that he did not have proper consultation with the local authorities concerned. The court dismissed the appeal, the facts of which appear in the judgment.

Capewell, K.C., and *Rees-Davies* for the appellants.

C *The Attorney-General (Sir Hartley Shawcross, K.C.)* and *H. L. Parker* for the Minister.

Cur. adv. vult.

July 30. MORRIS, J., read the following judgment. By this motion application is made to the court by two residents in Crawley in the county of Sussex who desire to question the validity of an order made by the Minister of Town and Country Planning on Jan. 8, 1947, purporting to be in pursuance

D of the powers given to the Minister by the New Towns Act, 1946, s. 1 (1). The order is cited as the Crawley New Town (Designation) Order, 1947. The appellants invite the court to quash the Order. Before the hearing the appellants informed the Minister that reliance would only be placed on two grounds. One is that the Order is not within the powers of the New Towns Act, 1946, and/or that the requirements of the said Act and/or sched. I thereto have not been

E complied with, and/or that the interests of the appellants have been thereby substantially prejudiced by the said Act, and/or by the requirements thereunder not having been complied with. The other ground is that the New Towns Act, 1946, impliedly requires that the draft Order and the objections of the appellants thereto should be fairly and properly considered by the Minister, and that the Minister should give fair and proper effect to the result of such consideration in deciding whether the said Order should be made

F and that such implied requirements were infringed. The Town and Country Planning Act, 1944, s. 16, applies to an Order made under the New Towns Act, 1946, s. 1. Reference to that section shows that the court may quash the Order now under consideration if it is not within the powers of the New Towns Act, 1946, or that the court may quash the Order if the interests of the appellants have been substantially prejudiced by some failure to comply with a requirement of the Act.

G The first ground of the notice of motion raises two complaints, namely, that the Order is not within the powers of the New Towns Act, 1946, and that requirements of the Act have not met with compliance. In regard to the latter complaint the appellants must, if they establish it, further show that they have been substantially prejudiced. The reasons stated in the notice of motion for the first ground are not separately and individually assigned as between a

H complaint that the Order is *ultra vires* and a complaint of non-compliance with requirements. Each reason must be carefully examined. Broadly stated, counsel for the appellants made three main submissions in reference to this first ground of the notice of motion : (a) that the Minister failed to give sufficient information in regard to the proposed new town ; (b) that the Minister did not have proper consultation with the local authorities concerned, and (c) that no proper local inquiry was held.

The New Towns Act, 1946, s. 1 provides :

- (1) If the Minister is satisfied, after consultation with any local authorities who appear

to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town by a corporation established under this Act, he may make an order designating that area as the site of the proposed new town.

The first part of sub-s. (2) provides that the provisions of sched. I to the Act are to have effect with regard to the procedure to be followed in connection with the making of Orders under the section. Schedule I provides :

Where the Minister proposes to make an order under s. 1 of this Act, he shall prepare a draft of the Order, describing the area to be designated as the site of the proposed new town by reference to a map, either with or without descriptive matter (which, in the case of any discrepancy with the map, shall prevail except in so far as may be otherwise provided by the draft order) together with such statement as the Minister considers necessary for indicating the size and general character of the proposed new town.

The Minister prepared a draft of an Order designating an area of approximately 6,250 acres situate in the rural district of Dorking and Horley, the rural district of Horsham and the rural district of Cuckfield as the site of a proposed new town. Annexed to the draft Order was a map which showed the proposed area of land enclosed by a black line edged blue. Accompanying the draft Order was a statement made by the Minister indicating the size and general character of the proposed new town. The statement was as follows :

At this preliminary stage the intention is that the proposed new town of Crawley shall, when fully developed, be self-contained in that accommodation will be provided for a total population of about 50,000 and that a proper balance will be maintained between industrial and residential development.

The appellants complain that this statement was inadequate. The complaint is thus framed in the notice of motion :

(a) The Minister or his representatives or the inspector did not give any or any proper information to the objectors with regard to the proposed draft Order, and/or explain the purpose of the proposals and how such purpose could be achieved, and/or give any or any proper indication of the general character of the proposed new town ; (b) The objectors were deprived of the opportunity of adequately presenting their objections. In reference to that statement, the Minister, in an affidavit sworn on June 10, 1947, deposed in these words :

This statement contained all the information which I considered necessary for indicating the size and general character of the proposed town, and, indeed, was the only information for that purpose which I was in a position to give at that date.

It will be seen that the Act of Parliament, by the provision in sched. I, lays it down that the statement is to be such as the Minister considers necessary for indicating the size and general character of the proposed new town. It is not such a statement as the court considers was necessary. Parliament has entrusted to the Minister the duty of framing such a statement as he considers necessary. In the present case it is clearly shown that the Minister did make such a statement as he considered necessary for indicating the size and general character of the proposed new town. The statutory requirement has, therefore, as to this matter been satisfied. In his affidavit the Minister stated that the information which he gave was all that he was in a position to give. It was really superfluous for this to be stated, for it was immaterial whether the Minister could have given more information than he did so long as he did give all that he honestly considered necessary for indicating the size and general character of the proposed new town. Equally, if the Minister in a particular case gives all the information which he has, the statutory requirement will not be satisfied unless that is all that he considers necessary to indicate size and general character. Counsel for the appellants stated, however, that, as the Minister had deposed in the terms which I have quoted, he desired to cross-examine the Minister on his affidavit. Accordingly, the Minister attended for cross-examination. He stated that the information which he had gathered through his various consultations was not in connection with the character of the proposed town, but in connection with the suitability of its proposed location. He regarded the word " character " in relation to a town as referable to such questions as whether the town was to be a holiday or a dormitory or an industrial town. He agreed that the words which had been used to describe the size and general character of some proposed other new towns under the Act had been virtually the same as those used in the present case, but explained

that the reason was that all the proposed new towns intended to be created to meet the problem of dispersal from London had the same common features as to size and general character. On behalf of the appellants, it was urged that there was insufficiency of information in that there was no indication as to which parts of the proposed area would be zoned for industrial, and which for residential, purposes, and that knowledge as to this would be greatly desired by residents, many of whom might not be able to decide without such knowledge, whether to object or not. The Minister was asked about this, and pointed out that he was not himself going to do any zoning, but that, in accordance with the Act, plans and proposals for the new town would be prepared by a Development Corporation which would be established, and that he would then consider such plans and proposals. Having heard the Minister's evidence, I see no reason to doubt his statement that, in regard to the questions of the size and general character of the proposed new town, he gave all the information which he was in a position to give, nor to doubt that he gave all that he considered necessary. The complaint that the Minister failed to give sufficient information is, therefore, not substantiated.

The next question to be considered is whether the Minister had proper consultation with the local authorities concerned. On behalf of the appellants, counsel made a number of submissions in regard to this point. He submitted that at no time was there "consultation" in the true sense of that word as used in the statute. Further, he submitted that, in any event, there was no consultation with all the local authorities concerned, and also that no meeting which took place before Aug. 1, 1946, when the Act received the Royal Assent, could be regarded or relied upon as being a consultation which complied with the provisions of the statute. Additionally, he urged that consultation should be before a draft of an Order is prepared. In connection with these submissions, it is necessary to bear in mind the exact statutory provisions, to which I have already referred. It is to be observed that Parliament has expressly enacted that it is for the Minister to decide which are the local authorities that are concerned. There must be consultation with such local authorities as may appear to the Minister to be concerned. In his oral evidence the Minister stated that he had considered what local authorities were concerned and had come to the conclusion that parish councils were not concerned in the matter. He had further come to the conclusion that it was not necessary to consult the Sussex and Mid-Surrey Joint Planning Committee. If, on a consideration of the facts to which I am about to refer, it is held that there was "consultation" within the meaning of that word in s. 1 (1) of the Act, then I consider that such consultation was with such local authorities as appeared to the Minister to be concerned.

A meeting took place on July 10, 1946. This was three weeks before the New Towns Act, 1946, received the Royal Assent, but was at a time when the probable future shape and terms of the Act could be foreseen, always assuming that the Bill was passed and the Royal Assent given. The circumstances under which the meeting took place are set out in the affidavit of Mr. Beaufoy, Assistant Secretary in the Ministry of Town and Country Planning, sworn on June 4, 1947. Mr. Beaufoy deposed as follows:

In June, 1946, the Minister instructed me to convene a conference at the Ministry of Town and Country Planning, 32, St. James's Square, London, S.W.1 on July 10, 1946, and, accordingly, I invited representatives of the East Sussex County Council, the Cuckfield Rural District Council, the West Sussex County Council and the Horsham Rural District Council, whose districts or part thereof were within the areas proposed to be designated as the site of the new town, and I also invited representatives of the Surrey County Council and the Dorking and Horley Rural District Council, although at that time it was not proposed to designate any land within their districts.

The letter arranging the meeting of July 10, which was dated June 25, 1946, was in these terms:

I am directed by the Minister of Town and Country Planning to inform you that he has under consideration the development of a new town in the Crawley-Three Bridges area in Sussex. This proposal is, of course, a further step in the implementation of the policy of His Majesty's government for the planning of London, and, in particular, in the execution of a programme of decentralisation from its congested inner areas to the country outside the green belt ring. In the circumstances the Minister would welcome an early meeting with representatives of the local authorities primarily con-

cerned in this proposal, and he hopes that these authorities will share his view that even at this initial stage—when, necessarily, detailed proposals cannot exist to be discussed—such a meeting would fulfil a useful purpose. At such a conference the Minister for his part would propose to outline the main factors which have led him to consider the Crawley-Three Bridges area especially suitable to be the site of a new town and would indicate any general considerations which have so far emerged in relation to its development. I am accordingly to invite your council to nominate, say, two representatives to attend a conference on this subject with the Minister to be held in the conference room at 32 St. James's Square, at 2.45 p.m. on Wednesday, July 10.

The meeting was held and was attended by representatives of all the local authorities invited, and it was agreed that a statement should be issued for publication in the public Press. Copies of the minute which was prepared were sent to those represented at the meeting.

It may be convenient at this stage to mention certain further facts and dates. On Sept. 7, 1946, there was published a draft of the Order which the Minister proposed to make. Objections to the proposed Order were made, and, on Nov. 4, 5 and 6, a public local inquiry was held. I use these words at the moment as convenient words of description, while not forgetting that the appellants contend that no proper or satisfactory public local inquiry was held. Before that inquiry a meeting took place on Oct. 7, 1946, between Mr. Beaufoy and other officers of the Ministry of Town and Country Planning and representatives of the local authorities which had been represented at the meeting with the Minister on July 10. The local authorities were as follows: Surrey County Council, West Sussex County Council, East Sussex County Council, Dorking and Horley Rural District Council, Horsham Rural District Council, and Cuckfield Rural District Council. Representatives from Crawley, Slaughtam and Worth Parish Councils also attended on this occasion. On Nov. 19, the inspector who held the public local inquiry, presented his report to the Minister. On Jan. 9, 1947, the Minister made the Order which is the subject of these proceedings.

The meeting held on Oct. 7 came about in the following circumstances. An informal meeting took place on Sept. 23 of representatives of some of the local authorities to whom I have referred. At that meeting there was a discussion about the Minister's proposed designated area for the new town. As a result, a letter dated Sept. 24 was sent to the Ministry inviting the Minister to send a representative to Crawley to meet a gathering of representatives of interested local authorities. The letter contains the following passages:

From the views expressed at this meeting [the meeting of Sept. 23] it is evident that there will be objections to the Minister's proposal. Furthermore, there is a general feeling that it is difficult to formulate intelligent and constructive criticism of the proposed area and its boundaries without knowing and being able to appreciate the reasons which prompted the Minister to fix the boundaries as he has. The meeting resolved that I should invite the Minister to send a representative to Crawley at an early date to explain to a gathering of representatives of interested local authorities the considerations which the Minister has had in mind in arriving at the boundaries of the area. It is felt that, if this could be done, much present confusion of thought would be cleared up, and certain objections now beginning to take shape might be met in their early stages, thus lessening the trouble and expense involved in any public inquiry.

A note was made of what took place at the meeting on Oct. 7. Mr. Beaufoy gave a brief account of the considerations which had led the Minister to decide on the course of the boundary of the designated area for the new town, and then he and Mr. Thomas Sharp, the planning consultant for the proposed new town, and a representative of the Ministry of Transport answered questions. Some 39 or more persons were present at the meeting. At the public local inquiry there were appearances on behalf of various local authorities, and there was opportunity for those bodies to make representations. Questions were put by counsel appearing for the present appellants to those who appeared on behalf of the various local authorities, and, in particular, the question was put to them whether before the inquiry their particular local authorities had been consulted by the Minister in regard to the draft Order. As this is a matter which the court now has to determine on a consideration of all the material available, the answers given by the witnesses cannot, in my judgment, be in any way conclusive. It may, however, be useful to indicate what some of the witnesses said. Mr. Sellick, the clerk to the Dorking and Horley Rural District Council,

said that there was no consultation before the issue of the draft Order, but that there was afterwards. Mr. Heber-Davies, appearing on behalf of the Mid-Surrey Joint Planning Committee, answered likewise. Mr. Hayward, the clerk to the West Sussex County Council appeared for that body. The transcript of the hearing shows that certain questions and answers were as follows :

A MR. REES-DAVIES : May I put this by way of an omnibus question ? Has any local authority been consulted with reference to this matter before the draft Order was issued ? Then there is a second question : Has any member of any local authority concerned been told the details of the lay-out and the character of the proposed plan ? I think that covers the two points. First of all, were they consulted ; was it talked over with them before the plan ? Secondly, have they been told anything of the character or details of the proposed plan ?

B MR. HAYWARD : I should like to answer those two points very briefly. It depends what you mean by consultation, but the local authorities were called to a conference by the Minister at a comparatively early stage to inform them that it was his intention to proceed with the establishment of a new town at this particular point and at that conference the actual boundaries were not discussed. So far as I am aware, there was no consultation in relation to the draft Order setting out the designated area, the boundary of the designated area, before the issue of that draft order. The second point is—

C MR. REES-DAVIES : It is the question of whether the lay-out of the plan, that is, the character of the town, the factories and houses, and so on, was dealt with at all in general consultation.

D MR. HAYWARD : In general consultation that was dealt with in broad outline, telling us what type of town this would be. We were told it was the intention that certain industries would be established in the area and they wanted to get a fair cross-section of all types of people living in the area, but the actual detailed plan has not been discussed with us and I do not believe it exists today, at the moment. It is probably in course of being prepared, but we do not know the lay-out or particular zonings of the areas in any detail and I do not believe the Minister knows it either.

THE INSPECTOR : Do you wish to have the answers from the others ?

MR. REES-DAVIES : I should be very much obliged.

MR. HEBER-DAVIES : I think I have already answered those questions.

MR. H. S. MARTIN : I stand where Mr. Hayward stands.

E Mr. Martin is the Clerk of the East Sussex County Council and of the Cuckfield and District Joint Planning Committee, and appearing on behalf of both those bodies. The transcript records the following questions, answers and observations :

MR. REES-DAVIES : There is one other matter, on the question of consultation. May I take it that the statement we have before us is the sole information which you have been given ? That is, the document which was read at the start of these proceedings.

THE INSPECTOR : I think the reply is the same as Mr. Hayward's. There were preliminary—

F MR. REES-DAVIES : I was trying to find out to what extent the word " consultation " applied. Was there any other matter, other than that set out in the statement ?

MR. MARTIN : There was the meeting to which Mr. Hayward referred.

THE INSPECTOR : As to the rough outline of the plan.

MR. MARTIN : There was an official note issued of that conference.

MR. REES-DAVIES : Did the official note of that conference deal with that matter ? Or did it cover further ground ?

G MR. MARTIN : It is on the record. I have not got a copy here.

MR. REES-DAVIES : Is there any possibility of having a copy of that ?

MR. MARTIN : I do not know if this is a question between counsel and myself. I think it is rather a question between the objector and the Ministry. I have given the information I have got and I am not making any objection to lack of consultation.

H Viscount Gage, a councillor of the East Sussex County Council made a statement, in the course of which he said that they were not opposing the proposed site except in matters of detail. Mr. Tulk, appearing as chairman of the Surrey County Council, was asked about consultation. The transcript records as follows :

MR. TULK : I think the answer, so far as my council is concerned, is that we were not consulted, and it was a question I raised at the informal conference in October. I asked if the Mid-Eastern Town Planning Committee had been consulted, and I was told that they had not been consulted. I was told that it was a genuine mistake that they had not been consulted.

MR. REES-DAVIES : Is it right to say that today is the first opportunity you have had to lay before the Minister your objections to any part of this scheme ?

THE INSPECTOR: They have been submitted in writing.

MR. TULK: Yes, I think that is so.

MR. REES-DAVIES: Apart from your own submission in writing?

MR. TULK: That is so.

It is to be observed that the Surrey County Council were represented at the meetings on July 10 and Oct. 7. Mr. A. W. Laidman appeared on behalf of the Horsham Rural District Council (in whose area Crawley is situated), and stated that his council had no serious objection to the establishment of a new town in the Crawley-Three Bridges area. Mr. L. Manwaring, the clerk to the Cuckfield Rural District Council, appeared on behalf of that body. It would not appear that the local authorities have made complaint in regard to lack of consultation, but whether they have or not seems to me to be immaterial. The present appellants are fully entitled to raise this matter, and on their behalf it is urged that local authorities have the expert staff and the knowledge and the resources to enable them to make effective observations in regard to any proposals, and that they owe to local inhabitants a duty carefully to consider such proposals, and that they cannot effectively discharge this duty unless proper consultation with them takes place. It is also submitted that the complaint as to inadequacy of information is interlocked with the complaint as to non-consultation, for it is said that there can be no satisfactory consultation unless there is adequate information as to the topics about which consultation is to take place.

I have already dealt with the question whether the Minister made a statement which satisfied the statutory requirement of para. 1 of sched. I to the Act, but both in reference to that matter and to the question of consultation it is important to bear in mind the purpose and provisions of the Act. The Act is one to provide for the creation of new towns by means of development corporations. Section 1 of the Act refers to the designation of sites of new towns. The Minister is not charged with the duty of presenting a detailed picture of how the future town will look. Indeed, he must not prejudge this matter or usurp the functions of others. Section 2 of the Act provides that for the purposes of the development of each new town, the site of which is designated under s. 1 of the Act, the Minister is to establish a development corporation whose objects shall be to secure the laying-out and development of the new town. In regard to the question when consultation must take place, I do not find any warrant in the Act for the submission that it must be between the date of the passing of the Act and the preparation of a draft of an Order. It may well be that consultation before such preparation would be fruitful and satisfactory, but, in my judgment, the only statutory stipulation is that consultation with such local authorities as appear to the Minister to be concerned should precede the making of a decision by the Minister whether he is satisfied that it is expedient in the national interest that any area of land should be developed as a new town by a development corporation and the making of an Order designating such area as the site of the proposed new town.

On the further matters which arise, the conclusion I have reached is that, by the proceedings of July 10 and Oct. 7, taken together, there was fulfilment of the statutory obligation to consult. The meeting of July 10, being followed by the preparation of the draft Order dated Sept. 7, led to the informal meeting of representatives of the local authorities on Sept. 23, which, in turn, brought about the meeting of Oct. 7. It is said that the meeting on July 10 could not amount to statutory consultation since it was before the passing of the Act. Having regard to the facts of this case, it becomes unnecessary to decide this point, but I see no reason why a consultation, if otherwise fully effective, should not avail even though it took place in anticipation of legislation. The consultation in such a case would not at the time be held pursuant to any statute, but no question of the retrospective operation of a statute would arise. The position would simply be that the Minister had, in fact, held a consultation which had enabled him to derive the assistance which consultation could yield to him, but a consideration of this question would depend on the precise facts of each particular case.

It is said, further, that the meeting of July 10 was not, in any events, a consultation in the ordinary normal sense of that word, but was a meeting at which a provisional decision was announced. It is said that a consultation

under s. 1 of the Act must be one concerned with the selection of a site, and must not be merely in the nature of a consideration of a chosen site. Certain passages and expressions in the documents concerning the meeting were referred to by counsel who suggested that they indicated that the local authorities were being told what was going to be done rather than being consulted about what should be done. These submissions are not without force, and a reference to the letter of June 25, 1946, shows that there was no express invitation to the local authorities to formulate and state their views. It must be realised, however, that in the nature of things a Minister must tentatively formulate some suggestion or proposal in reference to a particular site. Indeed, only when he has done so can it be decided which local authorities would appear to him to be concerned. It would be unfruitful to consult certain local authorities at large, and without any thought or idea that in their locality a possible suitable site could be found. The roving enquirer might find himself perpetually speeded on his way and encouraged to believe that what he sought lay always further on. It is reasonable also to bear in mind that by the letter of June 25 the information was imparted that the Minister had under consideration the development of a new town in the Crawley-Three Bridges area, and invitations to a conference to be held fifteen days later were extended. The local authorities had opportunity to get together and to consider what to do. If any serious objection to the proposal occurred to them, there is no reason to suppose that they would have been reluctant or timid to express it. If there were any considerations which they felt that they wished to put before the Minister, they had every opportunity to put them, and it seems to me inconceivable that they would have refrained from raising any matter that they considered of moment. The note in regard to the meeting of July 10 records that at its conclusion the appreciation of those present was expressed for their having had an early opportunity of discussing the proposal with the Minister. Their readiness to co-operate was promised. If, on later reflection, it had seemed to any of those present that some relevant considerations had been overlooked, it can hardly be thought that they would not have communicated them to the Minister. Nearly six months passed before the Order of Jan. 9, 1947, was made, and during that time those who had welcomed an early opportunity to discuss the proposal would not have withheld the proffering of any advice which knowledge of local conditions might have prompted them on reflection to offer. It is said that, in effect, the local authorities were invited to hear a pronouncement and that their views were not being sought, and that, as questions were invited, they were, perhaps, given opportunity for enlightenment, but were not being asked to contribute from their store of local knowledge or experience. This seems to assume or to suggest that the representatives of the local authorities would be too submissive to express criticism either constructive or monitory. In my judgment, it is necessary to look, not at the terms of particular letters, but rather at the substance and reality of the matter. After the letter of June 25, the local authorities were expressly or impliedly invited, either on July 10 or at a subsequent time, to say anything to the Minister that would illuminate the consideration of the project of developing a new town in the Crawley-Three Bridges area. When the meeting of Oct. 7 took place it was held against the background of all that had taken place. After the meeting of July 10 there was a communication to the Press. Then, on Sept. 7, came the draft Order, and the meeting of Oct. 7 was a month later. That it originated in a request from the local authorities does not militate against its being a consultation within the meaning of the statute. By the date of it there had been ample time for opinion to form and for questions and problems to present themselves. The particular points raised by the local authorities are indicated in the letter of Sept. 24. When the request for a meeting was acceded to it must have been in the minds of all concerned, not merely that the Minister's representative would, if he could, answer questions that were raised, but that the local authorities would have the opportunity to present for the consideration of the Minister any ideas or fears that occurred to them. After the meeting of Oct. 7 it would not be reasonable to suppose that the local authorities could proffer some important advice but would, for no explicable reason, withhold it.

It was said on behalf of the Minister that, if a local authority states that it is not interested in a proposal to designate a site the Minister need not further

consult them. I do not accede to this view, though I doubt whether this point here arises. Indeed, I cannot imagine that local authorities would be likely to be non-co-operative. Though a Minister could not extract advice if there was a refusal to tender it, it remains the duty of the Minister to do all in his power to hold consultation with those local authorities which appear to him to be concerned in a proposed site. Nor do I accede to any submission that, if local authorities do not contend that they have not been consulted, it is then not open to others to put forward that contention.

It was submitted that, if a local authority objects to a scheme and then appears and is represented at a local inquiry and there urges certain contentions, then sufficient consultation with such local authority will have taken place. On the view which I have formed this point does not arise for decision, but I feel it right to say that I do not accede to this submission. In a particular case it might happen that a local authority would impart the same information when appearing at a local inquiry as it would if consulted, but, in my judgment, the statutory duty of the Minister to consult does not disappear, or is not performed, merely because a local authority embraces the opportunity to make a statement at an inquiry. It might, however, be the case that, if consultation had not preceded the holding of a public local inquiry, the course taken by some local authority at a public local inquiry might have some relevance when the Minister was deciding which local authorities appeared to him to be concerned. The holding of consultation with such local authorities as appear to the Minister to be concerned is, in my judgment, an important statutory obligation. The Minister, with receptive mind, must by such consultation seek and welcome the aid and advice which those with local knowledge may be in a position to proffer in regard to a plan which the Minister has tentatively evolved. For the reasons which I have given, I consider that on the facts of this particular case consultation did take place so as to be a compliance with the statute.

The remaining contentions urged by counsel for the appellants were those which I have earlier indicated. In regard to them counsel frankly acknowledged that decisions of the Court of Appeal prevented his succeeding in regard to them. One contention was that no proper local inquiry was held. In view of the decision of the House of Lords in *Franklin v. Minister of Town and Country Planning* (1), this submission fails. The other contention put forward was that the Minister did not give fair and proper consideration to the draft Order and to the objections of the appellants. In view of the decision of the Court of Appeal in *Robinson v. Minister of Town and Country Planning* (2) and in view of the decision also in the *Stevenage* case (1), to which I have referred, this submission cannot succeed. For these reasons this application fails.

Appeal dismissed.

Solicitors: *Syrett & Sons* (for the appellants); *The Treasury Solicitor* (for the Minister).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

FLETCHER AND OTHERS *v.* MINISTER OF TOWN AND COUNTRY PLANNING.

[KING'S BENCH DIVISION (Morris, J.), July 14, 16, 17, 30, 1947.]

Town and Country Planning—New town—Duty of Minister—Consultation—New Towns Act, 1946 (c. 68), s. 1 (1).

On July 16, 1946, the Minister of Town and Country Planning invited the representatives of six local authorities to a conference on July 26 with regard to a new town in the Hemel Hempstead district, the development of which was under consideration by him. At that conference the Minister made a statement explaining the whole project, and then invited comments and questions from the representatives of the local authorities. On Aug. 1, 1946, the New Towns Act, 1946, became law, and on Sept. 27, 1946, the Minister published a draft Order which complied with the provisions of paras. 1 and 2 of sched. 1 to the Act. Objections were made and, as a result, on Nov. 19, 1946, the Minister attended a private meeting of the

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representatives of the six local authorities. At that meeting the Minister made no speech, but he invited questions. On Dec. 2, 3 and 5, 1946, a public local inquiry was held, and on Feb. 4, 1947, the Designation Order was made. It was submitted on behalf of the appellants that no proper consultation was ever held, since the consultation specified in s. 1 (1) involved an exchange of views between the Minister and those local authorities who appeared to him to be concerned and the seeking by the Minister of advice from the latter in circumstances in which it was made clear, either in express terms or by necessary implication, that a consultation for the purposes of the Act was at the time intended. It was also submitted, that no purported consultation taking place before the passing of the Act could be considered to be a consultation as specified in s. 1 (1), and that, subject to its being after the Act, the logical time for such a consultation was before a draft Order was made; that, in regard to the private meeting of Nov. 19, there were features that suggested that the meeting was not a consultation pursuant to s. 1 (1); that the procedure of inviting questions for answer negatived the idea of a consultation taking place; that the fact that at the meeting the Minister imposed a stipulation that a note which was being made should not be used in any later proceedings also negatived the view that there was consultation; that certain topics, such as the question of the water supply and of the sewerage system for the projected new town, were either expressly or impliedly stipulated not to be for discussion, that, accordingly, the Minister's mind was closed in regard to these subjects, and that, if these important subjects were excluded from discussion and the Minister was not welcoming or receiving advice on them, no consultation in any real and true sense was being held; and that, when the evidence in regard to the meeting of Nov. 19 is surveyed, the conclusion ought to be drawn that the Minister was giving his conceptions in regard to new towns and was explaining the reasons why he had selected Hemel Hempstead as the site of one of them, but was not consulting the local authorities.

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HELD: (i) if a consultation precedes the making of the final order the requirements of s. 1 (1) of the Act will have been satisfied, and, *semble*, there is no reason why a meeting held before the passing of the Act should not be a consultation within s. 1 (1).

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(ii) in deciding whether there has been a consultation within s. 1 (1) of the Act of 1946, the substance of the material events and not merely their form, must be considered; and it cannot be conclusive either way according to whether parties said in terms that a consultation under the Act was taking place, or to take place, or was intended, or whether nothing relative to this was said at all. The meetings of July 26 and of Nov. 19 were closely related and must be considered together. So linked, they constituted a consultation within s. 1 (1), the procedure adopted on Nov. 19 of inviting questions for answer and the fact that it was agreed that the proceedings on Nov. 19 should be private not being inconsistent with their being consultation on that date.

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(iii) on the facts, the obligation imposed on the Minister to have consultation in accordance with s. 1 (1) had been fulfilled.

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Per MORRIS, J.: The word "consultation" is one that is in general use and that is well understood. No useful purpose would be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultation may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one.

[FOR THE NEW TOWNS ACT, 1946, s. 1 (1), see HALSBURY'S STATUTES, Vol. 39, p. 664.]

APPEAL under the New Towns Act, 1946, to quash the Hemel Hempstead New Town (Designation) Order, 1947, made by the Minister of Town and Country Planning on Feb. 4, 1947, on the ground that there was no consulta-

tion complying with the Act between the Minister and the local authorities concerned. MORRIS, J., dismissed the appeal, the facts of which appear in his judgment.

C. L. Henderson, K.C., and G. A. Thesiger for the appellants.

The Attorney-General (Sir Hartley Shawcross, K.C.) and H. L. Parker for the Minister.

Cur. adv. vult.

July 30. MORRIS, J., read the following judgment. By this motion the appellants ask the court to quash the order made by the Minister of Town and Country Planning on Feb. 4, 1947, by which he designated an area of land, comprising approximately 5,910 acres and situated in the borough of Hemel Hempstead, the rural district of Hemel Hempstead, the rural district of St. Albans, and the rural district of Watford, as the site of a proposed new town. One only of the grounds set out in the notice of motion is relied on. That ground is that the Order is not within the powers of the New Towns Act, 1946, and, alternatively, that requirements of the Act have not been complied with in relation to the making of the Order and the interests of the appellants have been thereby substantially prejudiced, in that there was no consultation within the meaning of s. 1 (1) of the New Towns Act, 1946, between the Minister and the local authorities appearing to him to be concerned before the making of the Order designating the area of land in question as the site of a proposed new town.

It becomes necessary to determine whether, on the facts of the case, there was consultation between the Minister and the local authorities appearing to him to be concerned. If there was no consultation or no consultation which complied with the Act, then counsel for the appellants submits that the court should quash the Order on the ground that it was not within the powers of the Act in that the holding of consultation is a condition precedent to the making of an Order. Alternatively, he submits that it is a requirement of the Act that there should be a proper consultation with local authorities and that his clients' interests have been substantially prejudiced by non-compliance with this requirement. The central inquiry is, therefore, whether there was a proper consultation. No question arises as to which are the local authorities concerned. It is for the Minister to decide this. On the facts the Minister considered that the authorities concerned are the Hemel Hempstead Borough Council, Hemel Hempstead Rural District Council, Hertfordshire County Council, Watford Rural District Council, Mid-West Hertfordshire Joint Planning Committee and St. Albans Rural District Council.

Certain dates and events form the main structure of the facts to be reviewed. On July 16, 1946, a letter was addressed to the six local authorities whom I have named. The letter was in the following terms:

I am directed by the Minister of Town and Country Planning to inform you that he has under consideration the development of a new town in the neighbourhood of Hemel Hempstead. This proposal is, of course, a further step in the implementation of the policy of His Majesty's government for the planning of London and, in particular, in the execution of a programme of decentralisation from its congested inner area to the country outside the green belt ring. In the circumstances the Minister would welcome an early meeting with representatives of the local authorities primarily concerned in this proposal, and he hopes that these authorities will share his view that even at this initial stage—when, necessarily, detailed proposals cannot exist to be discussed—such a meeting would fulfil a useful purpose. At such a conference the Minister for his part would propose to outline the main factors which have led him to consider the Hemel Hempstead area especially suitable to be the site of a new town and would indicate any general considerations which have so far emerged in relation to its development. I am, accordingly, to invite your council to nominate, say, two representatives to attend a conference on this subject with the Minister to be held in the conference room at 32, St. James's Square, at 10.30 a.m., on July 26.

The local authorities replied that they would attend the proposed conference. The reply of the town clerk of the borough of Hemel Hempstead was as follows:

Your letter of July 16 has been considered by the town council, who have asked me to inform you that, in view of the importance of the suggested conference and the fact that this corporation would appear to be the authority most affected, the town council consider that it would be not unreasonable for them to appoint more than two representatives. I spoke to Mr. Tennant about this matter the other day and I gathered that there would be no objection on the part of the Minister. The town council have, accordingly, appointed the following [eight] representatives . . .

The conference was held on July 26, 1946, and was attended by the Minister, accompanied by about 9 officials of the Ministry. About 21 persons in all attended on behalf of the six local authorities. Notes of the proceedings were prepared both on behalf of the Ministry and on behalf of the town clerk of the borough of Hemel Hempstead. The Minister made a statement explaining the whole project, and then invited observations from the representatives of the local authorities either by way of comments or by way of questions. On

- A Aug. 1, 1946, the New Towns Act, 1946, passed into law, and on Sept. 27, 1946, the Minister published the draft of an Order and complied with the provisions contained in paras. 1 and 2 of sched. I to the Act. The draft Order indicated an area of land comprising approximately 7,930 acres situate in the borough of Hemel Hempstead, the rural district of Hemel Hempstead, the rural district of St. Albans and the rural district of Watford. Annexed to the draft Order was a map which showed the contemplated area enclosed by a black line edged blue.
- B The Minister also made a statement indicating the size and general character of the proposed new town. No criticism is made of that statement. Among objections that were received to the proposed Designation Order were objections from the Hemel Hempstead Borough Council, the Hemel Hempstead Rural District Council, the St. Albans Rural District Council and the Watford Rural District Council. The Hertfordshire County Council, while not objecting,
- C reserved the right to appear at a public inquiry. Because these objections were lodged the Minister decided that he would himself meet the representatives of the local authorities. This was to be at a private meeting to be held at Hemel Hempstead town hall on Nov. 19. The Minister further arranged to address a public meeting the same night. The public meeting was for the purpose of explaining his proposals. These meetings took place. At the meeting with the local authority representatives (at which the six authorities were represented) the Minister decided not to begin by making a speech, but thought that the best procedure would be for him to invite questions with which he would endeavour to deal. That procedure was followed. On Dec. 2, 3 and 5, 1946, a public local inquiry was held. The Hemel Hempstead Borough Council, the Hemel Hempstead Rural District Council and the Watford Rural District Council were objectors and were represented. On Dec. 13, 1946, the Minister received a report from the inspector who held the inquiry. On Feb.
- E 4, 1947, the Designation Order was made. The Order designates an area of 5,910 acres as compared with one of 7,930 acres referred to in the draft Order.

These being the main facts in outline, it is submitted on behalf of the appellants that no proper consultation was ever held. It is submitted that the consultation specified in s. 1 of the Act involves an exchange of views between the Minister and those local authorities who appear to him to be concerned and the seeking by the Minister of advice from the latter in circumstances in which it is made clear, either in express terms or by necessary implication, that a consultation for the purposes of the Act is at the time intended. It is also submitted that no purported consultation taking place prior to the passing of the Act could be considered to be a consultation as specified in s. 1 of the Act, and that, subject to its being after the Act, the logical time for such a consultation is before a draft Order is made. Additionally, it is urged that, in regard to the private meeting of Nov. 19, there were features that suggested that the meeting was not a consultation pursuant to s. 1 of the Act. It is said that the procedure of inviting questions for answer negatives the idea of a consultation taking place; that the fact that at the meeting the Minister imposed a stipulation that a note which was being made should not be used in any later proceedings also negated the view that there was consultation; that certain topics, such as the question of the water supply and of the sewerage system for the projected new town, were either expressly or impliedly stipulated not to be for discussion, and that, accordingly, the Minister's mind was closed in regard to these subjects, and that, if these important subjects were excluded from discussion and the Minister was not welcoming or receiving advice on them, no consultation in any real and true sense was being held. Furthermore, it is said generally that, when the evidence in regard to the meeting of Nov. 19 is surveyed, the conclusion ought to be drawn that the Minister was giving his conceptions in regard to new towns and was explaining the reasons why he had selected Hemel Hempstead as the site of one of them, but was not consulting the local authorities. It is

also said that those who attended the meeting had no authority to express views on behalf of their local bodies, but only to attend and to listen to what was said. These are all submissions well deserving of most careful consideration, and it is the duty of the court to ensure that there is full and fair compliance with statutory requirements. The duty which is cast on the Minister to hold consultation with local authorities under s. 1 of the Act is unquestionably an important one. By the performance of it a handsome dividend of information may well be earned.

As regards the time when consultation should take place, the Act, in my judgment, does no more than to prescribe that it must be before a final Order is made. It may well be that in many cases the most convenient and satisfactory time for consultation will be before a draft Order is made, but it is not for the court to give any ruling in regard to this matter. If consultation precedes the making of a final Order the terms of the statute will, in my judgment, have been satisfied.

The word "consultation" is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultation may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one. In deciding whether consultation has taken place, regard must, in my judgment, be paid to the substance of the events and it cannot be conclusive either way according to whether parties said in terms that a consultation under s. 1 of the Act was taking place, or to take place, or was intended, or whether nothing relative to this, was said at all. In my judgment, the meetings of July 26 and of Nov. 19 are closely related and must be considered together. The meeting of Nov. 19 cannot be considered in isolation. It was attended by representatives of all the six local authorities as was the meeting of July 26. The events that preceded it were in the knowledge of those present. It had been known for a period of four months that the Minister had in mind the designation of an area at Hemel Hempstead as the site of a new town and the exact delineation of the proposed area had been known since Sept. 27. Because, in my judgment, it is not only proper, but essential, to link together the meetings of July 26 and Nov. 19, the point does not really arise for decision whether, if the meeting of July 26 had stood alone, there would have been a compliance with the Act. I need say no more, therefore, than that I am not satisfied that there is any reason why a consultation taking place before Aug. 1, 1946, should, on account of date alone, be ineligible to be regarded as a consultation satisfying statutory requirement. In my judgment, no question of the retrospective operation of a statute is involved. The facts and circumstances concerning any consultation taking place before Aug. 1, 1946, would require careful consideration, and in a given case it might be manifest that a consultation which had taken place at an early date could not in the nature of things amount to a sufficient consultation for the purposes of s. 1 of the Act. It would all depend on the precise facts.

By the terms of the letter of July 16 the local authorities were clearly informed that the Minister had under consideration the development of a new town in the neighbourhood of Hemel Hempstead. The criticism is made that the letter proceeds to indicate that at the suggested conference the Minister would propose to outline the main factors which had led him to consider the Hemel Hempstead area as a suitable site, but does not state that the Minister would seek at the conference the views, opinions and criticisms of the local authorities, nor that the purpose of the proposed conference was that, in accordance with the anticipated provisions of probable legislation, the Minister would actively seek the guidance of those with local knowledge so as to know whether he was on the right lines or whether he should retract his tentative ideas. The criticism is not without force and the letter might have been worded otherwise, but, in my judgment, when all the facts are examined, the criticism really resolves itself into one rather of form than of substance. There cannot have been any misapprehension, or there ought not to have been any misapprehension, as to what was under

consideration. The local authorities had at all times after receipt of that letter the opportunity to consider the proposal and to give advice to the Minister on it. They had the opportunity of offering their views at the meeting on July 26, at any time thereafter by supplementing in writing what had been said at the meeting or by asking for an interview, and they had further opportunity later at the meeting on Nov. 19. The importance which the borough of Hemel Hempstead attached to the meeting of July 26 is shown by the terms of the letter sent on July 23. At the meeting the Minister stated that he hoped that the local authorities would approve the proposal in principle and that there would be the fullest co-operation between them and the development corporation when established. The Minister asked for questions and comments. In my judgment, all this shows quite clearly that local authorities were asked their views.

[HIS LORDSHIP observed that the submission that the representatives of the Hemel Hempstead Borough Council exceeded their mandate at the meeting of July 26, concerned the internal arrangements of that council, and the court was only concerned with the question whether the Minister had done all that he ought to have done by way of consultation. The Minister could not be expected to examine the representatives as to their mandate. HIS LORDSHIP continued:] A shorthand note of the proceedings on Nov. 19 was taken. By agreement the transcript was read at the hearing before me, but the point was still open and was taken on behalf of the appellants that the fact that at the time the Minister had stipulated that the note should not be referred to in any later proceedings demonstrated that the meeting could not be regarded as being a consultation which complied with or assisted to comply with s. 1 of the Act. I do not accept this submission. If, by agreement in a particular case, it is decided that the proceedings should be regarded as private, the notion of a consultation is not thereby defeated. It might be that in some circumstances freedom of expression would, by such an arrangement, be encouraged and facilitated. The court is, however, not concerned with this, nor with the nature of any views expressed at a consultation. The court is only concerned to enquire whether a proper consultation did take place. It may be, of course, that, if available, evidence as to what was, in fact, said at a meeting might be material in deciding whether or not the meeting partook of the nature of a consultation. The form that the private meeting on Nov. 19 took was that the Minister stated that he would not make a speech, but that he would endeavour to answer any questions raised. The proceedings must be surveyed in the light of all that had gone before. The request of the Minister on July 26 for observations, questions and comments must be regarded as one that remained continuously open at all later times. On July 26 the local authority representatives had been able to say all that they then wished to say. If at any subsequent time they had been able to offer any helpful views, either constructive or destructive in their nature, clearly they were implicitly, if not expressly, asked to submit them. When the meeting of Nov. 19 took place, it was in a sense a resumption of the prior meeting. By Nov. 19 there had been ample time for views to crystallize and an actual draft Order with plan had been publicised. When, therefore, in those circumstances questions were invited on Nov. 19 it is, in my judgment, plain that comments and observations were still being sought and invited. There is no suggestion that anyone wished to raise points by way of making a statement rather than by putting questions or that anyone was denied any such opportunity. Those present were not persons uninstructed in public affairs or unaccustomed to public speaking. They were gentlemen who were devoting time to public affairs, either as members of local authorities or as full-time officials. They must have realised that the invitation to put questions was not to be considered as a limiting or limited one, but that full opportunity was being afforded to them to say what they wished or to raise what questions they wished at a time some four months after the matter being considered had been propounded for their consideration.

Having regard to the view which I have formed in this case, it becomes unnecessary to decide whether, if consultation were lacking, a Designation Order would be *ultra vires* or whether the position would be that there was non-compliance with a requirement of the Act. Nor is it necessary to consider the facts relating to the interests of the appellants. On a consideration of all

the facts, it is, in my judgment, shown that the obligation imposed on the Minister to have consultation in accordance with the provisions of s. 1 of the Act was amply fulfilled. For these reasons this motion fails.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Lovel Smeathman & Son*, Hemel Hempstead (for the appellants); *The Treasury Solicitor* (for the Minister).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Reversed. H.L. (Sub nom. LORD HOWARD DE WALDEN v. I.R.C.). [1948] 2 All E.R. 825.

INLAND REVENUE COMMISSIONERS v. SCOTT-ELLIS.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), July 2, 3, 31, 1947.]

Income Tax—Sur-tax—Settlement—“Income under a settlement”—Undistributed income from shares of foreign company—Taxpayer controlling chain of companies—“Body corporate”—Finance Act, 1938 (c. 46), s. 41 (4) (a) (ii)—Finance Act, 1939 (c. 41), s. 13 (3).

By a deed of gift dated June 7, 1923, the taxpayer's father gave to the taxpayer 25,000 shares in D., a company incorporated abroad. The shares had previously been transferred into the name of E., another company incorporated abroad, which was party to the deed of gift and thereafter held the shares as trustee for the taxpayer. On Aug. 20, 1934, the taxpayer, in view of his intended marriage, executed a deed, which was a “settlement” within ss. 38 and 41 (4) (b) of the Finance Act, 1938. Under that deed at all material times the taxpayer was entitled to any income arising from 15,000 of the shares in D. There were in existence at material times, six other companies incorporated abroad. D. held shares in five of them and there was considerable reciprocal shareholding. By virtue of the voting rights attached to the classes of shares in the various companies the taxpayer directly controlled E., and by means of this control he was able indirectly to control all the companies in the chain. D. had declared no dividends, and, therefore, the trustees under the deed had received and made no distribution of income:—

Held: the introduction of sub-apportionment in sub-ss. (3) and (4) of s. 13 of the Finance Act, 1939, necessarily involved giving an enlarged meaning to the words “the body corporate” in s. 41 (4) (a) (ii) of the Finance Act, 1938, by the substitution for those words of such words as “the relevant body corporate,” and, consequently, the taxpayer was liable for sur-tax not only in respect of the income of D. but also in respect of the income of the other six companies, as being income arising from the settlement within the extended meaning of s. 41 (4) (a) (ii) of the Act of 1938.

[FOR THE FINANCE ACT, 1938, s. 41 (4) (a) (ii), see HALSBURY'S STATUTES, Vol. 31, p. 353. FOR THE FINANCE ACT, 1939, s. 13 (3) AND (4), see *ibid.*, Vol. 32, p. 181.]

Case referred to:

- (1) *Van Grutten v. Foxwell*, [1897] A.C. 658; 66 L.J.Q.B. 745; 77 L.T. 170; 43 Digest 735, 1704.

APPEAL by the Crown from an order of ATKINSON, J., dated Apr. 1, 1947.

By a deed of gift dated June 7, 1923, Lord Howard de Walden gave the taxpayer (his son) 25,000 shares in Dufferin Investment Co., Ltd. (hereinafter called “Dufferin”) a company incorporated in Canada. The shares had previously been transferred into the name of Established Investments, Ltd. (hereinafter called “Established”), another Canadian company, who were parties to the deed of gift and thereafter held the shares as trustees for the taxpayer. By a further deed, dated Dec. 11, 1933, the taxpayer, who had come of age on Nov. 27, 1933, gave his father back 5 shares, which continued to be registered in the name of Established as trustees. On Aug. 20, 1934, the taxpayer, in view of his intended marriage, executed a deed whereby he created trusts over 15,000 out of the 24,995 shares in Dufferin then held by Established as trustees for him. Under this deed the whole income from the 15,000 shares was payable to the taxpayer during the joint lives of himself and his father, on the death of either the intended wife became entitled to an annuity of £1,000,

A and on the death of the survivor that annuity was increased to £5,000. The unexpended income of the trust property was to be held in trust for the children, and the taxpayer had a power of appointment among them. The taxpayer and his father were alive during the whole of the years under appeal, so that the former was entitled to any income arising from the 15,000 shares. By deed dated Oct. 28, 1937, the taxpayer and his father purported to terminate certain provisions of the deed of Dec. 11, 1933, and the father returned to the taxpayer the 5 shares which had been given him. At all material times there were in existence besides Established and Dufferin six other companies incorporated in Canada or Kenya, including Finance and Trusts, Ltd. (hereinafter called "Finance and Trusts"). Dufferin held shares in five of them, and there was considerable reciprocal shareholding. By virtue of the voting rights attached to the classes of shares in the various companies and the shareholdings, the taxpayer directly controlled Established, and, by means of his control of

B Established, was able indirectly to control all the companies in the chain. Dufferin had declared no dividends and the trustees under the deed of 1934 had consequently made no distribution of income.

The taxpayer was assessed to sur-tax on the footing that the deed of Aug. 20, 1934, was a "settlement" within the meaning of that term in ss. 38 and 41 (4) (b) of the Finance Act, 1938, and that the income arising under that settlement was to be treated as the income of the taxpayer in accordance with s. 38 (3) of that Act since he had an interest in such income. The sur-tax was computed on the footing that the undistributed income of all the companies other than Dufferin and Established could (in accordance with para. 8 of sched. I to the Finance Act, 1922, and s. 13 of the Finance Act, 1939) be apportioned and sub-apportioned among the various companies in accordance with their shareholdings, with the result that eventually all such income came to be apportioned to Dufferin, and that 15/25ths of such income should, accordingly, be included in the income arising under the settlement. This view depended on the assumption that each of these companies was a company to which s. 31 of the Finance Act, 1922, applied, or would apply if the company concerned were incorporated in the United Kingdom. The Special Commissioners were of the opinion that the provisions of the Acts did not enable the income of the foreign companies, other than Dufferin, to be apportioned to the taxpayer or to the trustees of the settlement, and held that the proportion of Dufferin only could be included in the computation of the income arising under the settlement, and this decision was affirmed by ATKINSON, J. The Crown now appealed, the appeal being allowed.

The Solicitor-General (Sir Frank Soskice, K.C.), J. H. Stamp and Reginald P. Hills for the Crown.

F *F. Grant, K.C., and Graham-Dixon for the taxpayer.*

Cur. adv. vult.

July 31. **LORD GREENE, M.R. :** I have had the advantage of reading the judgments prepared by my brethren, and I agree with them and do not wish to add anything.

COHEN, L.J., read the following judgment. It is now common ground

G between the parties (a) that the marriage settlement executed by the taxpayer is a settlement within the meaning of s. 38 of the Finance Act, 1938, and (b) that so much of the income of Dufferin as could have been apportioned to Established as trustee of the settlement under s. 21 of the Finance Act, 1922, for the relevant period if Dufferin had been incorporated in any part of the United Kingdom is income arising from the settlement under the definition contained in s. 41 of the Act of 1938. The question that we have to decide is

H whether any part of the income of the remaining six companies all of which were incorporated in Canada or Kenya is included in that definition. To determine this question we must have regard to earlier legislative provisions dealing with the liability to tax on the income of companies under the control of a limited number of persons.

The beginning of this legislation is to be found in s. 21 of the Finance Act, 1922. Sub-section (1), so far as material, provides :

Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other

period ending on any date subsequent to April 5, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members . . .

It is to be noted (a) that the sub-section deals only with actual income and does not include any notional income; (b) that the apportionment is solely for the purposes of sur-tax to which only individuals are liable. Sub-section (6), so far as material, is as follows:

This section shall apply to any company which is under the control of not more than five persons and which is not a subsidiary company or a company in which the public are substantially interested. For the purpose of this sub-section—A company shall be deemed to be a subsidiary company if, by reason of the beneficial ownership of shares therein, the control of the company is in the hands of a company not being a company to which the provisions of this section apply, or of two or more companies none of which is a company to which those provisions apply. . . The expression "company" means a company within the meaning of the Companies (Consolidation) Act, 1908.

Having regard to these definitions, it is clear that s. 21 would have applied to each of the six companies concerned had it been incorporated in any part of the United Kingdom.

It soon became plain that it was easy to avoid this section by making use of a chain of companies, since, if income of a company was apportioned under s. 21 to another company, wherever incorporated, no tax would be payable on the amount so apportioned. The second company would not be liable to sur-tax, and, even if the second company were itself within s. 21, on an apportionment under that section only the actual income of the second company could be apportioned, not any income notionally apportioned to the second company on the application of s. 21 to the first company. To meet this difficulty s. 32 of the Finance Act, 1927, was passed. Sub-section (1) of that section is in the following terms:

Where a member of a company (in this section referred to as "the first company"), the income of which for any year or period has been deemed to be the income of its members and has been the subject of an apportionment (in this section referred to as "the original apportionment") under s. 21 of the Finance Act, 1922, is itself a company (in this section referred to as "the second company") to which the provisions of that section apply, the excess of the amount so apportioned to the second company over the amount, if any, which has been received by the second company out of the income as aforesaid of the first company in such manner as would, in the case of an individual, render the amount so received liable to be included in the statement of his income for the purposes of super-tax, shall for the purposes of the said section be deemed to be income of the members of the second company and shall be apportioned among them in accordance with their respective interests in that company, and the provisions of the said section shall, with any necessary modifications, apply accordingly.

So far, the section dealt only with a chain containing two links. To meet the case of a chain with a larger number of links, sub-s. (4) provided:

Where a member of any such second company as aforesaid is itself a company to which the said s. 21 applies, the income apportioned to it under the foregoing provisions of this section shall in turn be deemed to be the income of its members and apportioned to them, for purposes of assessment to super-tax, in accordance with their respective interests, and so on successively where any member to whom income of a company has been apportioned is itself a company to which the said section applies, so that successive apportionments shall in like manner be made until the entire amount of the income which was apportioned under the provisions of this section among the members of the second company has been apportioned to persons other than a company to which the said section applies . . .

The legislature had thus covered completely the case of a chain of English companies, but no alteration was made in the definition of "company," and, accordingly, the chain could still be broken by the inclusion of a company incorporated outside the United Kingdom. This was the state of the relevant legislation when the Finance Act, 1938, was passed. Section 41 (4) of that Act, so far as material, was in the following terms:

For the purposes of this Part of this Act—(a) the expression “income arising under a settlement” includes . . . (ii) where the amount of the income of any body corporate has been apportioned under s. 21 of the Finance Act, 1922, for any . . . period, or could have been so apportioned if the body corporate were incorporated in any part of the United Kingdom, so much of the income of the body corporate for that year or period as is equal to the amount which has been or could have been so apportioned to the trustees of or a beneficiary under the settlement. . .

A That section, as I have said, plainly made the income of Dufferin taxable, since its income could have been apportioned under s. 21 of the Finance Act, 1922, and it would have been apportioned to Established who were the trustees of the settlement, but, if it had been sought to tax the taxpayer in respect of the income of, *e.g.*, Finance and Trusts, the attempt would have been abortive. The income of Finance and Trusts would have been apportioned to Dufferin, but, as Dufferin was not a company incorporated in any part of the United Kingdom, it would have been impossible to sub-apportion that part of the income of Finance and Trusts which had been apportioned to Dufferin. The law was, however, modified by s. 13 of the Finance Act, 1939. Sub-sections B (3) and (4) of that section are in the following terms :

(3) Subject to the last preceding sub-section and to any other express provision of this Act, any reference in any enactment to apportioning income under or for the purposes of the provisions, or any specified provisions, of the said s. 21 or of the said sched. I shall be construed as a reference not only to apportioning by means of an original apportionment but also to apportioning by means of an original apportionment together with one or more sub-apportionments or series of sub-apportionments, and in ascertaining under para. (c) of sub-s. (1) of s. 19 of the Finance Act, 1936, whether or not income could be apportioned among not more than five persons, account shall, in cases where an original apportionment and any sub-apportionment are involved, be taken only of persons to whom income could be finally apportioned as the result of the whole process of original apportionment and sub-apportionment. C (4) In this section the expression “sub-apportionment” means such an apportionment of income as is provided for by s. 32 of the Finance Act, 1927 (which applies the said s. 21 to inter-connected companies) and the expression “original apportionment” has the same meaning as in the said s. 32. D

The Crown contend that the effect of that section is to render the taxpayer liable in respect of the income of all six companies. This contention was rejected by the commissioners and their decision was affirmed by ATKINSON, J. E Section 13 of the Finance Act, 1939, is a good example of bad referential legislation. Applying that section literally to s. 41 of the Finance Act, 1938, s. 41 (4) (a) (ii) would read as follows :

Where the amount of the income of any body corporate has been apportioned by means of an original apportionment under s. 21 of the Finance Act, 1922, for any year or period or by means of such an original apportionment together with one or more such sub-apportionments or series of sub-apportionments as is provided for by s. 32 of the Finance Act, 1927, or could have been so apportioned if the body corporate were incorporated in any part of the United Kingdom, so much of the income of the body corporate for that year or period as is equal to the amount which has been or could have been so apportioned to the trustees of or a beneficiary under the settlement. F

The question for our decision turns on the meaning to be attributed to the expression “the body corporate” in the enlarged definition of “income arising under a settlement” set out above. Counsel for the taxpayer says that the expression must have the same meaning throughout. To make his point clear he assumed that the income to which it was sought to apply the definition was the income of Finance and Trusts. That being so he said, and I agree, that the expression “body corporate” must mean Finance and Trusts where that expression secondly appears. So, he said, it must mean Finance and Trusts where it first appears. That being so, the definition, even as enlarged by s. 13 of the Finance Act, 1939, did not render the income of Finance and Trusts taxable in the name of the taxpayer. Section 13 of the Act of 1939 did not provide for any alteration in the meaning of the expression “the body corporate,” and there was no need to enlarge its meaning. Even on his construction, said counsel for the taxpayer, the section would not necessarily be abortive since, had Dufferin been incorporated in the United Kingdom, sub-apportionment would have been possible under s. 32 of the Finance Act, 1927. Counsel for the Crown, however, said, and, in our opinion, rightly, that this argument gave too limited an effect to s. 13 (3) and (4) of the Finance Act, 1939. These G H

sub-sections bring in sub-apportionments and, in my view, this change, necessarily involves giving an enlarged meaning to the expression "the body corporate," since, applied to sub-apportionments, the expression would otherwise be inept. The enlarged meaning which, in my view, is necessary, is to substitute for the words "the body corporate" the words "the relevant body corporate." Taking the illustration adopted by counsel for the taxpayer where the expression first occurs, the relevant body corporate where dealing with original apportionment is Finance and Trusts, but where dealing with sub-apportionments it is Dufferin. Where the expression secondly occurs, it is Finance and Trusts since it is only the income of that company to which the notional operation contemplated by the definition is being applied. A

The learned judge rejected the argument which commends itself to us, because he said there was plain language extending the effect of s. 19 of the Finance Act, 1936, and no express words suggesting an intention to enlarge s. 41 (4) (a) (ii) of the Act of 1938. I do not think this argument is well founded. The express reference to s. 19 of the Finance Act, 1936, is not made for the purpose of extending the effect of that section. The extension was effected by the earlier part, *viz.*, s. 13 (3). The express reference is made for the purpose of limiting and defining the effect of that extension. The learned judge also relied on an aphorism of ROWLATT, J., for the conclusion which he reached. That aphorism is as follows: B

In revenue matters there is no room for intendment. Ambiguity must tell in favour of the taxpayer. C

I do not consider it necessary to consider how far that aphorism can be carried. Difficulty of construction cannot relieve the court of its duty to construe, and, in my view, upon the true construction of the sections in question, the expression "body corporate" now bears the enlarged meaning for which the Crown contends. For these reasons, in my opinion, the appeal must be allowed. D

ASQUITH, L.J., read the following judgment. The short point involved in this appeal is what meaning should be given to the words "the body corporate" in the fourth line of s. 41 (4) (a) (ii) of the Finance Act, 1938, in the light of s. 13 (3) of the Finance Act, 1939. Unluckily, the short point is not easy to disentangle from the congeries of baffling and ill-drafted provisions in which it lies embedded. As LORD MACNAGHTEN observed in *Van Grutten v. Foxwell* (1) ([1897] A.C. 671), it is easy to put a case in a nutshell, but difficult to keep it there. So, here, it is necessary to review the provisions referred to in order to see how the issue narrows down to the short point indicated. E

Between 1922 and 1939, a succession of Finance Acts struck at devices for avoiding sur-tax. The earliest and simplest device was for the taxpayer to transfer his assets to what is popularly called a "one-man" company, and for that company to retain its profits undistributed. Section 21 of the Finance Act, 1922, (while defining "one-man" companies in terms quoted below) struck at this practice by providing that, if such a company distributed an unreasonably small proportion of its income, a "direction" might be given by the Special Commissioners as the result of which the whole of the company's actual income would be deemed to be that of its members and would have to be apportioned to them by the Special Commissioners in proportion to their holdings. The members would, accordingly, become liable to sur-tax on the amounts apportioned to them respectively. The application of this provision was limited by sub-s. (6) of s. 21 to companies which were (a) registered in the United Kingdom and (b) under the control of not more than five persons, not being subsidiaries or companies in which the public was substantially interested. I will call these, for short "s. 21 companies." F

What may be called device No. 2 sought to circumvent the Act of 1922 by employing at least two companies, A and B. The taxpayer's assets were vested in company A, which was a "one man", or "one member," company, controlled by company B which was a "one man" company controlled by the taxpayer. Assuming for the sake of simplicity one hundred per cent. control, the effect of s. 21 on this arrangement was that, if company A distributed no profits or made an inadequate distribution, the whole of its actual income, G H

pursuant to a "direction" within s. 21, was deemed to be the income of company B, and there the matter rested, for company B, being a limited company, was not liable to sur-tax. Section 32 (1) of the Act of 1927 was aimed at this artifice. Like the 1922 provision it was limited to "s. 21 companies." It provided that where a company's income was, under the Act of 1922, deemed to be the income of its members and was apportioned to a member, which member was also a company, the income so apportioned should be "sub-apportioned" (to borrow an expression from a later Act), *i.e.*, it should be deemed to be the income of, and should be apportioned among, the members of such last named company, in proportion to their holdings therein. Sub-section (4) of s. 32 of the Act of 1927 enables this process to be repeated as many times as there are companies in the chain. If company A's income is sub-apportioned to a member of company B which member is itself a company, *viz.*, company C, it is further sub-apportioned to the members of company C, and so on until its progress is arrested. Its progress may be arrested either because a member to whom it is sub-apportioned is a natural person, who thereupon becomes liable to sur-tax on the part sub-apportioned to him, or because a member to whom it is sub-apportioned, though an artificial person, is a company to which the Acts of 1922 and 1927 do not apply, *e.g.*, a non-"one man" company, or a foreign company, or a company which is both.

Device No. 3 took advantage of this limitation in the scope of previous Acts to elude the provisions just referred to. The taxpayer's assets could, after all, be vested in a foreign "one-man" company. Such a company, not being a "s. 21 company," could accumulate profits and retain them undistributed, without becoming liable to any of the existing apportionment provisions. Indeed, as has been seen, if a chain of companies were employed, the interposition of a foreign company at any point in the chain would halt the process of apportionment at that point and intercept the notional passage of the income to the pocket of the taxpayer. Section 41 of the Finance Act, 1938, is designed to frustrate such a proceeding. By an earlier section of the same Act, s. 38 (3), the material provisions are for some reason limited in their application to a "settlor" who retains an interest in a "settlement" as defined in the Act, whereas previous Acts had applied to the "one man" at the end of a string of one-man companies, whether a settlor or not. Section 38 (3) reads as follows:

If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year, and not as the income of any other person.

Section 41, so far as material, reads as follows:

(4) For the purposes of this Part of this Act, the expression "income arising under a settlement" includes:—(a) ... (ii) where the amount of the income of any body corporate has been apportioned under s. 21 of the Finance Act, 1922, for any year or period, or could have been so apportioned if the body corporate were incorporated in any part of the United Kingdom, so much of the income of the body corporate for that year or period as is equal to the amount which has been or could have been so apportioned to the trustees of or a beneficiary under the settlement.

This last provision stopped the loophole just referred to, in cases where the trustee or beneficiary was a member of a foreign company, by extending the apportionment provisions of the Act of 1922 to such a case. As the result of this the undistributed income, for instance of Dufferin in which "Established," the trustees, were the predominant shareholders, was deemed to be included in "income arising from the settlement," and was, therefore, to be treated under s. 38 (3) "as the income of the settlor," the taxpayer. But s. 41 (4) (a) (ii) speaks only of "apportionment," not of the process dealt with in s. 32 of the Finance Act, 1927, and christened later, "sub-apportionment." There is, therefore, nothing in this section to prevent Device No. 4—recourse to two or more or a whole string of foreign companies, as illustrated by the present case.

There can be no doubt that s. 13 (3) of the Finance Act, 1939, was designed so to affect the operation of s. 41 as to defeat Device No. 4. The question is whether it has succeeded in doing so. Section 13 (3) of the Act of 1939, so far as immediately material, reads as follows:

Subject to the last preceding sub-section and to any other express provision of this Act, any reference in any enactment to apportioning income under or for the purposes of the provisions, or any specified provisions, of the said s. 21 or of the said sched. I shall be construed as a reference not only to apportioning by means of an original apportionment but also to apportioning by means of an original apportionment together with one or more sub-apportionments or series of sub-apportionments. . .

Now s. 41 (4) (a) (ii) of the Act of 1938 is an "enactment" containing "a reference to apportioning." How would it be read if the extended meaning attributed to the word "apportioning" by the Act of 1939 is read bodily into it? For this purpose it may be well also to fill in the blanks of s. 41 where it refers to "any body corporate" by naming one of the companies involved in this case, *e.g.*, Finance and Trusts, the company immediately above Dufferin in the chain, the trustees being shareholders in Dufferin. With the minimum alteration prescribed by s. 13 of the Act of 1939, s. 41 (4) (a) (ii) would then read as follows :

"Income arising under a settlement" includes (ii) Where the amount of the income of Finance and Trusts . . . could have been apportioned under s. 21 of the 1922 Act ("so" apportioned, or apportioned by means of an original apportionment together with one or more sub-apportionments) if Finance and Trusts were incorporate in any part of the United Kingdom, so much of the income of Finance and Trusts as is equal to the amount which . . . could have been so apportioned (or apportioned by means of an original apportionment with one or more sub-apportionments) to the trustees of or a beneficiary under the settlement.

Read in this way, the section fails to frustrate Device No. 4 because, even if Finance and Trusts had been a United Kingdom company (as the section deems it to be), its income could not have been sub-apportioned to the trustees unless Dufferin also were or were deemed to be a United Kingdom company. The only provisions enabling sub-apportionment are those of the Act of 1927. These provisions only apply when at least two companies are involved, one being a member of the others, and both of them (or if more than two, all of them) must be United Kingdom companies.

For s. 13 (3) of the Act of 1939 to enable s. 41 (4) (a) (ii) to defeat Device No. 4, it would be necessary to read the words "the body corporate" in line 4 of the latter, not as limited to the body corporate whose income is involved—the "body corporate" in line 1—but as including any other body or bodies corporate in whose members a sub-apportionment would notionally vest that income in part or in whole, in this case Dufferin.

Counsel for the Crown argued that this was precisely how the court ought to read the words. Section 13 (3) of the Act of 1939 would be entirely inoperative in relation to s. 41 (4) (a) (ii) of the Act of 1938, unless "the body corporate" in line 4 were read as "each body corporate" or "any appropriate or relevant body corporate," or "any bodies corporate involved." For this last variant he invoked the provisions in the Interpretation Act to the effect that the singular includes the plural. More generally, he contended that, if statute A provides that a term used in a previous statute, B, shall receive an extended meaning and that term cannot receive the extended meaning without minor consequential changes in its context in statute B, statute A implies that these consequential changes should be made, and made they should be rather than that the provision in statute A should be wholly stultified.

Counsel for the taxpayer contended, *inter alia*, that this amounted to rewriting s. 41, that the argument involves reading "body corporate" in line 1 of sub. para. (ii) in one sense (as meaning Finance and Trusts) and reading "body corporate" in line 4 in a different sense, as meaning Finance and Trusts *plus* any other company or companies involved in a sub-apportionment (in this case Dufferin), and reverting, when "body corporate" is used in line 6, to the sense attributed to it in line 1. He argued that, if reading the expression in all these passages in the sense which it has in line 1, stultifies s. 13 (3) of the Act of 1939, then so much the worse for that sub-section.

I am of opinion on this issue that the Crown is entitled to succeed. No doubt, s. 13 (3) of the Act of 1939 is inartistically drafted, but its intention is unmistakable, and I do not think that to read "the body corporate" in line 4 of sub-para. (ii) as by implication amended to "each body corporate" or "the bodies corporate" is to do unpardonable violence to that sub-paragraph

or to rewrite it in the sense in which rewriting is prohibited.

- One other contention around which much argument revolved, and which, if sound, supported the Crown's case, should be noticed. It was suggested during the argument that, leaving the Act of 1939 entirely aside, the taxpayer could be caught by the unassisted operation of s. 41 (4) (a) (ii) if "income" in the first line is read as including both actual and notional income, and if the section is applied to each company in turn, taking into account when it is applied to a company lower down in the chain—say Dufferin—the effect of its having been applied to a company higher up in the chain. Apply it first to Finance and Trusts. The effect of doing this is, under the Act of 1922, to deem the undistributed income of Finance and Trusts to be the income of Dufferin. Dufferin's income thus includes (a) that company's actual income, and (b) its notional income (actually the undistributed income of Finance and Trusts). Dufferin distributes no part of (a) or (b). Then apply the sub-section again, this time to B Dufferin in respect of that composite income (a) *plus* (b). The result is that it is deemed to be that of the trustee and indirectly (by virtue of s. 38 (3)) of the settlor. I do not think this argument can be sustained. Counsel for the Crown is, I think, right in contending that the income of a company, on failure to distribute which adequately the Act of 1922 provides that certain consequences shall ensue, is the "actual" income of that company (the word "actual" is used in s. 21) and includes no notional or imputed element. If the case were otherwise, the Act of 1927 would never have been needed. In the case of United Kingdom companies such as alone were contemplated by the Act of 1922, the intended result could have been reached by the operation of s. 21 of that Act, without more. On its main contention, however, the Crown succeeds, and the appeal must be allowed.

Appeal allowed with costs.

- D Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Wiley & Powles* (for the taxpayer).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

E UPSON v. LONDON PASSENGER TRANSPORT BOARD.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.J.J.), July 9, 10, 11, 31, 1947.]

- F *Street and Aerial Traffic—Pedestrian crossing—Controlled crossing—Duty of "approaching" driver—Interrupted view of crossing—Injury to passenger thereon—Pedestrian Crossing Places (Traffic) Regulations, 1941 (S.R. & O., 1941, No. 397), reg. 3.*

- G Regulation (3) of the Pedestrian Crossing Places (Traffic) Regulations, 1941, provides: "The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing."

A pedestrian was knocked down by an omnibus while on a pedestrian crossing controlled by traffic lights. The lights were in favour of the driver, but his view of the crossing was masked by a stationary taxi-cab which was drawn up at the kerb on the crossing. When the omnibus became stationary, its front wheels were on the crossing:—

- H **HELD:** (LORD GREENE, M.R., *dissenting*) the presence of the taxi-cab, which prevented the omnibus driver having an uninterrupted view of the whole of the crossing, made it impossible for him to see that there was no foot passenger thereon; it was, therefore, his duty, under reg. 3 to proceed at such a speed as to be able, if necessary, to stop before reaching the crossing; having failed to do so, he was in breach of the regulation; and that breach was a contributory cause of the accident.

[FOR THE PEDESTRIAN CROSSING PLACES (TRAFFIC) REGULATIONS, 1941, see HALSBURY'S STATUTES, Vol. 34, p. 350.]

Cases referred to :

- (1) *Chisholm v. London Passenger Transport Board*, [1938] 4 All E.R. 850 ; [1939] 1 K.B. 426 ; 108 L.J.K.B. 239 ; 160 L.T. 79 ; Digest Supp.
- (2) *Bailey v. Geddes*, [1937] 3 All E.R. 671 ; [1938] 1 K.B. 156 ; 107 L.J.K.B. 38 ; 157 L.T. 364 ; Digest Supp.
- (3) *Wilkinson v. Chetham-Strode*, [1940] 2 All E.R. 643 ; [1940] 2 K.B. 310 ; 109 L.J.K.B. 823 ; 163 L.T. 26 ; 104 J.P. 283 ; Digest Supp.

APPEAL by the defendants from an order of HUMPHREYS, J., dated Feb. 27, 1947, awarding damages to the plaintiff for injuries received by her when she was knocked down by one of the defendants' omnibuses. The appeal was dismissed.

Fox-Andrews, K.C., and *Armstrong-Jones* for the defendants.

Russell Vick, K.C., and *I. F. Reuben* for the plaintiff.

Cur. adv. vult.

July 31. The following judgments were read.

LORD GREENE, M.R. : It was admitted at the trial that the plaintiff was negligent. What she did was to hurry across the crossing without taking the trouble to satisfy herself that the traffic lights were in her favour (which they were not) and thinking that she had time to reach the refuge before the defendants' omnibus which she saw was approaching the crossing would reach her. For conduct such as this negligence is too feeble a word. The evidence shows as clearly as anything can be shown that the plaintiff was guilty of reckless disregard of her own safety, and she now charges with negligence the driver of the omnibus, by whose skill and promptitude and by the care which he showed in having his omnibus under control—his speed was about 15 miles an hour, a perfectly reasonable speed in the circumstances—her life was, in all probability, saved. The learned judge used language intended in part to palliate her conduct. He said :

I do not find the plaintiff was negligent in making an honest miscalculation—it is a very difficult thing to do—as to the speed at which the bus was coming and whether it was quite safe for her to cross. It turned out to be very nearly safe, but she just miscalculated it.

I am afraid that I must respectfully dissent. Honest miscalculation is surely no excuse for the plaintiff's conduct. She tried to cross in front of an oncoming vehicle when, as the witnesses who watched her movements saw at once, an accident was inevitable, since she could not possibly reach the refuge before the omnibus would be on her. A very large number of traffic accidents are caused by honest miscalculations, but when the person who makes the miscalculation acts on it in circumstances in which a reasonable person either would not make a miscalculation or would not risk acting on the chance that his calculation was correct, that person cannot, in my opinion, turn round and say that his action was not negligent—negligent towards others, if he is charged with such negligence; negligent of his own safety, if the charge is one of contributory negligence.

I now come to the charge of negligence against the driver of the omnibus on which the claim is based. HUMPHREYS, J., approached this question in the following manner. He first examined the position as it would have been at common law irrespective of the Traffic Regulations and the Highway Code, but on the footing that traffic lights giving an intelligible warning were, in fact, there. Having come to the conclusion that on this basis the driver was negligent in not keeping a proper lookout, he proceeded to refer to the Traffic Regulations, but decided that he could dismiss them from his mind since there was nothing in any of them, he said, which abrogates the old common law rule which requires the driver of every vehicle to use reasonable care not to injure other users of the road, whether those others are or are not themselves guilty of negligence. The whole of the learned judge's judgment turns on his finding that the driver was negligent in failing to keep a proper lookout. It is on this point that, in my respectful opinion, the judge fell into an error. The main argument presented to us on behalf of the plaintiff was the same as that relied on by HUMPHREYS, J., *viz.*, failure to keep a proper lookout, and I propose to deal with that before I come to consider an additional argument based on reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941.

In considering the position in which this driver was as he approached the crossing and what was the extent of his duty to take care, it is, in my view, misleading to ignore the regulations and the Highway Code which have an important bearing on the extent of that duty so far as regards pedestrians. To say that a driver was negligent in failing to keep a proper lookout implies, of course, that in the circumstances it was his duty to keep the particular lookout which he did not, in fact, keep. The existence of those provisions of the regulations

A and the Highway Code that indicate what the conduct of pedestrians should be in relation to a crossing controlled by lights or the police is a very relevant circumstance in considering the assumption which a careful driver approaching such a crossing is entitled to make. The driver of the omnibus was entitled to assume that the plaintiff, like other pedestrians, would conform to common-sense and ordinary care in the presence of an adverse signal, particularly in view of the provisions of the Highway Code. Paragraph 98 of the Code in force at

B the time, which forms part of the instructions to pedestrians, was as follows :

At controlled crossings, *i.e.*, wherever traffic is controlled by police or signals, cross the road only when the appropriate line of traffic is held up.

By reg. 28 (iii) of the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, it is provided that :

C The green signal shall be taken to indicate that vehicular traffic may pass the signal and proceed straight on . . . with due regard to the safety of other users of the road . . .

The concluding words of this extract do not mean that a driver is to drive on the assumption that pedestrians will disobey the lights. If it did, every driver would have to slow down to a snail's pace every time he approached a controlled crossing. It merely means, in my opinion, that the green light does not excuse a driver from the ordinary duty to take care and reminds him that he must pay due attention to the rights of other users of the road. Regulation 3 of the

D Pedestrian Crossing Places (Traffic) Regulations, 1941, raises a separate point, as I have already said. Regulation 4 has no application to controlled crossings. Regulation 5 directs drivers at or approaching a controlled crossing to :

. . . allow free and uninterrupted passage to every foot passenger who has started to go over the crossing before the driver receives a signal that he may proceed over the crossing.

E This regulation has no application to the present case. Its object is to give precedence to pedestrians who have already started to cross when the driver receives the green signal. This the plaintiff had not done. The regulation, however, implies that a pedestrian who starts to cross after the traffic has received the green signal has no such rights of precedence although, of course, a driver who observes such a pedestrian must take every reasonable step to avoid injuring him.

F In my opinion, a driver approaching a controlled crossing when the lights are in his favour is entitled to assume that pedestrians will conform to the traffic lights since no reasonable and careful pedestrian would fail to do so. I must dissent entirely from the proposition that a driver who is entitled to assume that no reasonable and careful person will act in disregard of the signals is, nevertheless, under a duty to be looking out for the possibility that some person may so act and to drive in such a way as to be able to avoid a person who does

G in fact so act. If this were the standard of care required of a driver approaching a controlled crossing with the lights in his favour, it would mean that, instead of watching the road in front of him, he would be under a duty to keep watch on the pavement (on both sides of the road in cases where there was no refuge) for the possibility of some action being taken by a pedestrian which no reasonable and careful pedestrian can be assumed to be likely to take, *viz.*, cross against the

H lights. If such be the standard of duty I venture to say that there is not a driver who conforms to it as anyone can see who watches motor traffic at a controlled crossing when the lights are in its favour. Indeed, if the standard of duty at such a crossing were that laid down by the learned judge, one of the main purposes of traffic lights, *viz.*, to facilitate a speedy flow of traffic, would be entirely defeated. The true view, in my opinion, is that a driver approaching a controlled crossing, whether it be controlled by lights or by the police, with the light signal or the police signal in his favour, is entitled to proceed on the assumption that pedestrians will conform to the directions given to them as to what their

behaviour should be when the signals are against them, and that he is under no duty to keep a lookout for the possibility of a pedestrian disobeying the signals or to drive on the assumption that a pedestrian may at any minute do so.

But let me not be misunderstood. If a driver approaching such a crossing does, in fact, see that a pedestrian is crossing, or, apparently, is intending to cross against the signals, it is the duty of the driver to do everything that he can reasonably do in the circumstances to avoid running the pedestrian down. Failure to take all reasonable steps to avoid injuring someone who is himself seen to be negligence, is itself negligent, but this is an entirely different thing from saying, as HUMPHREYS, J., said, that the driver is guilty of negligence if he fails to see a pedestrian crossing or intending to cross against the lights. To say this, as I have pointed out, implies that the driver is under a duty to be on the lookout for the possibility of a pedestrian so acting, *i.e.*, acting in a manner in which the driver is entitled to assume that a pedestrian will not act.

HUMPHREYS, J., appears to have based his opinion that the driver failed to keep a proper lookout on three propositions (1) that the driver knew from experience that a pedestrian might cross against the lights; (2) that he knew that he was not entitled to run a pedestrian down merely because he was negligent; (3) that the conductor and Mrs. Grenfell [a witness], who were inside the omnibus, saw the plaintiff hurrying across the pavement with the obvious intention of attempting to cross, and that if the driver, instead of watching the road, had turned his eyes towards the pavement, as they did, he must have seen what they saw and drawn the inference that they did. These propositions, in my opinion, do not support the conclusion which the learned judge based on them. As to the first proposition, the fact that a driver knows that other people on occasions do things that no careful driver would be expected to anticipate does not mean that he is under a duty to anticipate such action. Everyone knows, *e.g.*, that on occasions a driver may negligently cut in, but it cannot surely be suggested that other drivers are under a duty to drive on the assumption that an approaching driver will negligently attempt to cut in. Everyone knows that on occasions a pedestrian will negligently step off the pavement with his back to an oncoming motor car, but it cannot surely be suggested that a driver is under a duty to drive on the assumption that a pedestrian will do so. If one pedestrian, why not a succession of pedestrians along the whole length of the street? The truth is that, if drivers were not entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, would behave with reasonable care, all traffic would come to a standstill, since everyone at his peril would have to act on the hypothesis that his neighbour might at any moment put his own life in danger by behaving in a negligent manner. As to the second proposition, I do not appreciate its relevance. There was no question here of the driver behaving as though he was entitled to run the plaintiff down. On the contrary, he did what it was his duty to do, *i.e.*, as soon as he saw the plaintiff he did everything possible to avoid hitting her. As to the third proposition, the fact that, if the driver had looked in that direction, he would have seen the plaintiff is no ground for saying that it was his duty to look in that direction. The fact that a driver could have seen something if he had looked is, of course, conclusive against him when he was under a duty to look. To say that he was under a duty to look because, if he had looked, he would have seen, is, with respect, entirely to misunderstand the nature and foundation of the duty to keep a proper lookout.

For these reasons and with all respect, I find myself unable to agree with the view of HUMPHREYS, J.. Before us, however, an argument was presented which does not appear to have been put forward at the trial. It raised a suggested head of negligence which was not pleaded, but its introduction before us was not objected to. It was based on the language of reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941, which provides as follows:

The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing.

No suggestion was made that the plaintiff was claiming damages on the basis that the driver had been guilty of breach of a statutory duty. It was said, however, that this regulation was effective to set up a standard of care to which

the driver in the present case failed to conform. The argument was as follows. The regulation deals with both types of crossing, *viz.*, controlled as well as uncontrolled crossings. Owing to the presence of a stationary taxicab the driver, as he approached the crossing, was unable to see that there was no foot passenger on the crossing. He was, therefore, bound to proceed at such a speed as to be able if necessary to stop before reaching the crossing. As the question here is

- A one of negligence and not of breach of an absolute statutory duty or of prosecution for an offence, the regulation must be considered, not in isolation, but in relation to all the circumstances of the case. The alleged breach of the regulation is relied on as evidence of negligence and nothing more. Bearing this in mind, I ask myself whether in the circumstances the driver is to be regarded as negligent for failing to assume that the plaintiff might be on the crossing hidden from view by the taxicab? I do not see how this can be so. If he was entitled to drive on the assumption that no pedestrian would disobey the light signal, I do not see why he should be regarded as any more negligent because the taxicab was there than he would have been if it had not been there. The reasonable assumption which the driver was entitled to make was based on the warning given to pedestrians by the lights and that was precisely the same whether the taxicab was there or not. The argument appears to me to involve the proposition that the presence of the taxicab ought to have been assumed by the driver to make disobedience of the traffic signal by the plaintiff more likely than if the taxicab had not been there. I can see no reason for this.
- B There appears to me to be a further difficulty in the plaintiff's way. She stepped on to the crossing at the last minute. If there had been no taxicab there and the plaintiff had acted as she did act, the driver could, I think, have said that the regulation did not require him to drive in such a way as to be able to stop before reaching the crossing. On the facts, the omnibus had, I think, ceased to be an
- C "approaching" vehicle. As was pointed out by this court in *Chisholm v. London Passenger Transport Board* (1) ([1938] 4 All E.R. 861), if the word "approaching" is to be construed as covering the passage of the oncoming vehicle right down to the moment when its front wheels reach the crossing the result will be absurd. If, at the moment when the plaintiff stepped on to the crossing, the omnibus would have ceased to be an "approaching" vehicle for the purpose of the regulation in the absence of the taxicab (as on the facts it would, in my opinion, have done), I cannot understand why it should have been any the more an "approaching" vehicle because the taxicab was there.

- D Lastly, on the assumption that the driver broke the regulation, the question arises: Was his breach the cause of the accident? There is, of course, no finding by HUMPHREYS, J., on this matter, but, in my opinion, the plaintiff does not discharge this burden. The evidence satisfies me that the accident would have happened in any event. The plaintiff, in effect, threw herself in front of the omnibus in disregard of the traffic signal and in reliance on a wild estimate of the speed of the omnibus. The accident would have happened whether or not the taxicab was there. The real cause of the accident, in my opinion, was the negligent act of the plaintiff herself. I would allow the appeal, but, as my brethren take a different view, the appeal will be dismissed. I should add that I do not share the view of HUMPHREYS, J., that the decision in this court in *Bailey v. Geddes* (2) and *Chisholm v. London Passenger Transport Board* (1) are inconsistent with one another.
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H **COHEN, L.J.:** This is an appeal from a judgment of HUMPHREYS, J., given on Feb. 25, 1947, awarding damages to the plaintiff in respect of injuries suffered by her in a collision with the defendants' omnibus which occurred on Nov. 23, 1945. The learned judge assessed the damages suffered by the plaintiff at £500, but he only awarded her £250, holding that there was contributory negligence on her part and apportioning the negligence equally between the two parties. In this court the only issue was liability.

A number of facts in connection with this action are not in dispute, and I take them from the learned judge's judgment where he says:

This action arises out of an accident which took place on Nov. 23, 1945, in Baker Street, that part of Baker Street where it is crossed by Blandford Street. That crossing is controlled from one side of Baker Street to the other by traffic lights. There is also a refuge in the road at the centre line and there is a pedestrian crossing. The plaintiff was minded to cross Baker Street from the north eastern corner to the north western

corner and she proposed to cross by the refuge. She did that by walking on the pedestrian crossing and, as far as I can see, in the middle of the crossing. She had to walk a distance from the kerb to the nearest point of the refuge about 17ft. 9ins. She safely negotiated something like 15ft. of that 17ft. 9ins. and then she was knocked down and injured by one of the defendants' omnibuses which was coming south down Baker Street, and she was knocked down by the offside front wing of that omnibus. I ought to say here that there was a taxicab drawn up actually with its wheels on the pedestrian crossing. There was, in fact, blocking that pedestrian crossing, or part of it, a taxicab which was drawn up quite close to the kerb, and the evidence was that the taxi driver was off his seat, having stopped there to pick up a fare, and he was actually opening the door to pick up his fare. The effect of that, of course, was that, as far as the plaintiff was concerned, her view of the oncoming traffic, the traffic dangerous from her point of view, *i.e.*, the south-bound traffic in Baker Street, was masked by the width of the taxicab. I do not think it was given in evidence, but I suppose 5ft. is a reasonable amount to assume as the width of the taxicab. In the same way the view which the omnibus driver would have of her when she was on the pedestrian crossing would also be masked 5ft.

Before us it was also agreed that the lights were in favour of the driver, and that, when the omnibus became stationary, its front wheels were actually on the crossing. These agreed facts are, in my opinion, sufficient to determine the dispute, and I need not, therefore, consider the rest of the evidence.

The action was framed in negligence, and, as particulars of the negligence, the plaintiff alleged that the defendants, their servants or agents (a) failed to give the plaintiff free and uninterrupted right of passage over the said recognised crossing, (b) failed to keep a proper lookout, (c) drove at an excessive speed, (d) drove on the wrong portion of the road, (e) failed to apply their brakes soon enough, or at all, (f) failed to give any, or any adequate, warning. No claim was made in respect of breach of statutory duty, but both in the court below and in this court the plaintiff sought to rely as evidence of negligence on the alleged failure of the defendants' driver to comply with certain of the provisions of the Pedestrian Crossing Places (Traffic) Regulations, 1941, made under s. 18 of the Road Traffic Act, 1934. In my opinion, she is entitled so to do. It seems to me that, in considering whether a party has been negligent, the court is entitled to have regard to what restrictions Parliament has thought it necessary to impose on motor traffic for the protection of pedestrians whether the relevant provisions are to be found in an Act of Parliament or in regulations made thereunder. That was, I think, the view taken by this court in *Bailey v. Geddes* (2) where the claim was in negligence only, but this court decided in favour of the plaintiff on the ground that the cause of the accident was the failure of the driver to observe the regulations. So far as material, the regulations in question are in the following terms:

(2) For the purpose of these regulations unless the context otherwise requires the expression "crossing" means a crossing place for foot passengers indicated by a traffic sign prescribed for the purpose by regulations made by the Minister. (3) The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing. (4) The driver of every vehicle at or approaching a crossing where traffic is not for the time being controlled by a police constable or by light signals shall allow free and uninterrupted passage to any foot passenger who is on the carriage-way at such crossing, and every such foot passenger shall have precedence over all vehicular traffic at such crossing. (5) The driver of every vehicle at or approaching a crossing at a road intersection where traffic is for the time being controlled by a police constable or by light signals shall allow free and uninterrupted passage to every foot passenger who has started to go over the crossing before the driver receives a signal that he may proceed over the crossing.

Regulation 6 is not material, but I pause to remark that, on the evidence, it is plain that the driver of the taxicab referred to by the learned judge committed a breach of it in stopping on the crossing.

It will be observed that para. (a) of the particulars of negligence reproduces part of the language of regs. 4 and 5, but I have come to the conclusion that the plaintiff has failed to establish a breach of those regulations. Regulation 4 is irrelevant since the crossing in question in this action was controlled by lights and the driver committed no breach of reg. 5 since, according to the evidence, he had received a signal (the green light) that he might proceed over the crossing before the plaintiff started to go over the crossing. The position

is different as regards reg. 3. This was not quoted or referred to in the pleadings, but it was relied on without objection in the court below. It would have been better had the pleadings been amended when the point was raised, but I do not think we should be justified in refusing to allow the plaintiff to rely on it. On the evidence it is plain that at all material times the presence of the stationary taxicab prevented the driver having an uninterrupted view of the whole of the crossing. That being so, it was impossible for him to see that there was no foot passenger thereon, and it was, therefore, his duty under the regulation to proceed at such a speed as to be able, if necessary, to stop before reaching the crossing. On the driver's own evidence he saw the plaintiff when she was 9ft. away from the omnibus, and when he stopped the front wheels of the bus were on the crossing. Had he been driving at such a pace as to enable him to stop short of the crossing, it must, in my opinion, follow that he could have stopped within these 9ft.

A Counsel for the defendants, however, advanced two arguments to rebut the suggestion that the driver's failure to comply with reg. 3 made his clients liable in negligence. First, he said the regulation did not apply to crossings controlled by lights. He admitted that there was nothing in the regulation itself or in the definition in reg. 2 to exclude it, but he said that, if it applied to crossings controlled by lights, reg. 5 was unnecessary. I am unable to accept this argument. Regulation 5 protects passengers on the crossing before the light goes green in the driver's favour, but the facts of this case indicate that reg. 5 may serve a useful purpose where the line of vision of driver and foot passenger is obstructed by something on the crossing. In this connection it must be remembered that there is no regulation prohibiting foot passengers from traversing a road at crossings controlled by lights when the lights are green in favour of the drivers of vehicles. SCOTT, L.J., said in *Chisholm v. London Passenger Transport Board* (1) ([1938] 4 All E.R. 859):

His [the pedestrian's] duty . . . is left to the common law; no penalty is imposed on the pedestrian for embarrassing approaching vehicles.

The contrast between the position of the driver of a vehicle who is prohibited under reg. 28 of the Traffic Signs (Size Colour and Type) Provisional Regulations, 1933, from proceeding beyond the stop line on the carriageway when the red signal is on and the position of a foot passenger is important in this respect. I am supported in the conclusion reached on this point by the observations of SLESSER, L.J., in *Wilkinson v. Chetham-Strode* (3) where the learned Lord Justice says ([1940] 2 All E.R. 645):

It is apparent from the decision in *Bailey v. Geddes* (2) that, quite apart from any consideration of light signals, the obligation imposed on drivers by reg. 3 applies to all pedestrian crossings controlled or not controlled . . .

F Counsel's second argument was that, even if reg. 3 applied, on the facts of this case the driver's failure to comply with reg. 3 did not constitute negligence. He relied on the learned judge's findings that (a) the driver had the lights in his favour and was proceeding at a reasonable pace and had his omnibus under perfect control, and (b) the plaintiff proceeded against the lights although she had seen the omnibus, but finding (a) does not alter the fact that the driver failed to comply with reg. 3 and finding (b) only establishes contributory negligence. Counsel relied on the decision of this court in *Chisholm v. London Passenger Transport Board* (1). In that case the court was considering reg. 4, not reg. 3, and explained its earlier decision in *Bailey v. Geddes* (2). MACKINNON, L.J., said ([1938] 4 All E.R. 862):

H The primary duty of a driver is to proceed at a reasonable speed. Let that be x m.p.h. Suppose at x m.p.h. he can pull up in y ft. If he is going along at x m.p.h., and sees a pedestrian on a crossing ahead, he must, of course, slacken speed. If, however, he sees no pedestrian on the crossing he is approaching, I think that he can continue at x m.p.h. If, when he has got less than y ft. from the crossing, a pedestrian enters it, he must, of course, do his best to pull up. However, as, *ex hypothesi*, he can only do so in y ft., he may be unable to avoid hitting him. In that case, I do not think that he should be held to have broken the regulation. So to hold must mean that, going along the road at the proper speed of x m.p.h., every time he comes near to a crossing, he must slow down almost to a walking pace because of the possibility that some pedestrian may step into the road a few feet ahead of him. Moreover, this view of the regulation, besides being the commonsense one, seems to me to recognise that

there must also be a correlative duty of elementary care on the part of the pedestrian. Regulation 3 cannot have been intended to give pedestrians licence to be utterly reckless. If the vehicle is coming along at the reasonable rate of x m.p.h., at which it can be stopped in y ft., for a pedestrian to walk in front of it when it is less than y ft. from him, and he can plainly see it, is the acme of recklessness.

The court, however, was not considering reg. 3, and it was the basis of its conclusion (see *per* MACKINNON, L.J., at p. 861) that :

... the driver of the bus, when approaching the crossing, could, and did see that there was no foot passenger thereon, and, so long as he could see that, the regulation imposed no duty upon him.

In the present case he could not see whether there was anyone on the crossing. Therefore, he should have complied with reg. 3. It was said that, if the taxicab had not been there, he would have seen there was no one on the crossing at the material moment, but is not the answer to that argument that, if the taxicab had not been there, the plaintiff might not have misjudged her distance from the bus? The taxicab being where it was, it seems to me that both parties were negligent, the plaintiff for not proceeding with the caution demanded both by the colour of the lights and the presence of the taxicab and the driver for disregarding the precautions required by the location of the taxicab.

It was suggested, in the course of the argument that so to hold would be to paralyse traffic. I do not agree. My conclusion is based on the facts of this case, including the fact that the taxicab was stationary at a point where the law prohibits it stopping. I see no reason to assume that any undue inconvenience would be caused if the law requires that a driver approaching a vehicle in such a position should comply with regulations which have been imposed to prevent such a breach leading to an accident. For these reasons (which are not the same as those given by the learned judge) I am of opinion that his decision was right and should be affirmed.

ASQUITH, L.J. : HUMPHREYS, J., decided this case on the footing that the Pedestrian Crossing Places (Traffic) Regulations, 1941, should be ignored for all purposes and liability determined by exclusive reference to the common law as it would have operated if no such regulations had ever been made. If this had been the proper basis for determining liability, I am of opinion, with great respect, that he ought to have arrived at a different conclusion, *viz.*, that the driver of the bus was not negligent at all. At common law the driver of a motor vehicle is, of course, not entitled in all circumstances to assume that other users of the road will behave unimpeachably, but neither is he bound to anticipate and provide against every eccentricity and folly, however improbable, which they may elect to commit. For reasons given by my Lords, and which I will not repeat, I think the conduct of the plaintiff was consummately imprudent and such as no bus driver could reasonably be expected to foresee in pursuance of his common law duty of care. There remains, however, the complication raised by the existence of reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations. It seems to me, with all respect to the learned judge, plain that the existence of this and similar regulations cannot be wholly ignored for the purpose of determining civil liability. It is true that in this case breach of statutory duty is not pleaded as a separate cause of action. Nor was it so pleaded in *Bailey v. Geddes* (2), but that case, a decision binding on this court, proceeded on the footing (i) that for the purposes of civil liability the common law duty is enhanced by the super-addition of the duty contained in the regulation, provided that duty is sufficiently pleaded, and (ii) that that duty is, in fact, sufficiently pleaded, if its substance is alleged as one of the particulars of the negligence relied on. There need not be a separate and independent averment of breach of statutory duty as such. In *Bailey v. Geddes* (2) the material regulation was reg. 5, and its breach was pleaded as one of the particulars of negligence. In the present case the material regulation is reg. 3, and its breach is not pleaded at all, either as a separate cause of action or as one of the particulars of the common law negligence alleged. Particulars of that negligence are, in fact, given, and, oddly enough, among them is the substance of reg. 5, which is on the facts of this case irrelevant. If the material regulation or its substance had been pleaded, I personally should have felt bound, for the reasons given by COHEN, L.J., to hold that the driver had acted in breach of it, and that such

breach had been a contributory cause of the accident, and, as the case has been argued both below and here on the footing that the point was open to the plaintiff, I think the pleading should be treated as having been amended, and the appeal dismissed.

Appeal dismissed with costs.

Solicitors: *A. H. Grainger* (for the defendants); *Bryan O'Connor & Co.* (for the plaintiff).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

HINES v. WINNICK.

[CHANCERY DIVISION (Vaisey, J.), July 24, 25, 30, 1947.]

Trade Names—Passing off—Professional description—Fanciful name—Musician arranging music and conducting band under fanciful name—Name invented by producer, plaintiff's employer, but associated exclusively with plaintiff.

The plaintiff, a professional musician who specialised in the composition and arrangement of burlesque music, was engaged by the defendant, who was producing and performing musical sketches under contract with the British Broadcasting Corporation, to conduct the defendant's band, and, instead of being announced under his own name, he was persuaded by the defendant to allow himself to be announced with the band as "Dr. Crock and his Crackpots." The arrangement and orchestration of the burlesque music performed by "Dr. Crock and his Crackpots" was by the plaintiff, and, after a few performances, the name "Dr. Crock" became identified with him, and became his professional description. The plaintiff claimed the copyright in the musical performances broadcast under the name of "Dr. Crock and his Crackpots" and sought an injunction to restrain the defendant from passing off any act under that name as the plaintiff's musical act:—

HELD: the name "Dr. Crock" had become part of the plaintiff's stock-in-trade and had become identified with him, and it was not open to the defendant to make use of that name in connection with any person other than the plaintiff in respect of any performance such as that in which the plaintiff took part.

Landa v. Greenberg (1908) 24 T.L.R. 441 applied.

[AS TO TRADE NAMES AND PASSING OFF, see HALSBURY, Hailsham Edn., Vol. 32, pp. 614-620, paras. 920-924, and pp. 629, 630, para. 932; and FOR CASES, see DIGEST, Vol. 43, p. 265, Nos. 1021, 1022, and pp. 282-285, Nos. 1122-1146]

Case referred to:

(1) *Landa v. Greenberg*, (1908), 24 T.L.R. 441; 43 Digest 265, 1022.

ACTION claiming (i) an injunction to restrain the defendant from representing that he had any copyright in the musical act broadcast under the name "Dr. Crock and his Crackpots"; (ii) a declaration that the plaintiff was solely entitled to the copyright in the said musical act; and (iii) an injunction to restrain the defendant from passing off any act under the name "Dr. Crock and his Crackpots" or under any name only colourably differing therefrom as and for the plaintiff's musical act. The plaintiff alleged that the defendant had passed off and/or threatened and intended to pass off an act not being the plaintiff's as and for the plaintiff's act to the plaintiff's detriment. The defendant was producing and performing a series of sketches, entitled "Ignorance is Bliss," under contract with the British Broadcasting Corporation, and he engaged the plaintiff, who specialised in the composition and arrangement of burlesque music, to conduct the band which performed the musical part of these sketches and to prepare orchestrations of music to be played by the band. The plaintiff and the band were announced and known as "Dr. Crock and his Crackpots." The plaintiff claimed (i) the copyright in the musical arrangements broadcast under that name on the ground that he was the author of the music as broadcast in the act; and (ii) that the name "Dr. Crock and his Crackpots," had become well known to the public as denoting his act. The defendant denied the plaintiff's allegations and claimed that he was entitled to enter into further agreements for the production of his sketches entitled "Ignorance is Bliss," including therein performances by a band not conducted

by the plaintiff under the name "Dr. Crock and his Crackpots." It was held that the plaintiff was entitled to the copyright in the music as arranged by him, and that he was entitled to an injunction to restrain the defendant from passing off any performance of burlesque music under the name "Dr. Crock and his Crackpots" in connection with any person other than the plaintiff.

Aldous and John Brewis for the plaintiff.

Milner Holland for the defendant.

VAISEY, J. : The plaintiff, Mr. Henry Albert Hines, more commonly known as Harry Hines, is a professional musician and has been a professional musician for some 20 years. He specialises in the composition and arrangement of what I may call burlesque music. He is also expert in conducting such music when performed by bands or orchestras, and, besides that, he performs on several instruments, including, in particular, the clarinet. Burlesque music, as I understand it, is music which introduces inconsequences and surprising variations which are intended to amuse those who hear it, and I have no hesitation in saying that the composition of such music, its arrangement and its orchestration for performance by particular combinations of instruments, are matters of art, calling for years of study and experience. I am told that music is not insulted by that method of treatment, and that there is nothing offensive to the ordinary man in hearing music which is serious and solemn being made fun of, and in that view I think I may myself concur. There are some melodies which, no doubt, ought not to be treated in that manner, but there is no suggestion that the way in which music is handled, and, perhaps, mishandled, by the plaintiff is other than perfectly proper and a reasonable exercise of the special art in which he has made himself expert.

There has been for some time an item in the programmes broadcast by the British Broadcasting Corporation, lasting half an hour, and transmitted to the ears of hearers in the Light Programme. The performances are witnessed by comparatively small audiences in a studio, and their applause and appreciation assist in the performance of the music and give the impression to those who are listening that those who are seeing as well as hearing are amused by what they see and hear. The broadcasts of "Ignorance is Bliss" are produced from a script containing humorous dialogue which, like the music, is characterised largely by its inconsequence. A word which may not inaptly describe this dialogue is "back-chat." Interspersed with the spoken words, burlesque tunes are played, the inconsequence and eccentricity of the tunes according with the inconsequence and eccentricity of the dialogue.

To produce those tunes, an orchestra or band has been employed. Originally it was a band described as the orchestra of Mr. Sid Millward, but the engagement of Mr. Millward and his orchestra was terminated, and the defendant, Mr. Winnick, who has a large interest in the subject-matter of these broadcasts, approached the plaintiff to see whether he, with a company of musicians, would take the place of Mr. Millward and his orchestra. It is plain that the plaintiff, who takes his art seriously, was disquieted to find that, instead of being described by his ordinary name, as Mr. Millward had been, it was proposed that he and the orchestra he was to conduct should be known by a name which was comic in the very sound of it, and did not include the plaintiff's own name. He was displeased to find that he was not being placed in the same position as Mr. Millward, because he had hoped that his association with this performance would enhance his reputation. Ultimately, however, the plaintiff's misgivings were overborne, and he agreed that the performances of himself and the band should be announced under the comic, or semi-comic, name of "Dr. Crock and his Crackpots."

There can be no doubt that "Dr. Crock," as the name of an individual, became after a few performances associated and identified with the plaintiff, and it seems to me that, whether the plaintiff liked it or not, "Dr. Crock" became for a considerable time—for he performed in a number of these broadcasts—his admitted theatre name or professional description, and that such reputation, for good or evil, as was obtainable from the hearing of these broadcasts attached to the plaintiff and to no one else. At the end of each performance, some reference was made to "Dr. Crock and his Crackpots, misdirected by Harry Hines," but, notwithstanding that, during the whole period

of the plaintiff's broadcasts, which extended from Mar. 3, 1947, to some date in May, 1947, a reputation was being built up for the plaintiff in the name of "Dr. Crock," and as Mr. Winnick and the other persons associated with this production chose, contrary to the plaintiff's original wish, to attach that name to him, there are consequences which flow from that with which I have to deal.

A The case put for the defendant is that "Dr. Crock and his Crackpots" is a purely fanciful name, that anybody could have a performance of "Dr. Crock and his Crackpots," and there there is no right in the plaintiff either to a monopoly of the name of "Dr. Crock," or to prevent the intrusion into broadcasts of this description of a "Dr. Crock" who is some person other than the plaintiff. If "Dr. Crock" had at the inception of these broadcasts on Mar. 3, 1947, been a recognised appellation of some character—I instanced during the hearing of the case the name of "Colonel Blimp," or, in older days, "Ally Sloper"—I think that there would have been a good deal to have been said in favour B of the view put forward by the defendant. If, at the inception of these broadcasts, "Dr. Crock" had been a name already in existence, it might well have been that anybody would be entitled at the will of the producers of this show to be put forward as the man taking the part of "Dr. Crock," but that is not my view of this case. It seems to me that, by the arrangements to which the defendant was a party, the plaintiff was obliged to take, or, at any rate, did take, the name of "Dr. Crock" for the purposes of these performances. The C defendant was asked by me how he would regard similar, though less fanciful, descriptions of orchestras or bands associated with a name standing first. Some dozen names were taken from the current issue of THE RADIO TIMES, as to which the defendant, with perfect frankness, said that if, for instance, he was told that Duke Ellington and his orchestra were to perform, he would expect the man who is known as Duke Ellington to be the conductor of it, and it would not D be fair to the public or to Mr. Ellington to advertise a performance by "Duke Ellington and his orchestra" if any person other than Duke Ellington were in charge of it, and so with other names. I took another example. There is an orchestra or dance band called "Jose Norman and his Rumbaleros," and the defendant admitted—and I should certainly hold—that "Jose Norman and his Rumbaleros" meant the man called Jose Norman and certain performers of whom he was in charge, and so with other similar instances—Mantovani and his E Orchestra, Billy Ternent and his Orchestra, Leslie Perry's Orchestrette, and so on. It does not seem to me to make the slightest difference that the name attached to the plaintiff in connection with these weekly performances between Mar. 3 and the middle of May is a name which is obviously fanciful. I cannot see that the plaintiff is not entitled to say: "Under this name, 'Dr. Crock,' I have, through broadcasts and by what was seen as well as heard in the studio, F established a reputation for my performance under that name and in that association," and, if that is so, I cannot see that it would be right for any person other than the plaintiff to be put before the public under the name of "Dr. Crock," since the plaintiff's association with the name is the only association belonging to it at the date of the writ.

Some guidance is given to me by the decision of EVE, J., which was cited to me by counsel for the plaintiff, in *Landa v. Greenberg* (1), a case of a *nom de plume*. A Mrs. Landa contributed to a certain periodical articles under the G pen-name of "Aunt Naomi," and EVE, J., said (24 T.L.R. 441):

... I am bound to hold that the plaintiff had a good cause of action in respect of the defendant's conduct. The name [*i.e.*, "Aunt Naomi"] constituted part of her stock-in-trade as a writer, and that it had become identified with her was the very reason the defendant put forward for dismissing her, and the defendant was not confining himself to a mere denial of her right, but was himself making use of it in a way calculated H to lead to the belief that the league into which the applicants for membership were being admitted was still being conducted by her.

Translating that into the language which would be appropriate to the present case, I have come to the conclusion that the name "Dr. Crock" has become part of the plaintiff's stock-in-trade as an artist, that it has become identified with him, and that it is not open to the defendant to make use of that name in connection with any person other than the plaintiff, in connection with any such performance as that in which the plaintiff took part. It may well be that in relation to some wholly different subject-matter, for instance, "The

War Reminiscences of Dr. Crock," or some literary work, there would be no infringement of the plaintiff's right, but in connection with the performance of music, and, particularly, burlesque music, it seems to me that this fanciful name, this *nom de theatre* of the plaintiff, has become part of his stock-in-trade and identified with him. After all, we are not dealing here with a wholly commercial matter. We are dealing with a personal matter connected with an art, and if a man, be he musician, portrait painter or writer of articles in newspapers, gets to be known under a particular name, that name becomes inevitably part of his stock-in-trade, and, apart from some special contract or some other special element, he is entitled to say that it is his name and that anyone who adopts or causes the adoption of that name by some other person is inflicting on him an injury. In *Landa v. Greenberg* (1) EVE, J., was dealing, not with the alleged misuse of the name of a private individual, but with the alleged misuse of the name of an authoress and journalist, to which wholly different rules must be applied. EVE, J., said (24 T.L.R. 441):

The name in such a connection constitutes part of the owner's stock-in-trade, and its use without his or her authority may inflict grievous harm and result in pecuniary loss.

"Aunt Naomi" was the fanciful name adopted by Mrs. Landa. "Dr. Crock" is the fanciful name adopted by the plaintiff, and I have great difficulty in seeing the difference between the facts which were before EVE, J., in *Landa v. Greenberg* (1) and the facts with which I have to deal in this case.

It is, perhaps, to be observed, though it is not in any way conclusive of this matter, that the defendant himself seems to have attached some personal association to the word "Crock" (Professor or Doctor), for in the contract the defendant agreed to present the radio version of "Ignorance is Bliss," including the personal appearance of certain named persons, ending up with "Professor Crock and his Crackpots." The names which precede "Professor Crock and his Crackpots" are not followed by the word "and," or it might have been alleged that "Professor Crock and his Crackpots" is an expression which was incapable of division, but, as it is, there is no doubt that Professor Crock had to be produced by way of a personal appearance, just in the same way as the other named persons had to be produced at each performance. It was said on behalf of the defendant that that might well be so at the date of the contract to which I refer, but he says that, if that contract had been entered into at a later date, after the termination of the plaintiff's association with "Ignorance is Bliss," it would have been open to him to say that "Professor Crock and his Crackpots" meant any conductor of music and any band of musicians who happened at the time to be playing under that designation. In my view, that argument reveals the unsubstantial nature of the defendant's case, because, if "Professor Crock and his Crackpots" merely means those particular performers who, good or bad, were pretending to be "Professor Crock and his Crackpots," it seems to me to be an assertion that anybody could call himself "Professor Crock and his Crackpots," or, at any rate, that some person other than the plaintiff could be so designated by others. That appears to me to be in contradiction to the facts of the case, and an argument to which I am unable to accede.

Turning to the pleadings, I find, first, an allegation that the plaintiff was entitled to the copyright in something described as "a musical act under the name 'Dr. Crock and his Crackpots.'" I venture to think that the framer of that pleading was not so well aware as he is now of the exact nature of the performance known as "Ignorance is Bliss," but I do not think it can be disputed that there is some copyright here, that is to say, that the plaintiff has a copyright in the arrangements which he broadcast during the performances in question. Whether a declaration to the effect that such a copyright exists in the plaintiff can do him much good, I am not very clear. The declaration is only a declaration of his right as between himself and the defendant, but it seems to me—and, indeed, I do not understand that it is disputed by the defendant—that the arrangement, orchestration and lay-out of this burlesque music is something in which there is, undoubtedly, some copyright in the plaintiff. If it were not for the fact that the issue of copyright has been boldly and unreservedly put in issue in the defence, I should have hesitated to make any order in regard to that part of the claim, but, as the defence seems to suggest that there is no copyright

in this music in the plaintiff, I think I ought to make a declaration that the plaintiff is entitled to copyright in the music composed by his skill and art, that the copyright in him does exist, and that appropriate words must be found to limit the scope of that declaration. Although the defendant has put the copyright in issue, I do not gather that there is any threat to interfere with that part of the plaintiff's right, but in that regard I shall give the plaintiff leave to apply for an injunction, if necessary.

- A The rest of the action, apart from copyright, rests, I suppose it is accurate to say, in the plea of passing-off. The essence of passing-off in this sort of matter is the representation that someone other than the plaintiff is filling the part which the plaintiff alone is entitled to fill. I do not think the plaintiff has any right to a monopoly in the use of the word "Crackpots." I do not know that he has any monopoly in the use of the words "Dr. Crock," though I am bound to say that applicants for the privilege of using that name are unlikely to be very numerous or insistent. I think I can go no further than saying that the defendant ought not to pass off any act under the name of "Dr. Crock." I think the plaintiff is entitled to an injunction restraining the defendant from passing-off any musical act under the designation of "Dr. Crock and his Crackpots," or under any name only colourably differing therefrom, as and for the plaintiff's musical performance.

- B I am asked to order an inquiry as to damages, but I do not propose to do so.
- C It has not been suggested from start to finish that the plaintiff has, in fact, incurred any damage. He may have done so, but it may also be that the plaintiff has gained something by the publicity which this action has attained, and it may also be that when the parties have been assured as to what their rights are, they will not find that much harm has been done. All the same, I think that the defendant's claim to say, as he does, that "Dr. Crock" has nothing at all to do with the plaintiff, except so long as the defendant thinks proper to allow it, is not well founded. The defendant having given the plaintiff the name of "Dr. Crock" against the plaintiff's original wish, the name must be considered to have stuck to the plaintiff, so that the plaintiff has acquired rights in it as his professional name for the time being. I do not think there can be any objection to the plaintiff continuing to call himself "Dr. Crock," though I should feel grave objection to his describing himself as "Dr. Crock" in association with the word "Crackpots." I think his sole rights are to be the original and only "Dr. Crock" for the purposes of the performance of burlesque music, and that the defendant is not entitled to hold out as "Dr. Crock" or as "the Dr. Crock" any person other than the plaintiff himself.

I direct that the costs of the plaintiff be taxed and that the defendant shall pay them.

Order accordingly.

- F Solicitors: *Hall Clark & Goldhawk and Jutsum & Co.* (for the plaintiff); *Rubinstein, Nash & Co.* (for the defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

read on one point. C.A. [1948]
E.R. 821.

Re EDWARD'S WILL TRUSTS. DALGLEISH v. LEIGHTON AND OTHERS.

G

[CHANCERY DIVISION (Jenkins, J.), July 18, 25, 1947.]

Trustees—Power—Power to appoint to himself—Power of disposition over trust property—Whether given as an individual or virtute officii.

Wills—Construction—Disposal of residue by reference to settlement of even date—Unwitnessed memorandum of later date specifying dispositions under settlement—Subsequent codicils confirming will—Incorporation of memorandum in will.

H

Where a person is appointed by will or trust instrument to some fiduciary position and he is given the power of disposition over the trust property, it must be a question of construction in each particular case whether the power was given to him as an individual, or whether it was given to him *virtute officii*.

On Oct. 16, 1936, T. executed a settlement, and, on the same day, a will. By the settlement L. "and the managing trustee or trustees for the time

being of these presents [were thereafter] referred to as the managing trustee." The settlement directed the investment of the sum of £100 in "any investments which the managing trustee may . . . think fit as though he were beneficially entitled," and that the trust fund and income should "be held upon trust to pay the income and to transfer the capital . . . in specie or otherwise to such persons . . . as the settlor shall by any memorandum under his hand direct and in default . . . upon trust to pay or transfer the same . . . to such persons . . . as the managing trustee shall in his absolute and uncontrolled discretion think fit." Subject to this provision, the trust fund was to be held for T.'s wife and children. It was recited that L. had agreed to act as managing trustee, and that the power to appoint a new managing trustee was vested in T. for his life, and thereafter in L. for his life, and thereafter in L.'s personal representatives. By his will T. gave all his property to the trustees of the settlement "upon the trusts and subject to the powers . . . therein . . . contained." On Dec. 21, 1937, T. executed under his hand a memorandum purporting to exercise the general power of disposition reserved to him by the settlement directing *inter alia* the payment free of death duties of £20,000 to L., £5,000 on trust for T.'s daughter on the death of T.'s widow, and £10,000 to T.'s son, also on the widow's death. The document was not witnessed, but was an adequate exercise of the power conferred on T. by the settlement. By three codicils dated Sept. 15 and 22, 1939, and Feb. 4, 1944, T. confirmed his will. T. died on Feb. 6, 1944.

HELD : (i) on the true construction of the settlement, L. had no beneficial interest, and the powers of managing trustee were conferred, not on the individual but on the person for the time being holding the position of managing trustee, and, therefore, L. could not cause the fund to be applied for his own purposes.

(ii) giving full effect to the principle that a codicil operates to bring the antecedent will down to the date of the codicil, by the will, which must be taken to be dated Feb. 4, 1944, T. left his residuary estate, in effect, on such trusts as he should declare in a future document under his hand; the process of bringing the will down to the date of the codicil did not have the effect of incorporating the memorandum in existence at that date as part of T.'s testamentary papers; and, accordingly, the residuary gift *quoad* the trusts by reference to the settlement must be wholly bad.

In the Goods of Smart, [1902] P. 238, *applied*.

[AS TO INCORPORATION OF OTHER DOCUMENTS IN A WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 165, 167, 170, paras. 217, 219, 223, and FOR CASES, see DIGEST, Vol. 44, pp. 237-245, Nos. 624-712.]

Cases referred to :

- (1) *Gibbs v. Rumsey*, (1813), 2 Ves. & B. 294; 43 Digest 593, 419.
- (2) *Re Howell*, *Re Buckingham*, *Liggins v. Buckingham*, [1915] 1 Ch. 241; 84 L.J.Ch. 209; 112 L.T. 188; 43 Digest 593, 426.
- (3) *In the Goods of Smart*, [1902] P. 238; 71 L.J.P. 123; 87 L.T. 142; 44 Digest 389, 2234.
- (4) *University College of North Wales v. Taylor*, [1908] P. 140; 77 L.J.P. 20; 98 L.T. 472; 44 Digest 241, 675.
- (5) *Re Keen*, *Evershed v. Griffiths*, [1937] Ch. 236; [1937] 1 All E.R. 452; 106 L.J.Ch. 177; 156 L.T. 207; Digest Supp.
- (6) *Blackwell v. Blackwell*, [1929] A.C. 318; 98 L.J.Ch. 251; 140 L.T. 444; Digest Supp.
- (7) *In Re Huxtable*, *Huxtable v. Crawford*, [1902] 2 Ch. 793; 71 L.J.Ch. 876; 87 L.T. 415; 8 Digest 304, 832.
- (8) *Re Jones*, *Jones v. Jones*, [1942] 1 All E.R. 642; [1942] Ch. 328; 111 L.J.Ch. 193; 167 L.T. 84; Digest Supp.
- (9) *Allen v. Maddock*, (1858), 11 Moo. P.C.C. 427; 31 L.T.O.S. 359; *affg.* S.C., *sub nom.*, *Maddock v. Allen*, (1857), Dea. & Sw. 325; 44 Digest 243, 698.

ADJOURNED SUMMONS to determine (1) whether a trustee of a settlement was empowered by the settlement to appoint the trust fund to himself, and (2) the effect of a will by which the testator purported to dispose of his residuary estate by reference to a settlement of even date under which a general power of appointment was subsequently exercised by the testator. JENKINS, J., held that the trustee was not beneficially entitled, and that the purported disposal of the residuary estate was bad. The facts appear in the judgment.

J. Alberry for the plaintiff.

Andrew Clark, K.C., and *Irvine Goulding* ; *Pascoe Hayward, K.C.*, and *T. A. C. Burgess* ; and *E. M. Winterbotham* for the defendants.

A **JENKINS, J. :** The first question on this summons concerns the effect of three documents which were executed by the testator, Lionel Edwards, each of them, taken by itself, short and superficially simple, but, when taken in conjunction with the others, somewhat baffling. The three documents, in the order in which they were executed, were these. First, there was a settlement dated Oct. 16, 1936 ; then there was a will of even date disposing of the testator's residuary estate by reference to the trusts of the settlement ; and then, dated Dec. 21, 1937, there was a memorandum under the testator's hand purporting to exercise a general power of disposition reserved to him by the settlement. It is material also to observe that after the date of the memorandum the testator made three codicils dated, respectively, Sept. 15 and 22, 1939, and Feb. 4, 1944, those codicils being material only in respect that he thereby confirmed his will, thus, I apprehend, bringing the will down to the date of the latest of the codicils. The testator died on Feb. 6, 1944, and his will was proved on Sept. 30, 1944.

B Turning now to the three documents, and looking first at the settlement of Oct. 16, 1936, that settlement, so far as is material, is in these terms. The parties are the testator, of the first part, a Captain John Albert Leighton, of the second part, " who and the managing trustees for the time being of these presents are hereinafter referred to as the managing trustee," and the Royal Exchange Assurance of the City of London, thereafter called the corporation, of the third part. There is a recital of the testator's title to the sum of £100 and a recital of the transfer of that sum to the corporation to be held by them on the trusts and subject to the powers and provisions thereafter declared and contained. There is then a recital that the managing trustee has agreed to act as managing trustee of the settlement and the corporation has agreed to act as custodian trustee of the settlement as defined by the Public Trustee Act, 1906, s. 4. Then comes the operative part, a good deal of which I think I had better read *verbatim*. The first clause is administrative and relates to the investment of the sum of £100. It was to :

C . . . be invested in the names or under the legal control of the corporation in or upon any investments which the managing trustee may in his absolute and uncontrolled discretion think fit as though he were beneficially entitled, and there is a similar power to the managing trustee to :

. . . cause such investments to be varied or transposed and the said sum of £100 and the investments for the time being representing the same and any property for the time being held on the trusts of these presents

D are defined as the trust fund. Clause 2 is in these terms :

The trust fund and the income thereof shall be held upon trust to pay the income and to transfer the capital or any part or parts thereof *in specie* or otherwise to such persons or for such purposes as the settlor shall by any memorandum under his hand direct and in default of such direction upon trust to pay or transfer the same or any part thereof to such persons and for such purposes as the managing trustee shall in his absolute and uncontrolled discretion think fit.

E Clause 3 :

Subject to the provisions of the preceding clause the trust fund and the income thereof shall be held upon trust to pay one half of the income of the trust fund to Maria Mercedes Edwards the wife of the settlor during her life and subject thereto the trust fund and the income thereof shall be held in trust for all or any of the children or child of the settlor who being male attain the age of 21 years or being female attain that age or marry if more than one in equal shares.

F Clause 5 :

The statutory power of appointing either a managing trustee or a custodian trustee of these presents shall be vested in the settlor during his life and after his death in the said John Albert Leighton during his life and after his death in the legal personal representatives of the said John Albert Leighton.

It will be convenient if, before passing from the settlement, I deal with the question of construction arising on it which has been argued before me. It is common ground that the first part of cl. 2 gave the testator, or the settlor as

he is called in the settlement, a general power of appointment exercisable by any memorandum under his hand with respect to the trust fund. It is also, I think, common ground that that power is exercisable only *inter vivos* and not by will. The contest arose on the second branch of cl. 2 :

... and in default of such direction upon trust to pay or transfer the same or any part thereof to such persons and for such purposes as the managing trustee shall in his absolute and uncontrolled discretion think fit.

The question arising upon that branch of cl. 2 is whether the effect of it is to give Captain Leighton individually, or other the managing trustee for the time being, a beneficial general power of appointment in the sense in which that expression is ordinarily understood, that is to say, did it give Captain Leighton a power whereby he could cause the fund to be applied for his own purposes, and did it give him a power, therefore, which he could exercise by a residuary gift in his will ? On that topic, I have been referred to a considerable number of authorities, beginning with *Gibbs v. Rumsey* (1) and ending with *Re Howell* (2). I do not think it is necessary for me to refer to all these authorities because I think the proposition established is clear. The proposition seems to me to be this. Where a person is appointed by a will or trust instrument to some fiduciary position and he is given a power of disposition over the trust property, it must be a question of construction in each particular case whether the power was given to him as an individual or whether it was given to him *virtute officii*. If, as a matter of construction, one can find that the power is given to him as an individual, then, provided the terms of the power itself are sufficiently widely expressed, the power may be held to be a beneficial power giving him the same power of disposition as an absolute owner would have. If, on the other hand, one finds as a matter of construction that the power, in truth, is given, not to the individual as such, but *virtute officii*, the power is not a beneficial power, but is a power of disposition to be exercised in a fiduciary capacity and, therefore, is not one which the person exercising it can exercise for his own benefit.

The question that I have to decide in this case is on which side of the line the power given to the managing trustee falls ? On the construction of the words of the settlement I find it impossible to hold that the power is other than a fiduciary power. My reasons for that conclusion are these. First, Captain Leighton was appointed managing trustee, and "the managing trustee or trustees for the time being of these presents are hereinafter referred to as the managing trustee." Therefore, I apprehend that when the expression "managing trustee" is used in this document it means Captain Leighton or other the managing trustees for the time being. Then there is the recital that the managing trustee (Captain Leighton) has agreed to act as managing trustee of the settlement. One can find no suggestion that the testator, or settlor as he then was, was intending to confer any beneficial interest on Captain Leighton. Then, as has been pointed out, when one turns to the investment clause, the provision is that the money is to be invested in any investments which the managing trustee (that is, Captain Leighton, or other the managing trustee for the time being) may in his absolute and uncontrolled discretion think fit as though he were beneficially entitled. Therefore, one gets a recognition, I think, that Captain Leighton has not a beneficial interest, but is to have a right of control over the mode of investment as if he had that which he had not got, namely, a beneficial interest in the fund. When one comes to the power in the second branch of cl. 2, one finds it is conferred, not on Captain Leighton by name, but on the managing trustee, "for such purposes as the managing trustee shall in his absolute and uncontrolled discretion think fit." Therefore, one finds that the power is in terms conferred, not on the individual, but on the person for the time being holding the position of managing trustee. Finally, there is cl. 5 which deals with the power of appointment of a managing trustee or of a custodian trustee. That is vested in the settlor during his life and after his death in Captain Leighton during his life and after his death in the legal personal representatives of Captain Leighton. Having regard to these considerations, it seems to me to be reasonably plain, on the construction of this document, that the power in question is conferred on the managing trustee for the time being by virtue of his office and is not a power conferred on a particular individual for the benefit of that individual. If that were not so, the most remarkable

consequences might ensue, when one reflects on the range of people who might be appointed managing trustee. A bank or trust corporation might be appointed managing trustee and it would be ludicrous to assume that the settlor intended that a bank or trust corporation, for the time being holding office as managing trustee, could exercise a power so as to apply the settled fund for its own purposes. Therefore, I come to the conclusion, on the construction of this settlement, that the power conferred on Captain Leighton as managing trustee for the time being was a fiduciary and not a beneficial power. It was, as it were, a delegation by the settlor of his power of disposition to a person and to his successors who the settlor thought would be likely to deal with the property in the kind of way in which the settlor himself would have liked to deal with it. It is a fiduciary power of disposition and the person for the time being holding it by virtue of his office cannot, in my judgment, exercise it for his own benefit.

A Turning now to the will bearing even date with the settlement, one finds that the testator appoints Captain Leighton to be executor of the will with a substitutional appointment of the Royal Exchange Assurance and an ancillary provision as to the remuneration of that corporation in the event of the substitutional appointment becoming effective. Clause 2 is in these terms :

I give all my property subject to and after payment of my funeral and testamentary expenses and debts to the trustees of a settlement dated October 16, 1936, and made between me of the first part and the said John Albert Leighton of the second part and the Royal Exchange Assurance of the third part to be held by them upon the trusts and subject to the powers and provisions therein declared and contained so far as such trusts powers and provisions are subsisting and capable of taking effect.

C There one has a general residuary devise and bequest upon the trusts and subject to the powers and provisions declared in the settlement of even date. It should be noted that it is not a trust in favour of the persons who at the testator's death would be entitled to the fund settled by the settlement or anything of that kind, but simply a devise and bequest upon the trusts and subject to the powers and provisions therein declared and contained. In my judgment, the effect is that one must read cl. 2 of the will as if it set out the trusts contained in the settlement, beginning, so far as beneficial trusts are concerned, with the provision of cl. 2 conferring on the testator a general power of disposition exercisable by any memorandum under his hand and in default conferring on the managing trustee for the time being the power which I have discussed and have held to be a fiduciary power and not a true general power, and which, consequently, as a power conferred by will, must clearly be invalid on grounds of uncertainty. It seems to me to be reasonably plain that, if the testator had died when the matter was at that stage, he would, at all events, *quoad* the incorporated cl. 2 of the settlement, have made no effective disposition of the property by his will, because (going no further than the first branch of that clause) what he would have purported to do would have been to dispose of his property by reference to trusts to be declared by some future document or documents not duly executed and attested as a testamentary document must be.

F The last of the three documents is a memorandum dated Dec. 21, 1937, and is in these terms :

This is the memorandum referred to in the settlement by me Lionel Edwards dated Oct. 16, 1936 . . . Pursuant to cl. 2 of the settlement I direct the trustees thereof to raise and pay out of the trust funds subject to the trusts of the settlement the following sums : 1. The sum of £20,000 which shall be paid to my friend and partner the said John Albert Leighton and retained by him for his own absolute use and benefit and I direct that part thereof namely the sum of £10,000 shall be paid at the end of one year after my death free of all death duties and the remaining £10,000 shall be raised and paid upon the death of my widow free of all death duties. 2. The sum of £1,000 which shall be paid free of all death duties to my son Lionel Yeo to be paid to him as soon as conveniently may be after my death. 3. The sum of £5,000 which shall be raised and paid free of all death duties to the trustees of the marriage settlement of my daughter Joan upon the death of my widow. 4. The sum of £10,000 free of all death duties for the benefit of my son Paul Michael such sum shall be raised upon the death of my widow and settled by my trustees upon such trusts for the benefit of my said son his wife children or remoter issue as my trustees shall in their absolute discretion think fit.

H That document was simply signed and not witnessed. It was an adequate exercise of the power conferred on the settlor so far as the sum in the settlement was concerned, but it was not, and could not by any possibility be, in

itself, a valid testamentary document. As counsel pointed out, this memorandum definitely has a testamentary flavour. The testator had only settled the sum of £100, yet he provided for the raising of £20,000, £1,000, £5,000 and £10,000 on his death or at some later date, such as on the death of his widow, and there are references to freedom from death duties. The document has a decidedly testamentary flavour, and it is obvious that the testator contemplated that by the time it became necessary to raise those funds according to the terms of the memorandum the settled fund would, in fact, have been increased by reason of the residuary gift in his will by reference to the trusts of the settlement. It was, in effect, a document which the testator contemplated as having a testamentary operation. In fact, I think the solution of this curious tangle probably is that the testator, or those who advised him, evolved this plan of settlement and power of appointment and referential bequest as a means of enabling the testator as and when so minded to make a disposition to take effect concerning his property after his death without complying with the requirements applicable to testamentary documents.

If the matter had ended with the execution of the memorandum, it seems to me it would be clear beyond argument that the residuary gift failed so far as the purported incorporation of the trusts in cl. 2 of the settlement were concerned because the testator would have attempted in the will itself to reserve power to alter his testamentary dispositions by a future non-testamentary document and he would subsequently have purported to exercise that reserved power. It remains to consider whether the codicils confirming the will produced a different result. In my opinion, they did not. Giving full effect to the principle that a codicil operates to bring the antecedent will down to the date of the codicil, one notes that the testator, by a will which must be considered to be as of the date of the last codicil, has left his residuary estate upon certain referential trusts, including, in effect, such trusts as he should declare or such directions as he should give by any memorandum under his hand, referring, therefore, to a future document. That being the effect of the codicil, it seems to me to be clear that the process of bringing the will down to the date of the codicil does not have the effect of incorporating the memorandum in existence at that date as part of the testator's testamentary papers. The reference in the will is still a reference to a future document, or to a series of future documents, and not to any one particular existing document. Therefore, it cannot be said that the memorandum executed between the date of the will and the date to which it was brought down by the confirming codicils is, as a matter of construction, referred to or incorporated in the will as a particular existing document, nor can it, indeed, be so incorporated without doing violence to and contradicting the terms of the will, for the will, when one reads into it the trusts of the settlement, refers to a future document, whereas this memorandum, viewed from the date of the codicil to which the date of the will has been brought down, would be a particular existing document. Therefore, it seems to me that, even giving full effect to the confirmation of the will by the codicil, the residuary gift, *quoad* the trusts by reference to cl. 2 of the settlement, must be wholly bad.

A number of authorities were cited to me in support of the conclusion which I have reached. The first in order of date is *In the Goods of Smart* (3), the headnote of which is as follows:

The testatrix, by a will made in 1895, gave to M.R.S., during her life for her own absolute use and benefit, all her furniture, books, plate, and personal effects, and, after the death of the said M.R.S., the testatrix directed that her trustees should give to such of her friends as she (the testatrix) might designate in a book or memorandum, to be found with her will, "the different articles specified for such friends in such book or memorandum . . ." The will also declared that M.R.S. was to have absolute power to dispose of any articles not specifically disposed of by the testatrix:—*Held*, that as the "book or memorandum" was referred to in the will as a future document, the codicil, which confirmed the will, could thereby only be taken to speak of the book as a future document, even although it was in fact written before the date of the codicil: *Held*, therefore, that the book was not incorporated and could not be included in the probate.

GORELL BARNES, J., said (*ibid.*, 239):

At the time when this will was made, as far as I can make out from the affidavit which has been filed, there was no such book as that mentioned in the will, or, if there was, it is not in existence; but, after the date of that will, there is a book which I under-

stand, though it is not deposed to on affidavit at present, is in the handwriting of the lady, beginning "1898. Hints for Executors; amended 1899," . . . It seems to me that it has been established that if a testator, in a testamentary paper duly executed, refers to an existing unattested testamentary paper, the instrument so referred to becomes part of his will; in other words, it is incorporated into it; but it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a written instrument then existing—that is, at the time of execution—in such terms that it may be ascertained . . . It will be seen from a statement of the principle in the form I have just given, that the document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document. If the document is not existing at the time of the will, but comes into existence afterwards, and then, after that again, there is a codicil confirming the will, the question arises, as it has done in a number of these cases, whether that document is incorporated. It appears to me that, following out the principle which I have already referred to, the will may be treated, by the confirmation given by the codicil, as executed again, and as speaking from the date of the codicil, and if the informal document is existing then, and is referred to in the will as existing, so as to identify it, there will be incorporation; but if the will, treated as being re-executed at the date of the codicil, still speaks in terms which show that it is referring to a future document, then it appears to me there is no incorporation.

Applying that principle to the present case, it seems to me that, incorporating the settlement, the will here referred to some future memorandum, so that the codicil did not have the effect of incorporating the particular existing memorandum in the will any more than the codicil in *Smart's* case (3) had the effect of incorporating the particular existing book or memorandum, that is to say, the one which existed at the date of the codicil, because the reference in the will there, as here, was to a future, not an existing document.

In *University College of North Wales v. Taylor* (4) the headnote is as follows ([1908] P. 140):

In order to admit parol evidence for the purpose of identifying a document referred to in a will and intended to be incorporated, the description of the document in the will must definitely refer to an existing document. If the will can be construed as referring to an existing or future document, parol evidence is not admissible.

LORD COZENS-HARDY, M.R., said (*ibid.*, 144):

Now it is admitted, I think—and if it is not admitted it could not really be disputed—that the respondents must fail if, according to the true construction of the will, the £10,000 is to be held as if the testator had said "upon such trusts and conditions, and subject to such rules and regulations, as shall be found contained and specified in any existing or future memorandum, amongst my papers written or signed by me." That, in my view, is the true meaning and construction of this gift. I cannot read it as meaning "upon the trusts and upon the terms specified in any one existing document unless and until I may alter it by some other document which I may execute at some future time." Whether such a gift would or would not be valid I do not pause to consider, but I am entirely unable to accept that view of the construction. The word "any" presupposes the possibility of more than one, and the fact that the second gift does not necessarily as a matter of construction refer to the same memorandum as is mentioned in the first gift—although the document which is admitted to probate relates to both—greatly assists and helps this view. Now, if that be the construction, is it open to us to admit parol evidence? I think it is not.

Applying that to the present case, I think it would not be open to the court to admit parol evidence to identify the memorandum which the testator signed after the date of the will as being the memorandum referred to in cl. 2 as "any memorandum." FLETCHER MOULTON, L.J., said (*ibid.*, 146):

The respondents to this appeal do not contest that the testator intended to reserve to himself the power of making future memoranda setting forth the conditions under which these legacies were to be enjoyed. But they suggest that because there was one document in existence at the date of the will which answers the description in the will that document is entitled to probate although future documents of the same kind would not be.

FARWELL, L.J., gave judgment to the same effect.

In *Re Keen* (5) the headnote is):

A testator by his will gave to his trustees £10,000 to be held upon trust and disposed of among such person, persons or charities as he might notify to them during his lifetime and in default of such notification to fall into the residue. The testator had

on the execution of an earlier will containing a similar clause which was revoked by the later one told one of his trustees that he desired to provide for a person whose name was to be kept secret, and that he had written the name and address of the proposed beneficiary on a sheet of paper enclosed in a sealed envelope which he then handed to the trustee to be kept with his will and not to be opened until after his death. The envelope remained in the trustee's possession and no further communication relating to it was ever made by the testator. After his death it was opened and found to contain a paper bearing the words "£10,000 to G.," giving a person's name and address. The other trustee until then was ignorant of the existence of the secret trust.

The Court of Appeal held :

... that on the true construction of the will it reserved power to the testator to dispose of property by a future unattested disposition, contrary to the Wills Act, 1837. The trust sought to be established by parol evidence was one inconsistent with the terms of the will, the notification of it to the trustee being anterior to the will. The trust therefore failed and the legacy fell into residue.

Taking the date of the will as the date of the last codicil, it seems to me that that decision is very much in point. After quoting from the speeches in the House of Lords in the case of *Blackwell v. Blackwell* (6) LORD WRIGHT, M.R., said (*ibid.*, 246):

As in my judgment cl. 5 should be considered as contemplating future dispositions and as reserving to the testator the power of making such dispositions without a duly attested codicil simply by notifying them during his lifetime, the principles laid down by LORD SUMNER must be fatal to the appellant's claim. Indeed they would be equally fatal even on the construction for which Mr. Roxburgh contended, that the clause covered both anterior or contemporaneous notifications as well as future notifications. The clause would be equally invalid, but, as already explained, I cannot accept that construction.

Then he said (*ibid.*, 247) :

But there is still a further objection which in the present case renders the appellant's claim unenforceable; the trusts which it is sought to establish by parol evidence would be inconsistent with the express terms of the will. That such an objection is fatal appears from the cases already cited, such as *Re Huxtable* (7).

Finally, there is the recent case of *Re Jones* (8), a decision of SIMONDS, J. The headnote to that case is :

A testator directed his trustees to pay a legacy of £1,000 to "the T. College Investment Trustees appointed or to be appointed under special declaration of trust for the benefit of T. College or otherwise as therein contained executed by me bearing even date with this my last will and testament or any substitution therefor or modification thereof or addition thereto which I may hereafter execute" : Held, that, if effect were given to such a direction, it would be equivalent to giving a power to change a testamentary disposition by an unexecuted codicil in violation of the provisions of the Wills Act; and that the gift failed for uncertainty.

SIMONDS, J., said (*ibid.*, 329) :

The question which I have to determine is whether this is a valid gift to trustees to be held by them on the trusts of the declaration of trust of even date with the will which has been, as I hold, clearly identified and proved. It is clear that a gift in a testamentary document, by reference to a then existing and identifiable document, may be valid. The former document is incorporated in the latter; and may be, though, indeed, not necessarily, admitted to probate. It is equally clear that a gift in a testamentary document may be made by reference to other documents in such terms as to exclude parol testimony; as where it is to papers not yet written, or where the description is so vague that it is incapable of being applied to any document in particular. Such a gift is clearly bad, [the judge referred to *Allen v. Maddock* (9)]. A third case is where, as here, in the testamentary document there is a gift by reference to an existing ascertainable document, or to a document which may in the future be substituted therefor. In regard to such a gift, two different contentions are put forward. On the one hand, it is urged that the existing document must be admitted in evidence and incorporated in the testamentary document; and, this having been done, the rest of the reference must be disregarded. There is then a valid gift in the terms of the incorporated document. The court is not entitled, or concerned, to inquire whether there was a later document. On the other hand, it is urged that the whole gift must be treated as invalid, on the ground that the testator's testamentary intention can only be ascertained by evidence outside the will itself, both in regard to documents existing at the time of the will and to those coming into existence thereafter; and that, since such evidence cannot be admitted about the latter, it ought not to be admitted about the former. I think that the second contention is the right one; and, though I have been unable to find any case in which the question has come before the court in this neat form, I shall refer to certain authorities which appear to support the conclusion to which a consideration of principle leads me.

Then HIS LORDSHIP reviewed the authorities and came to the conclusion stated in the headnote, the result of the decision being that the trust was bad as regards not only a substituted document but also any existing document on the ground that effect could only be given to the testator's intention by treating as part of the testamentary disposition a document, original or substituted, and if it purported to be a substituted document it was, therefore, not validly incorporated in the will, and it would be impossible to reject that document and give effect to the trusts contained in the previously existing document because those trusts would not have given effect to the testator's intention.

The authorities to which I have referred seem to me to bear out the conclusions at which I have arrived in the present case as regards the invalidity of the residuary gift so far as regards the trust by reference to cl. 2 of the settlement. It remains to consider what is the position as regards the trust by reference to cl. 3 of the settlement. I have been invited to hold that, even if the trusts by reference to cl. 2 are abortive so far as the residuary estate is concerned, yet it is open to me to hold that there is a valid trust by reference to cl. 3. It seems to me that it would be wrong for me to come to any such conclusion. It is clear that the testator's intention was to incorporate as part of the trusts of his will the whole of the trusts subsisting under the settlement, including the trusts of any memorandum he might have executed or might thereafter execute. That was his intention. That intention fails, for the reasons I have stated. It seems to me impossible for the court to substitute another intention and, by rejecting that part of the disposition which is bad, arrive at some residual disposition which can be held to be good, because, by so doing, the court would be making a new will for the testator and would be doing something which there is no ground to suppose was his intention at all: see *Re Jones* (8). For these reasons, I am of opinion that the residuary gift in this peculiar case must be held to be wholly abortive.

Order accordingly.

Solicitors: *Mossop Syms* (for the plaintiff); *Wordsworth & Co., James Turner & Son*, and *Middleton Lewis & Clarke* (for various defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

sed. C.A. [1948] 2 All E.R. 51.

SQUIRE v. SQUIRE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Finnemore, J.), June 30, July 1, 2, 9, 1947.]

Divorce—Cruelty—Conduct arising from illness—Absence of deliberation, malignity and intent.

Over a period of four years a wife, who suffered from constant and severe insomnia as a result of illnesses and serious operations, insisted on her husband night by night reading her to sleep, made other demands on him, and nagged him, and, as a result, the husband's health was affected and his efficiency in his profession was impaired. On a petition by the husband for divorce on the ground of cruelty:—

HELD: the wife's conduct, arising, as it did, from illness, did not amount to legal cruelty, to constitute which the conduct complained of must be deliberate, malignant, and intentional.

[AS TO LEGAL CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-654, paras. 954-962; and FOR CASES, see DIGEST, Vol. 27, pp. 281-293, Nos. 2513-2694.]

Cases referred to:

- (1) *Russell v. Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest 291, 2661.
- (2) *Evans v. Evans* (1790), 1 Hag. Con. 35; 161 E.R. 466; 27 Digest 281, 2522.
- (3) *McNaghten's Case*, (1843), 10 Cl. & Fin. 200: *sub nom.*, *McNaughton's Case*, 4 State Tr. N.S. 847; 1 Town St. Tr. 314; 1 Car. & Kir. 130, n.; *sub nom.*, *Insane Criminals*, 8 Scott, N.R. 595.
- (4) *Astle v. Astle*, [1939] 3 All E.R. 967; [1939] P. 415; 109 L.J.P. 6; Digest Supp.
- (5) *Atkins v. Atkins*, [1942] 2 All E.R. 637; Digest Supp.
- (6) *Horton v. Horton*, [1940] 3 All E.R. 380; [1940] P. 187; 109 L.J.P. 108; 163 L.T. 314; Digest Supp.

PETITION by the husband for divorce on the ground of cruelty. The petition

was dismissed. The facts appear in the judgment.

Salmon, K.C., and Roland Adams for the husband.

Theodore Turner, K.C., R. J. A. Temple and Elson Rees for the wife.

Cur. adv. vult.

July 9. **FINNEMORE, J. :** The petitioner, Colonel Edward Keith Squire, asks for a decree dissolving his marriage with his wife, the respondent, on the ground of her cruelty to him. The case has given me a great deal of anxiety, and I confess that my mind has fluctuated during the hearing. The dilemma with which I am faced is complete. Either I have to refuse relief to the husband, although it is obvious that for a number of years his married life was desperately difficult, or I have to fix on the shoulders of the wife the matrimonial offence of cruelty when it is common ground that during all the material years she was extremely ill. All I can do is to put aside, as I must, feelings of sympathy, and apply the law strictly as I understand it.

The parties were married in 1932. The husband was a regular officer in the British Army, and from 1932 to 1936 he lived with his wife at various stations, or, if she was not with him, he visited her when he could. In 1936 he went to India, and was joined by her in Oct., 1938, when, to use his own expression, she was "in great form." In 1940, however, things changed, and from that time until Feb., 1944, when the husband finally left the wife, she was extremely ill. She has had a most unfortunate medical history. In her early life she had a double mastoid operation, which was followed by constant trouble with sinus infections, and at the end of her honeymoon she had further troubles, the result of which, on uncontradicted medical evidence, was that she suffered from an extremely toxic condition. In 1934 and 1935 she had two major and extremely serious operations, one of which resulted in the removal of her ovaries and might be expected to have very grave results both physiologically and psychologically. In 1942, she developed coronary thrombosis. She had further trouble in the form of myocarditis, and, as the result of all these things, she suffered constantly and severely from insomnia.

These circumstances affected both the wife and the husband. Such ill-health was bound to create a position of the greatest difficulty and inevitable suffering for both of them. It is said that during these four years life between them became almost impossible. The wife required her husband night by night to read her to sleep. She wanted him to do many things for her. Apparently, she did not like anybody else about her or in her room and insisted that he should look after her in the way of dressing and bathing and that sort of thing. The effect on the husband was that he began to suffer from worry and lack of sleep and his work began to suffer. He appeared to people in his office as tired, anxious, losing his power of concentration, and ceasing to be the efficient officer he had been. That is the general picture. It resulted in Nov., 1943, in the husband being given compassionate leave because his wife had to be brought back to England and it was thought to be essential that she should have her husband with her. When they got back in Feb., 1944, and the wife had been taken to her mother's house in the Isle of Wight, the husband, after visiting her there twice, left her. After that time he wrote her a series of letters, affectionate and kindly, until 1946, when he made it clear that he was never going to live with her again. He said that he left her because he found the strain of their living together impossible.

In approaching the crucial point in this case, it has to be remembered that "cruelty" has never been defined, but is always strictly interpreted in these courts. In *Russell v. Russell* (1) ([1897] A.C. 445) LORD HERSCHELL quoted the famous judgment of LORD STOWELL, in *Evans v. Evans* (2), in which he said that, with regard to these matters, the courts must always be extremely strict. The question which falls for my decision is whether this case is one in which the course of the wife's illness and the demands which that illness made on the husband were such that married life became impossible, or whether it is a real case of one spouse treating the other with legal cruelty within the meaning of the Matrimonial Causes Act, 1937, or as understood in the cases before that Act when cruelty was a ground for judicial separation. I accept the medical evidence, as well as that of the husband, that by 1943 it was impossible for these two people to go on living as they were. Obviously, a man cannot do his duty day by day and indefinitely sit up half the night and sometimes all the night.

Life having become impossible between them in that sense, was it because the wife was treating her husband cruelly, or was it because her health became so bad that she needed so much care and made so many demands on her husband, that he could no longer meet them without breaking down himself? Counsel for the husband argues that it does not matter, but if, in fact, the wife was making these demands on her husband, she must be taken to have appreciated the effect they would have on him and to have intended their natural consequences, which was that sooner or later his health would break down under her conduct, that she was responsible for doing that, and, therefore, she was cruel. The only defence to that, it is contended, would be insanity. Short of that, she must be presumed to have understood what she was doing, and to have intended the natural consequences. Counsel referred to the rules in *M'Naghten's Case* (3). They were also referred to by HENN COLLINS, J., in *Astle v. Astle* (4), but he made no decision on the point, and I confess I find it very difficult to see how those rules can be applied to a matter of this kind. The rules in *M'Naghten's Case* (3) were adopted many years ago, and are still in full force as deciding criminal responsibility. They pre-suppose a crime, and they lay down the principles on which a person can be excused from the consequences of crime on the ground of insanity. He must be shown either not to have known what he was doing, or, if he did know, not to have known that it was wrong. I think that is rather an unreal proposition to apply in a case of this kind. There is no question here of the commission of a crime; there is no question of the wife being insane because she did not know what she was doing or thought it was right when it was obviously criminally wrong. I do not think that the *M'Naghten* rules are the test in all kinds of cases. I do not think, for example, that in this Division one ever thinks of those rules in connection with unsoundness of mind in the making of a testamentary disposition.

However that may be, I come back to the main question. The husband stated in his evidence that he thought his wife insisted on his reading all night, not just because she was ill, but, as he put it, "she deliberately and maliciously and sadistically stopped me from sleeping." He says it was quite irrational if she did that, but that is the view he adopts, and I think this case stands or falls on this matter, and what is commonly called nagging. It is true—and there are a number of cases on the point now, *Atkins v. Atkins* (5) being one of the most recent—that, apart from any blows being struck, continual nagging, day after day, week after week, month after month, year after year, if it results in a breakdown, or causes a likelihood of a breakdown in health, is cruelty. I am satisfied on the facts that on many nights Mrs. Squire did require her husband to read to her to help her to get to sleep. I doubt whether she thought very much about him. She was, no doubt, a very sick person, very often in considerable pain, suffering from this appalling illness and the consequent affliction of insomnia, and, apparently, not willing to have anybody take her husband's place. Is the husband right when he says that she was acting as she did, not merely because she wanted to get to sleep, but because she wanted to see that he did not if she did not?

I think that, if a person is ill and says in effect: "I can't sleep, so you shan't," that might well be a case of cruelty, and that is the case which the husband has made. I have, however, come to the conclusion that this is a case of a woman who was seriously ill and in great pain, who was unable to sleep and was making very wide demands on her husband, the only member of her family she had with her—demands which from a practical point of view became impossible for him to comply with indefinitely. I do not think that she ever deliberately set out, from spite to her husband, to hurt him, or to prevent him sleeping as she could not. I am satisfied that it was because of the wife's illness that life became impossible for them.

Is that cruelty? One or two cases were referred to. There is *Astle v. Astle* (4). The headnote to that is:

Intention or malignity is an essential element in the matrimonial offence of cruelty, and there can be no such cruelty if the accused spouse's state of mind is such that he does not know the nature and quality of his acts.

There, of course, in the latter part of the sentence the wording of one of the rules laid down in *M'Naghten's Case* (3) is adopted. I am not going to say that I differ from HENN COLLINS, J., because he did not have to decide that matter, but I demur

from the argument in this case that only by the application of the rules in *M'Naghten's* case (3) can intention or malignity be negatived. Another case cited to me was *Horton v. Horton* (6), a decision of BUCKNILL, J., which raised some interesting questions whether the conduct of the wife was an unjustifiable attack on the husband or was merely the development and manifestation of her normal character. In the latter event there was, of course, no remedy, because by our law a decree cannot be granted on the ground that the spouses find that their temperaments are incompatible or that one of them is very selfish. One of the spouses has to be shown to have invaded the sphere of the other to the extent of causing injury to health, or the reasonable apprehension of it. In *Horton v. Horton* (6) BUCKNILL, J., found that there was something more than the development of the wife's normal character, and that there were specific acts which showed that by wilful and unjustifiable conduct she was interfering with the life of her husband and causing injury to his health, and that, he said, amounted to legal cruelty. In his judgment BUCKNILL, J. ([1940] P. 193), said:

Mere conduct which causes injury to health is not enough. A man takes the woman for his wife for better, for worse. If he marries a wife whose character develops in such a way as to make it impossible for him to live happily with her, I do not think he establishes cruelty merely because he finds life with her impossible. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing him injury to health.

The last case to which I was referred was that of *Atkins v. Atkins* (5), which, I was told, is the first reported case in which nagging alone, without any physical assault, was held to be legal cruelty. The headnote says:

Over a long period a wife had constantly and increasingly nagged at her husband, sometimes up to 3 or 4 a.m. The court was satisfied that this conduct resulted in danger to the husband's health.

It was held that that was sufficient to enable the court to grant a decree, but, HENN COLLINS, J. ([1942] 2 All E.R. 638), said:

The legislature has said that [cruelty] shall be a ground for dissolution, but that has not altered the quality of what is known as cruelty in this court, nor has it altered the reasons which actuate the court in its proceedings, which are simply these: the defaulting spouse has been guilty of deliberate behaviour, the effect of which either had been or must be, in the ordinary course, to injure the health, either bodily or mental, of the other spouse.

All those cases emphasise, as I think all the cases before 1937 laid down, the fact that cruelty must be deliberate, malignant, and intended. I do not think that to negative intention, wilfulness, deliberation, or malignity, it is necessary to go so far as to say that the accused spouse was insane, but where the court is satisfied that there was no deliberately adopted intention, as I find in this case, but, owing to illness, in the course of illness, and arising out of illness, there were certain conduct and demands made on the other partner to the marriage which were heavy and became impossible, I do not think there is deliberation, malignancy or intention, or whatever be the proper word, so as to amount to legal cruelty. After all, unfortunately, many husbands and wives get married and one of them develops some incurable disease—cancer, tuberculosis, arthritis—in which life becomes desperately difficult, and, perhaps, almost impossible, for the other spouse, because the one party needs almost constant attention of all sorts and kinds, but no one would dream of saying that that involves cruelty. It is part of the contract of marriage, and part of the marriage service, that the parties take one another for better or worse, and undertake to cherish one another in sickness and in health. In the present case I do not think that the married life of the spouses became impossible because the wife was cruel in the sense which I have mentioned. I think that the married life became impossible because the wife was desperately ill and progressively getting worse, and the husband could no longer—and no blame has been attached to him—stand the strain which the illness of his wife and her demands arising out of that illness made on him. I do not think I would be entitled to fix on the wife the matrimonial offence of cruelty, and, accordingly, I reject this petition.

Petition dismissed with costs.

Solicitors: *Lewis & Lewis and Gisborne & Co.* (for the husband); *Preston, Lane-Clayton & O'Kelly*, agents for *Fardells*, Ryde, Isle of Wight (for the wife).
[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

H. MORELL & SONS, LTD. v. CANTER.

[COURT OF APPEAL (Scott, Asquith and Evershed, L.JJ.), October 14, 1947.]

Landlord and Tenant—Compensation for goodwill—Business carried on in two separate premises—Apportionment of goodwill—Landlord and Tenant Act, 1927 (c. 36), ss. 4, 5.

The tenants carried on business as picture frame makers in two adjoining buildings held from different landlords under different titles. One building was used solely as a warehouse, and the other was used as a shop and workshop. The lease of the warehouse was determined and the tenants served on the landlord a notice under the Landlord and Tenant Act, 1927, requiring the landlord to grant them a new lease of the warehouse. Goodwill attached to the business premises as a whole, but the county court judge found that no goodwill attached to the warehouse as such :

HELD : there was nothing in the Act of 1927 to warrant the assertion that where a business was carried on in two separate buildings and goodwill attached to the business there must in law be an apportionment of the goodwill between the two, and, therefore, as no goodwill attached to the warehouse as such, no order under s. 5 of the Act for the grant of a new lease of the warehouse could be made.

[AS TO COMPENSATION FOR GOODWILL, see HALSBURY, Hailsham Edn., Vol. 20, pp. 294-301, paras. 333-345 ; and FOR CASES, see DIGEST, Supp., Landlord and Tenant, Nos. 2306a-2306s.]

APPEAL by the tenants from an order of His Honour JUDGE DRUCQUER at Westminster County Court.

The county court judge found as a fact that no goodwill attached to a warehouse which, though held under a separate title, formed part of the tenants' business premises. It had been argued that, on a true construction of the Landlord and Tenant Act, 1927, the court was bound to apportion the goodwill of a business between all the premises in which the business was carried on. The county court judge did not accept this argument, and his judgment was upheld by the Court of Appeal. The facts appear in the judgment of SCOTT, L.J.

Beney, K.C., and *Heathcote-Williams* for the tenants.

Holroyd Pearce, K.C., and *J. W. Russell* for the landlord.

SCOTT, L.J. : This is an appeal from the county court judge at Westminster under the Landlord and Tenant Act, 1927. The tenants held a property which comes within that Act. They or their predecessors had carried on a business of picture frame makers and other things connected with that trade for 90 years. They had been holding part of the demised premises—a warehouse—under a lease which ended in 1943 or 1944 and they then held over as tenants from year to year. The tenancy of the warehouse was duly determined, and on its determination a claim was made by the tenants for compensation for loss of goodwill and a new lease under the Act.

Before dealing with the facts, I will refer to the terms of the Act. The Act was entitled :

An Act to provide for the payment of compensation for improvements and goodwill to tenants of premises used for business purposes, or the grant of a new lease in lieu thereof . . .

The tenants in this case wanted, not compensation—though they included it in their claim—but a new lease of the warehouse. The Act contains provisions entitling a tenant of premises used for business purposes in certain defined circumstances and under certain definite conditions to demand from his landlord a new lease. Its first three sections deal with compensation for improvements. Section 4 deals with compensation for loss of goodwill. Section 5 concerns the right to a new lease in certain cases, but that right is dependent on the provisions contained in s. 4 about compensation. Section 5 provides :

(1) Where the tenant alleges that, though he would be entitled to compensation under the last foregoing section, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises, he may in lieu of claiming such compensation, at any time within the period allowed for making a claim under

the said section, serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him. (2) Where such a notice is so served, the tribunal [*i.e.*, the county court here] on application being made for the purpose either by the landlord or by the tenant . . . may, if it considers that the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy for such period (being a term of years absolute) not exceeding fourteen years and on such terms as the tribunal may determine to be proper . . .

The notice was duly served in the present case and there is no dispute about that. The question in the appeal is as to the right to a new lease and not as to any claim for compensation. Section 5 (3) provides in effect that where the tenant is the applicant the grant of a new lease under the section shall not be deemed to be reasonable unless he proves he is a suitable tenant and that he is entitled to compensation under s. 2:

. . . but that the sum which could be awarded to him under that section would not compensate him for the loss he would suffer if he removed to and carried on his trade or business in other premises.

Section 4 provides:

(1) The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner—(i) in the case of a tenancy terminated by notice, within one month after the service of the notice on the tenant; and (ii) in any other case, not more than 36 nor less than 12 months before the termination of the tenancy; be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto: Provided that (a) the sum to be awarded as compensation for such goodwill shall not exceed such addition to the value of the holding at the termination of the tenancy as may be determined to be the direct result of the carrying on of the trade or business by the tenant or his predecessors in title, and in determining such addition the tribunal shall, if it is proved that the premises will be demolished wholly or partially, or used for a different and more profitable purpose, have regard to the effect of such demolition or change of user on the value of the goodwill to the landlord.

Under those provisions of s. 4, as I read them, Parliament laid down certain stringent conditions on the right to compensation conferred on the tenant and the liability of the landlord to pay compensation, and, therefore, consequentially on the right of the tenant to a new lease and the duty of the landlord to grant one. The first condition, that the business should have been carried on for 5 years, is obviously complied with here. As regards the second condition, there is a finding that goodwill had become attached to the premises in which the tenants carried on their business, but that was because, in addition to these warehouse premises, they had, under a different title, premises fronting the street where their office and shop were—the goodwill belonged to the business and thereby became attached to the premises in which they carried it on, but it only attached to them as a whole. The third condition is that by reason of the attachment of goodwill to the premises contained in the tenancy those premises could be let in the future at a higher rent than otherwise would have been realisable. The proviso to which I referred adds a further condition, that the enhancement of value of the premises must be the direct result of the carrying on of the business in the premises and that the landlord's position in relation to the premises does not make that goodwill useless to him. That, broadly speaking, is the extent to which for present purposes Parliament interfered with freedom of contract between landlord and tenant.

I now come to the facts of the case. The front premises of the tenants were 9 and 10 Monmouth Street, London, W.C. The entry to the whole of the premises was there. The public came in there. The front part was a shop, and behind it was a work shop. The premises about which the dispute has arisen known as Nos. 11, 12 and 13 Neal's Yard were at the back with no entrance to them from Monmouth Street at all. They were a bare warehouse with no facilities of any kind, except floor space extending to three floors. It was a mere warehouse except that it could be used by customers going in to see the materials for frames and so on which the tenants kept in it; and for that purpose there

is a finding of fact that it was used by the tenants as a showroom. Under the lease the rent of the Neal's Yard premises was £300 a year. At the time when the matter came before the county court judge and the present question arose for determination, market rents had risen considerably, and the market rent value of the premises was fixed at £525 a year by the referee, to whom the matter was referred by the county court. That represented a rise in value quite irrespective of goodwill, and merely reflected the rise of market rents generally in the district. Over the whole of the premises occupied by the tenants it was conceded that there was a general additional value due to the goodwill of the business which had been carried on in both the front premises and the warehouse over a long period of years. The evidence on one side was that there was an increase of rental value of the Neal's Yard premises by reason of the goodwill of the business, which had attached to the Neal's Yard premises as well as to the front premises in Monmouth Street, and, on the other side, that no part of that goodwill attached to these mere warehouse premises at the back. The referee adopted the latter contention and found that there was no goodwill value attached to the Neal's Yard premises as such. The county court judge accepted the finding of the referee that no goodwill attached to the Neal's Yard premises and he, therefore, dismissed the claim for a new lease.

In my view, the judgment of the county court judge was right. Counsel argued strenuously that, under the Act, if there are, as in this case, two sets of premises held for the purpose of one business and goodwill attaches to the business, there must in law be an apportionment between the two sets of premises. I see no ground for saying so. The Act is limited clearly to the premises contained in the lease or other tenancy agreement referred to in both ss. 4 and 5 of the Act. Having regard to the general object of the Act, even if there were an ambiguity—which I do not think there is—in either of those sections, I should resolve the ambiguity in favour of the Act not directing interference with the freedom of contract between landlord and tenant. As I say, in my view, there is no such ambiguity, but, if there be any, I answer it by saying that the Act must not be interpreted to put on the landlord an obligation to grant a new lease except where the unambiguous terms of ss. 4 and 5 are strictly complied with. In the present case, in my opinion, the evidence is clear that no goodwill attached to these back premises at all. Nothing was added to the value to the landlord of the front premises within the meaning of the sections which I have cited and, therefore, it would be wrong to allow the appeal and order a new lease to be granted. The appeal must be dismissed with costs.

ASQUITH, L.J.: I agree.

EVERSHED, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Stone & Stone* (for the tenants); *Corner & Co.* (for the landlord).
[Reported by C. St.J. NICHOLSON, Esq., *Barrister-at-Law.*]

R. v. NICHOLSON.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Singleton, JJ.), October 16, 1947.]

Criminal Law—Autrefois convict—Consideration of outstanding offences.

The court expressed the opinion that the taking into consideration of outstanding cases at the request of an accused person does not give rise to a successful plea of *autrefois convict*.

R. v. McMinn (1945) 109 J.P. 130 doubted.

[AS TO PLEA OF AUTREFOIS CONVICT, see HALSBURY, Hailsham Edn., Vol. 9, p. 152, para. 212; and FOR CASES, see DIGEST, Vol. 14, pp. 336-346, Nos. 3550-3624.]

Case referred to:

(1) R. v. McMinn, (1945), 109 J.P. 130; 30 Cr. App. Rep. 138; Digest Supp.

APPLICATION for leave to appeal against conviction on the ground that the applicant was *autrefois convict*. The application was refused.

No counsel appeared.

SINGLETON, J., delivering the judgment of the court. On Aug. 13, 1947, the appellant was convicted at Devon Quarter Sessions on a charge of larceny. He now asks for leave to appeal against that conviction on the ground that on July 22, 1947, he was brought before the justices at Hitchin on a certain charge and the offence of which he was subsequently convicted at the Devon Quarter Sessions was then included in a list of outstanding offences which he admitted and asked to be taken into consideration. It is clear that that offence was not taken into consideration by the justices at Hitchin, and in a report which the learned chairman has sent to this court, he points out that on that ground it is distinguishable from *R. v. McMinn* (1), where the outstanding offence had been taken into consideration.

It is all to the good that our attention has been drawn to *R. v. McMinn* (1), for we are given to understand that the decision in that case has led to some difficulty. On Jan. 24, 1945, McMinn was indicted before LEWIS, J., at Northamptonshire Assizes for obtaining a cheque by false pretences. On being arraigned he entered a plea of *autrefois convict*. Evidence was called to prove that on Sept. 26, 1944, he had appeared before the Stratford (Essex) Petty Sessional Court charged with larceny. He consented to be dealt with summarily, the justices found the offence proved, and he then asked that the offence of obtaining the cheque by false pretences in Northamptonshire, which was then outstanding and in respect of which he had signed the usual "other offences" form, should be taken into consideration. The justices agreed to take that offence into consideration, and they passed a sentence of six months' imprisonment. The defendant appealed to Essex Quarter Sessions against the conviction of larceny, and on Nov. 30, 1944, quarter sessions allowed the appeal and quashed the conviction. The defendant was then arrested for the offence of obtaining the cheque by false pretences and was committed to Northamptonshire Assizes for trial. LEWIS, J., said (109 J.P. 130):

I have considered the point of law and I think that the plea in bar of *autrefois convict* succeeds. I shall direct the jury to return a verdict that the prisoner has been previously convicted. I have been referred to several cases, but I do not think there are any on all fours with this one.

He so directed the jury and the accused man was acquitted.

We feel unable to agree with the opinion of the learned judge. We recognise that the question has not been argued before us, but we think it right to point out that the taking into consideration of offences at the request of an accused person does not mean that there has been a conviction in respect of each of such offences. For many years there has been a practice by which, when an accused person has signed the usual form, outstanding offences may be taken into consideration if the accused, after conviction of the offence with which he has been charged, admits them and wishes them to be taken into consideration. That practice was adopted largely to enable an accused person to start with a clean sheet when he was released from prison. It also avoids multiplicity of proceedings. Sentence is passed on the count or counts on which there has been a conviction, and no matter how many offences are taken into consideration, the sentence cannot exceed that prescribed by law for the offences charged in the indictment and on which there has been a conviction. There is no conviction on the outstanding cases, nor is there any separate sentence on them. In the normal case no proceedings follow on any of them, not because there have been convictions of them but because they have been taken into consideration. We think it is right to point this out to avoid misunderstanding, and though, as I have said, the question has not been argued before us, we have considered the arguments and the judgment in *R. v. McMinn* (1), and we are all strongly of opinion that it ought not to be followed in future cases, at least until it has been considered by this court. The application for leave to appeal against conviction is refused.

Application refused.

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

R. v. EPPING (WALTHAM ABBEY) JJ. *Ex parte* BURLINSON.
[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Singleton,
JJ.), October 16, 1947.]

Public Health—Statutory nuisance—Proceedings against local authority—Competence—Public Health Act, 1936 (c. 49), ss. 92 (1) (c), 99.

A A local authority can be made a defendant before justices under s. 99 of the Public Health Act, 1936, on a complaint that it has caused a statutory nuisance within the terms of s. 92 (1) of the Act, nor is it any objection to the jurisdiction of the justices that the nuisance arose from some operation in the course of the carrying out by the local authority of some public duty.

[FOR THE PUBLIC HEALTH ACT, 1936, s. 99, see HALSBURY'S STATUTES, Vol. 29, p. 399.]

B Cases referred to :

- (1) *Scarborough Corpn. v. Scarborough Sanitary Authority*, (1876), 1 Ex.D. 344 ; 34 L.T. 768 ; 40 J.P. 726 ; 36 Digest 235, 745.
- (2) *R. v. Pariby*, (1889), 22 Q.B.D. 520 ; 58 L.J.M.C. 49 ; 60 L.T. 422 ; 53 J.P. 327 ; 36 Digest 178, 234.
- (3) *Fulham Vestry v. London County Council*, [1897] 2 Q.B. 76 ; 66 L.J.Q.B. 515 ; 76 L.T. 691 ; 61 J.P. 440 ; 36 Digest 179, 236.

C MOTION for an order of *mandamus* directing the Epping justices to hear and determine a complaint, preferred by Thomas Burlinson against the corporation of Chingford, that the corporation had caused a nuisance within the Public Health Act, 1936, s. 92 (1) (c), which nuisance still existed. The justices held that they had no jurisdiction to hear the case because the defendants to the complaint were a local authority. The Divisional Court held that the justices had jurisdiction and the order of *mandamus* must issue.

D

F. H. Lawton for the applicant.

Berryman, K.C., and *Bernard Lewis* for the respondents.

E LORD GODDARD, C.J. : In this case the complaint was that in or upon part of land known as Mansfield Park there existed a statutory nuisance as defined by the Public Health Act, 1936, s. 92 (1) (c), namely, an accumulation or deposit which was prejudicial to health, and that that statutory nuisance was caused by the act of the mayor, aldermen and burgesses of the borough of Chingford.

The point taken before the justices was that the provisions of the Public Health Act, 1936, which deal with the powers of justices to hear and determine cases relating to what are known as statutory nuisances did not enable the justices to hear and determine a case if the defendant was a local authority —in other words, that a local authority was privileged in that, although it could proceed against persons whom it alleged created nuisances, it could not be proceeded against if it were alleged that the authority itself was committing or permitting a nuisance.

F Section 91 of the Act provides :

G It shall be the duty of every local authority to cause their district to be inspected from time to time for the detection of matters requiring to be dealt with under the provisions of this Part of this Act as being statutory nuisances within the meaning of the next succeeding section.

H Section 92 deals with what are referred to throughout the Act as statutory nuisances. It is not pretended and could not be pretended that justices have power at the suit either of the local authority or of any other person to deal with any nuisance which may arise. Justices only have power to deal with the nuisances which are enumerated in s. 92. One of the nuisances enumerated in the section is caused by an "accumulation or deposit which is prejudicial to health or a nuisance." That is the nuisance which is alleged in the present complaint, and clearly it is a statutory nuisance in respect of which the justices can hear and determine unless they are prevented from doing so because the defendant is a local authority. Section 93 gives a local authority power to serve an abatement notice calling on a particular person to abate a nuisance. Section 94 provides that, if a person on whom an abatement notice has been served makes default, the local authority can cause a complaint to be made to

the justices and then the matter can be dealt with by a court of summary jurisdiction. The remedies which are open are set out. On hearing the complaint, if it is proved to the court that the nuisance exists or that it is likely to recur, they may make an order requiring compliance with all or any of the requirements of the abatement notice, or otherwise the abatement of the nuisance, within a time specified in the order, and the execution of any works necessary for that purpose, and they may prohibit a recurrence of the nuisance and require the defendant, within a time specified in the order, to execute any works necessary to prevent a recurrence. They may also impose a fine not exceeding £5. Sub-section (6) provides :

If it appears to the court that the person by whose act or default the nuisance arises, or the owner or occupier of the premises, cannot be found, the nuisance order may be addressed to, and executed by, the local authority.

In other words, the justices in those circumstances can authorise the local authority to do the work itself without ordering in the first instance the person responsible to do it.

Section 96 deals with the recovery from the person by whose act or default the nuisance was caused of costs and expenses reasonably incurred by a local authority in abating or preventing the recurrence of a statutory nuisance where the order was made on some person other than the local authority or where the order was made on the local authority. In the ordinary course of events, where a nuisance exists it is the duty of the local authority to take proceedings for its abatement and those sections contemplate cases where the local authority is carrying out its duty in that respect. Section 99 provides :

Complaint of the existence of a statutory nuisance under this Act may be made to a justice of the peace by any person aggrieved by the nuisance, and thereupon the like proceedings shall be had, with the like incidents and consequences as to the making of orders, penalties for disobedience of orders and otherwise, as in the case of a complaint by the local authority, but any order made in such proceedings may, if the court after giving the local authority an opportunity of being heard thinks fit, direct the authority to abate the nuisance.

So, a private person has the same powers in respect of this matter with regard to the abatement of a nuisance as the local authority for the purpose of bringing the matter before the court and obtaining an order.

Counsel for the justices has contended that that section must be read as giving power to a private person to complain and obtain an order against another private person, but not as giving a right to a private person to complain and obtain an order against the local authority itself if the local authority itself is found to be causing the nuisance. The sole observation I would make is that there are no words in that section which have any such effect, and it could only be competent to a court to read into a section words limiting the right of a private person to bring proceedings against a local authority or exempt the local authority against proceedings in respect of a statutory nuisance if a consideration of other parts of the Act made it impossible to contemplate that Parliament could have intended that the local authority itself could be made a defendant. It seems to me that the answer which counsel for the applicant gave in the course of his reply to that contention is sufficient. No doubt, *prima facie* nuisances will be abated by the local authority, but two things may happen. A local authority may refuse to abate what a private person alleges to be a nuisance. It may be that the local authority may come to the conclusion that a nuisance does not exist and that it will not take proceedings. Section 99 gives power to a private person to bring the matter before the court on his own complaint and get an order if he can persuade the court that a nuisance does exist. Secondly, counsel says that the section must apply if the local authority itself is alleged to be responsible for the nuisance. In my opinion, it is right to say that the section applies in those two cases—(1) where the local authority is alleged not to have carried out its duty, and (2) where the local authority itself is alleged to have caused the nuisance. I think the concluding words of the section :

. . . but any order made in such proceedings may, if the court after giving the local authority an opportunity of being heard thinks fit, direct the authority to abate the nuisance . . .

can be explained in this way. If A brings proceedings against B, complaining that B has committed a nuisance, and persuades the justices that B has committed a nuisance, the justices may, if they think fit, direct the local authority to abate the nuisance, because a local authority has much greater facilities for abating nuisances than private persons. The expense of abating the nuisance might, in the opinion of the justices, be more properly borne in the first instance by the local authority who can recover it from the offender under the other sections to which I have referred. If the justices are going to do that, they must give the local authority an opportunity of being heard before they make the order that the local authority should carry out the necessary work of abatement. I do not think that those words can be construed as imposing a bar against the local authority itself being made the defendant and having an order made against it, because in those circumstances it will certainly have the opportunity of being heard. I can see no words in the section and I can see no necessary implications when the whole matter is considered, why it should not be possible to make the local authority a defendant in respect of a statutory nuisance just as much as any other person can be made a defendant.

If the decision were otherwise, the result would be somewhat remarkable. It is easy to imagine a case in which a ratepayer or an inhabitant of a district could allege that a local authority had been guilty of a nuisance. Many local authorities in these days carry on municipal trading. It might also be said that at the town hall or the offices of the local authority some nuisance existed in the shape of a defective drain or a dustbin which was affecting neighbouring premises, or a nuisance might arise from some other activity which the local authority was carrying on. The object of the Act, as has been emphasised, is to provide a cheap and speedy remedy, and why the remedy should be used at the instance of the local authority, who have all the ratepayers' money behind them, but not against the local authority by an inhabitant of the district, I fail to see.

We have been referred to certain authorities which, it is said, throw some light on the point. *Scarborough Corporation v. Scarborough Sanitary Authority* (1) heard in 1876, was very similar to the present case. It was alleged in that case that the urban sanitary authority, *i.e.*, Scarborough Corporation, had created a nuisance in the rural area by collecting refuse, manure, cinders, and so forth, and depositing them there, having sold them to farmers who would collect them from the dump. That case was heard under s. 96 of the Public Health Act, 1875, which does not differ in any material way from s. 94 (2) of the Act of 1936. The case was heard without any objection being taken that there was no jurisdiction to deal with it because a local authority was defendant. So far as I know, no doubt has yet been thrown on this case. It is true that no point was taken either by counsel or by the judges which would enable one to say that the case is an authority that these proceedings will lie, but it is remarkable that from 1876 until 1947 no doubt has ever been raised that that case was properly brought before the court. It came before this court, not on a motion for an order of *mandamus* or *certiorari*, but by a Special Case stated by the justices, and the conviction of the corporation was upheld by the court.

In *R. v. Parby* (2) one local authority took proceedings against another local authority, it being alleged that a nuisance arose from the defendant's sewage works. That case seems to decide no more than that a nuisance alleged to arise from the construction of a sewage system is not one of the statutory nuisances within the material sections of the Public Health Acts. In the course of his judgment WILLS, J., said (22 Q.B.D. 526) :

By s. 105 of the Public Health Act, 1875 [which is in substance the same as s. 99 of the Act of 1936] private individuals may complain to the justices of a nuisance, and thereupon the justices shall have the same powers as under the sections we have mentioned. We think *Mr. Foote* is right in his contention that so far as the person or body complained of is concerned, the magistrates have jurisdiction to entertain complaints against a local board as well as against an individual.

That is what we are holding now, that the local board, as it was in those days, or the local authority as it is under the present Act, can be made a defendant before the justices under these sections, provided always that the nuisance

in respect of which the authority summoned is a statutory nuisance within the terms of the section.

That case was followed by the Divisional Court in *Fulham Vestry v. London County Council* (3). It is true that there DAY, J., did use some rather wide language, but it was *obiter* for the purpose of that case. On the point raised in the present case he expressed no opinion, but again that was the case of a main sewer, and the court held that a nuisance alleged to arise from the ventilation or construction of the sewage works of the London County Council was not one of the statutory nuisances dealt with in the Public Health Act. That was the only point in the case, or was, at any rate, the *ratio decidendi*.

The other point which counsel for the justices made was that it appears on the affidavits in the present case that the local authority is carrying out a public work and it is alleged that a nuisance arises from that public work, and he says that the decision in *Fulham Vestry v. London County Council* (3) applies, and we ought to hold that the justices have no jurisdiction. I cannot agree with such a wide proposition. If the local authority can be made defendant in a case, as I think it can, I do not think it is any answer to say that the nuisance arises from some operation in the course of its carrying out some public duty. That is something which will have to be inquired into. I will assume that the provision of a public park is carried out under statutory powers, but if, in the course of the local authority carrying out its duty a nuisance is caused, as in this case, I cannot see why I am compelled to hold that the justices cannot inquire into it. WILLS, J., in *R. v. Parlbay* (2) said that the sections were intended for an ordinary and comparatively simple case, and a more ordinary and comparatively simple case than the one here I cannot conceive. For these reasons I think the justices were wrong, and, therefore, the order for *mandamus* must go, with costs.

HUMPHREYS, J.: I have arrived at the same conclusion, and my Lord has put in language far better than I can use precisely the arguments which appeal to me. I would like to add a word on one or two matters only. The first is with regard to the *Scarborough* case (1). It is certainly very odd that within a year of the passing of the Public Health Act, 1875, the question of the liability of a local authority for a nuisance under that Act should have come before a Divisional Court. Indeed, I find that the argument in that case of counsel for the appellants, Scarborough Corporation, proceeded on the lines that no order ought to be made against his clients because they were a public body discharging duties which it was important should be fulfilled for the public, and, therefore, anything like an order for the abatement of, or an order to prevent the recurrence of, a nuisance might result in their being hampered in the performance of the functions assigned to them. If it had been thought at that time that there was a short and simple answer to the proceedings then taken, which was that, being the local authority, they could not be sued at all in that court, that point would surely have been taken.

As my Lord has pointed out, it must be remembered that all we are dealing with here is a statutory nuisance. No one doubts that it is the duty of the local authority to prevent nuisances, and it is plain to anyone who looks at ss. 91 to 98 of the Act of 1936 that it is assumed by Parliament that it will be the local authority who will set the law in motion. I can, however, give no meaning to s. 99 unless it is that Parliament intended to deal with the case where the local authority themselves decline to do that which it is their duty to do under s. 91, *i.e.*, to cause their district to be inspected with a view to suppressing any statutory nuisance. In such a case and in that of the nuisances which are defined in s. 92 (1)—which include what is alleged in this case, namely, an “accumulation or deposit which is prejudicial to health”—any private person who has been injured by the existence of the statutory nuisance may proceed. Why should he not proceed against any person who has caused that nuisance? Why should we say, merely because in ordinary circumstances the local authority is the person to take proceedings, that Parliament intended that, if they did not do their duty, they were sacrosanct and were not to be proceeded against in that respect. To my mind, it would require very strong words to make any court hold that a local authority was exempt from any such proceedings, and I can find no words in s. 99 which indicate that. The like proceedings are to be

had at the instance of a private individual which would have been had at the instance of the local authority if they had acted.

The language of s. 99, which provides that :

... any order made in such proceedings may, if the court after giving the local authority an opportunity of being heard thinks fit, direct the authority to abate the nuisance ...

- A is perfectly simple, bearing in mind that there may be nuisances, including statutory nuisances, which are created by an individual who may not be in a position to abate or deal with them. He may be unable, for financial reasons, to abate the nuisance. I am not in the least impressed by the words "after giving the local authority an opportunity of being heard," which merely mean that justices must not require a local authority to do something until the authority have been given an opportunity of making any objections they wish to make. I cannot read those words as meaning that a local authority cannot be made defendants in any case. I think that s. 99, in its ordinary meaning, clearly gives the right to a private individual who may be aggrieved by a nuisance to take precisely the same proceedings as a local authority and those proceedings may be followed by the same results whoever is the person who is responsible for the nuisance. The argument of counsel for the justices seems to involve that, while a private individual may take proceedings and may have the assistance of the local authority by order of the justices if some other individual has been guilty of creating a nuisance, yet, for some reason which it is impossible to my mind, to understand, if it happens that the local authority themselves have been guilty of default, he can get no order against them, but is left to the expensive remedy of going to the High Court and instituting proceedings for an injunction and so forth. I do not find that the language of the Act requires me to hold any such thing, and I am sure that Parliament never intended it.
- D I agree with the judgment of my Lord.

SINGLETON, J. : I agree.

Order accordingly.

Solicitors : *J. H. Fellowes* (for the applicant) ; *Francis J. O'Dowd*, town clerk, Chingford (for the respondents).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

CHOWDHARY AND ANOTHER v. GILLOT AND OTHERS.

[KING'S BENCH DIVISION (Streatfeild, J.), October 14, 15, 16, 1947.]

- F *Master and Servant—Loan of servant—Motor car left with manufacturers for repairs—Employee of company instructed to drive owner to railway station in owner's car—Accident due to negligence of driver—Liability of company.*

- G The plaintiff took his motor car to the manufacturers for repairs and, after handing it over to the company's receptionist with instructions in regard to his requirements, he asked if he could have a "lift" to the nearest railway station and G., an employee of the company, was instructed to drive him to the station in his (the plaintiff's) own car. On the way to the station, owing to the negligence of G., the car collided with a lorry and the plaintiff was injured. In an action brought by the plaintiff against G. and the company, as his employers, the company contended that they were not liable for G.'s negligence because at common law the relationship of master and servant did not exist between them and G., their general servant, at the time of the accident, as the plaintiff was in control of his own car and G. himself, and not merely the benefit of his services, had been transferred to him, and, therefore, at the material time, G. was the particular servant of the plaintiff :—

HELD : (i) since the driver was lent to the plaintiff to drive his own car, the onus was on the plaintiff to show that he had abandoned control of the car.

Samson v. Aitchison ([1912] A.C. 844) and observations of LORD WRIGHT in *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*

([1942] 1 All E.R. 491, 496), and of VISCOUNT SIMON, L.C., in *Mersey Docks and Harbour Board v. Coggins & Griffiths (Liverpool), Ltd.* ([1946] 2 All E.R. 345, 348) applied.

(ii) having received the car for repairs, the company were, at the time of the accident, in possession of it as bailees and, so long as the bailment continued, the owner had no right to control the bailees' servants; the company had lent the plaintiff the services of their servant and had not transferred the servant himself to the plaintiff; and, accordingly, the driver did not at common law become the particular servant of the plaintiff.

Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool), Ltd. ([1946] 2 All E.R. 345) applied.

[AS TO LIABILITY FOR SERVANTS OF CONTRACTORS, see HALSBURY, Hailsham Edn., Vol. 22, pp. 241-243, paras. 421, 422, and Supplement; and FOR CASES, see DIGEST, Vol. 34, pp. 22-28, Nos. 23-61, and Supplement.]

Cases referred to:

- (1) *Mersey Docks & Harbour Board v. Coggins & Griffiths (Liverpool), Ltd., and McFarlane*, [1946] 2 All E.R. 345; 175 L.T. 270; *affg.*, S.C. *sub nom.*, *McFarlane v. Coggins & Griffiths (Liverpool), Ltd.*, [1945] K.B. 301; Digest Supp.
- (2) *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*, [1942] 1 All E.R. 491; [1942] A.C. 509; 111 L.J.P.C. 138; 167 L.T. 404; Digest Supp.
- (3) *Cameron v. Nystrom*, [1893] A.C. 308; 62 L.J.P.C. 85; 68 L.T. 772; 57 J.P. 550; 34 Digest 27, 61.
- (4) *Donovan v. Laing, Wharton & Down Construction Syndicate*, [1893] 1 Q.B. 629; 63 L.J.Q.B. 25; 68 L.T. 512; 57 J.P. 583; 34 Digest 26, 49.
- (5) *Moore v. Palmer*, (1886), 2 T.L.R. 781; 51 J.P. 196; 34 Digest 26, 47.
- (6) *Samson v. Aitchison*, [1912] A.C. 844; 82 L.J.P.C. 1; 107 L.T. 106; 36 Digest 100, 667.
- (7) *Pratt v. Patrick*, [1924] 1 K.B. 488; 93 L.J.K.B. 174; 130 L.T. 735; 36 Digest 62, 399.
- (8) *Hood v. Anchor Line (Henderson Brothers)*, [1918] A.C. 837; 87 L.J.P.C. 156; 119 L.T. 684; 8 Digest 104, 695.

ACTION for damages for personal injuries and loss by the negligence of the defendants.

The plaintiffs, a doctor and his wife, were injured in a collision between a motor car and a lorry. The doctor, the owner of the car, had left it with Daimler Co., Ltd. (the second defendants) for repairs, and, on his asking the company's receptionist if he could have a "lift" to the nearest railway station, Gillot, the first defendant, who was employed by the company, was instructed to drive him and his wife to the station in his (the doctor's) own car. On the way to the station, the car collided with a lorry driven by Jones, the third defendant. STREATFEILD, J., found that the defendant, Gillot, had been guilty of negligence which gave a right of damages to the plaintiffs, that the accident was due solely to the negligence of Gillot, and that the claim against the defendant, Jones, failed. He then dealt with the question of the company's liability for the negligence of Gillot, and held that Gillot was, at the time of the accident, the servant of the company. The report deals with the question of the company's liability, and the facts on this issue appear in the judgment.

Vick, K.C., and *Geoffrey Howard* for the plaintiffs.

Ryder Richardson for the first defendant, Gillot.

Humfrey Edmunds for the second defendants, Daimler Co., Ltd.

Geoffrey Lawrence for the third defendant, Jones.

STREATFEILD, J. [having reviewed the evidence]: I now come to what is the difficult and certainly the most interesting part of the case, namely, the question whether or not the defendants, Daimler Co., Ltd., are liable to the plaintiffs for the negligence of Gillot, who was admittedly their general servant, on the principle of *respondet superior*. The contentions which have been urged by counsel for the company are, first, that on common law principles the relationship of master and servant between them and their general servant did not exist at the material time, but that their servant, as distinct from the mere benefit of his services, was transferred to the male plaintiff so that he became his particular servant at the material time, and, secondly, as affecting the male

plaintiff only, it is contended that he contracted, or must be taken to have contracted, that any servant of the company driving his car should be deemed to be his servant and that he should discharge all liabilities incident to that relationship.

A The circumstances giving rise to those contentions are as follows, and it is material to go back into the history of the relationship between Dr. Chowdhary and the Daimler Co. For some ten or twelve years he had been a valued customer of the Daimler Co. He was in the habit of taking his Daimler car to their works and leaving it with them for servicing and repairs some three or four times every year. He either stated his requirements verbally or brought a rough list of the repairs which were required, and his instructions, either verbal or written, were then transferred to a form, which was headed "Repair order—chargeable," by one of the receptionists of the defendant company. If this form was then and there made out, he signed it on the premises; otherwise the company posted him a form two or three days later, which he signed at his home and returned to them. He tells me that he never at any time read the conditions on the back of that form, which is not altogether surprising, and he supposed that they contained what he called the ordinary conditions which garage people usually have on their contracts. On the front of the form which he was in the habit of signing were these words:

C Please execute the under-mentioned work and charge the same to my account in accordance with the conditions on the back hereof.

On the back are some eleven conditions, No. 4 of which reads:

D If a customer's car and/or chassis shall be driven at any time by one of the company's employees the employee shall be deemed for all purposes to be the servant of the customer who shall be entitled to all rights and shall discharge all liabilities incident to that relationship.

E Before the war when cars and petrol were more plentiful than they are to-day, the Daimler Co. had been in the habit of sending Dr. Chowdhary to the nearest railway station after he had left his car for repairs. For that courtesy service, as it may be called, they used one of their own cars and their petrol and one of their own drivers. It was a service which was rendered to other people as well, but in Dr. Chowdhary's case it was rendered, not only to an old and valued customer, but also to one who was described by the receptionist as a "No. 1 priority customer," Dr. Chowdhary being a medical practitioner. During the war the shortage of petrol and cars prevented them from rendering that service in the same way, but, at his request, when he had taken his car for repairs they continued, whenever possible, to provide one of their own servants to run him to the nearest station in his own car and bring it back to their works immediately afterwards.

F On Nov. 23, 1944, Dr. Chowdhary took his wife in his car to the Daimler works to have the car repaired. He either gave a list of requirements to the receptionist, Mr. Heagan, or Mr. Heagan received them verbally and memorised them. It does not matter which, but, in fact, he signed no order form there and then. Presumably, a form would or might have been sent to him later, but in the events which happened he never received nor signed one of these repair order forms. Having taken his car to the Daimler works, he was first minded to walk with his wife to the Park Royal station, some 15 minutes walk away, but on second thoughts he asked Mr. Heagan if he could have a lift to the nearest station, and, accordingly, Mr. Heagan detailed Gillot, who was a tester and tuner at their works and a driver of some 40 years experience, for the job. Accordingly, Dr. Chowdhary and his wife got into the back of the car and Gillot drove them. On the journey to the station the accident occurred, H caused, as I have already found, by Gillot's negligence. It is on these facts that I am asked to find, first, on common law principles, that there was a temporary transference of their paid servant by the Daimler Co. to Dr. Chowdhary so as to pass the right or authority to control him in "the way in which the act involving negligence was done." Those are the words of Viscount SIMON ([1946] 2 All E.R. 348) in *Mersey Docks and Harbour Board v. Coggins & Griffiths (Liverpool), Ltd.* (1), and they are very similar to the words of LORD UTHWATT (*ibid.*, 355): the "authority to control the manner of execution of the act in question."

The principles which, I think, must govern me in this matter are as follows. *Prima facie*, a general servant remains the servant of the master who pays him and there is a presumption against the transfer of that servant as distinct from his services. In *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* (2) LORD WRIGHT, after quoting from the speech of LORD HERSHELL, L.C., in *Cameron v. Nystrom* (3), dealing with the question of the requirements of the relationship of master and servant, stated ([1942] 1 All E.R. 496):

It is, I think, clear that the presumption is all against there being such a transfer. A

The second principle is, again, particularly enunciated by VISCOUNT SIMON in the *Mersey Docks and Harbour Board* case (1), namely that the burden of proof of such a transfer is a heavy one. VISCOUNT SIMON said ([1946] 2 All E.R. 348):

It is not disputed that the burden of proof rests upon the general or permanent employer—in this case the board—to shift the *prima facie* responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances. B

I think that those last words relating to exceptional circumstances refer to the case which was before the House of Lords there, where not only was a servant hired by the hirers, but also the crane (as it there was) was also hired with him. There can be no doubt that, in a case where not only the man but also the vehicle is hired, the burden is, indeed, a heavy one to show that the servant was transferred. I think that VISCOUNT SIMON'S reference to the exceptional circumstances refers to *Donovan v. Laing, Wharton & Down Construction Syndicate* (4), a somewhat similar case to *Mersey Docks and Harbour Board v. Coggins & Griffiths (Liverpool), Ltd.* (1), but which was decided the other way, and which came under some fire from some of the learned Law Lords but was justified by reference to its particular facts. C

Although it may be that the burden of proof, as I think, is not quite so heavy in a case where the man alone is hired, as opposed to the man *plus* the machine, I think that, none the less, it is a heavy burden to prove that there was a transference of the servant as opposed to the mere benefit of his services. BOWEN, L.J., in *Moore v. Palmer* (5) summarised the position in one short sentence in these words (2 T.L.R. 782): D

The great test was this—whether the servant was transferred or only the use and benefit of his work? E

That short passage is referred to in the speech of LORD WRIGHT ([1942] 1 All E.R. 496), in the *Century Insurance Co.* case (2). Thus, we have to apply a heavy burden of proof although it may be a somewhat lighter one than that which governed the court in the *Mersey Docks and Harbour Board* case (1). F

Thirdly, it must be proved that there was such a transference of the servant as to pass the right or authority to control him in the manner of the execution of the act in question. That I have already dealt with. Lastly, it is a question of fact involving the whole circumstances of the case whether there has been such a transference of the right or authority to control. In the *Mersey Docks* case (1) LORD PORTER said ([1946] 2 All E.R. 351):

Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed—all these questions have to be kept in mind. G

In the *Century Insurance* case (2) LORD WRIGHT quoted ([1942] 1 All E.R. 496) the words of LORD HERSHELL, L.C. ([1893] A.C. 312) in *Cameron v. Nystrom* (3) where he listed some of the requirements of the relationship of master and servant in the case of the transfer of a servant from one master to another.

I think one must also say that, although it may not affect the position as between the contractors *inter se*, it must be borne in mind that there cannot be a transfer of the servant from one master to another without his consent, and that consent may be either express or implied. That is insisted on in the *Mersey Docks* case (1) by all of the Law Lords, and, in particular, by LORD PORTER who said ([1946] 2 All E.R. 350): H

In determining this question it has to be borne in mind that the employee's position is an important consideration. A contract of service is made between master and man and an arrangement for the transfer of his services from one master to another can

only be effected with the employee's consent, express or implied. His position is determined by his contract. No doubt, by finding out what his work is and how he does it and how he fulfils the task when put to carry out the requirements of an employer other than his own, one may go some way towards determining the capacity in which he acts, but a change of employer must always be proved in some way, not presumed.

LORD PORTER then referred to requirements of the compulsory health insurance and accident insurance laws, and continued (*ibid.*):

A Nor is it legitimate to infer that a change of masters has been effected because a contract has been made between the two employers declaring whose servant the man employed shall be at a particular moment in the course of his general employment by one of the two. A contract of this kind may of course determine the liability of the employers *inter se*, but it has only an indirect bearing upon the question which of them is to be regarded as master of the workman on a particular occasion.

LORD PORTER concluded his opinion with the remark (*ibid.*, 351):

B In the present case [the *Mersey Docks* case (1)], if the appellants' contention were to prevail, the crane driver would change his employer each time he embarked on the discharge of a fresh ship. Indeed, he might change it from day to day, without any say as to who his master should be and with all the concomitant disadvantages of uncertainty as to who should be responsible for his insurance in respect of health, unemployment and accident. I cannot think that such a conclusion is to be drawn from the facts established.

C Those are the principles which, I think, must guide me on the question of fact whether there was a transfer of Gillot from his general employers to Dr. Chowdhary.

D Counsel for the company, applying those principles, contends, first, that the car had not at the material time been handed over to the Daimler Co., and he relies on certain answers given in cross-examination by Dr. Chowdhary as to the control which he felt that he could exercise over Gillot when driving the car. I need not quote them in detail. They were, in fact, answers whereby he agreed that if Gillot had driven the car dangerously he would have felt at liberty to check him, and, if he had refused to slow down or to drive more carefully, he would have forced him to, or would have taken over the wheel himself. That was really the first point of counsel for the company, *i.e.*, that the car still remained in the custody of Dr. Chowdhary and had not yet been handed over to the company. The second point that he raised in effect was that he discharged the *onus*, heavy though it was, by pointing to the fact that Gillot was lent to drive the car for its owner who was present in the car and retained possession of it and the right to control the manner of the driving. It is, of course, that detail which distinguishes this case from *Mersey Docks and Harbour Board v. Coggins & Griffiths* (1). It appears that there is no case right on all fours with the present one, but counsel for the company relies on the principle laid down in *Samson v. Aitchison* (6), and also on *Pratt v. Patrick* (7).

F With regard to *Samson v. Aitchison* (6) I need only read the headnote which is as follows:

G Where the owner of a vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not of itself exclude his right and duty of control; and, therefore, in the absence of further proof that he has abandoned that right by contract or otherwise, the owner is liable as principal for damage caused by the negligence of the person actually driving.

In his judgment which was approved in the Privy Council ([1912] A.C. 849), the trial judge said:

H I think that where the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right, or is shown by conclusive evidence to have in some way abandoned his right. If any injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property if, in his opinion, the necessity arises, he must be able to say to the driver, "Do this," or "Don't do that." The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering wheel. The owner, indeed, has a duty to control the driver . . . The duty to control postulates the existence of the right to control. If there was no right to control there could be no duty to control. No doubt if the actual possession of the equipage has been given by the owner to a third person—that

is to say, if there has been a bailment by the owner to a third person—the owner has given up his right of control.

On that principle counsel for the company contends that he has discharged the *onus* which lies on him of showing that there had been a transfer of the servant to Dr. Chowdhary because Dr. Chowdhary was riding in his own car and remained in possession of it and retained the right to control.

In my opinion, the fact that Gillot was lent to the doctor to drive his own car in those circumstances casts the burden of proof on Dr. Chowdhary to show that in all the circumstances he had in some way abandoned his right to control or in some way had "contracted himself out of" that right, to quote the words that I have just read. On that question I have given careful consideration to the argument of counsel for the plaintiffs. As I have said, in determining this question I have to consider the whole of the surrounding circumstances, and, in my judgment, the facts do support the view that Dr. Chowdhary had no right, or had abandoned his right or authority, to control Gillot at the material time. My reasons for that conclusion are these:—(i) the car, in my view, had been delivered to the Daimler Co. for repairs and the order had been accepted, and from that moment onwards the Daimler Co. were in possession of that car as bailees; (ii) thereafter and so long as the bailment continued, Dr. Chowdhary had no right to control the bailees' servants; (iii) in my opinion, he was doing no more than receiving the benefit of the Daimler Co.'s courtesy service, as I have called it, just as though it had been in their own motor car and with their own petrol as in former days, and the mere fact that it was the customer's own car did not, in my view, prevent it from being part of their service towards him; (iv) there is some indication, without laying undue stress on it, of the doctor having abandoned his right to control from the fact that he got into the back of the motor car, and, beyond telling Gillot which of two equi-distant stations he was to drive to, he was not in a position to exercise any right of control over the driver in the sense in which I interpret the word "control." It is true that he could have ordered him to drive more carefully if he was driving dangerously, or to drive more slowly if he was driving at an uncomfortable or dangerous speed, and so forth, but that, in my opinion, is really no more than common prudence dictates. Perhaps the control would be stronger in the case of a person whose own property, whose own life, perhaps, or whose own wife was involved, but it is no more than the control, or checking—if that is the right word—that one would exercise towards a taxicab driver who might behave in the same way. The taxicab driver, of course, is not the servant of the fare. But the doctor could not have ordered Gillot to stop and wait for him for half an hour. He could not have ordered him to deviate and to wait for him while he was visiting a patient. He could not have ordered him to drive him to a more distant place for his own purposes. An illustration was put before me that, supposing he had said he was in a hurry to catch his train and ordered the driver or purported to order him to drive more quickly and, if there was a regulation or a prohibition by the employers against driving customers' cars at more than, say, 20 miles an hour, Gillot would have been in a position to refuse to carry out any such orders. All orders or control of that type were directions which Gillot could have declined to obey from the person who, it is now contended, was his temporary master.

It seems to me, therefore, that in those circumstances the only control which Dr. Chowdhary could have exercised over Gillot would have been to tell him where he wanted to go to within the very narrow limits of the service which was being given to him, and beyond that, the car having been handed over to the bailees, he had no authority to control it. The service was extremely short. It could have been done in a matter of a few minutes. Gillot never clocked off from his own employers and he really performed this duty as part of his ordinary work. Indeed, I find it difficult to suppose that, had he been stopped by a policeman who asked him whose servant he was, he would not have said at once: "I am the Daimler Co.'s servant, and I am driving this car for a customer." One cannot possibly imagine that he would have gone on to say: "I am ordinarily a Daimler man but five minutes ago with my consent, express or implied, I became the servant of a new master and five minutes hence I shall revert to my former employment under my general masters."

With regard to *Pratt v. Patrick* (7) on which reliance is placed, in my view,

that is quite a different situation. In that case there was a delegation of the control of the car by the owner to a casual driver while the owner himself remained in the car ready to control, if he was so minded, or to direct the driver. There was no question of the car having been handed over to anybody. There was no evidence there of any abandonment by the owner of his right to control it. In *Samson v. Aitchison* (6) the circumstances were, perhaps, even stronger against the contention which has been put forward by counsel

A had actively directed Collins, the driver of the car, and the whole object of the journey in question was the driving of the car on a test with the view to the sale by the owner to a prospective purchaser. It seems clear in that case that there was not only a retention of the right to control, but the exercise of the right to control by the owner who remained in the front seat on exchanging the driver's seat with Collins. In my view, having regard to all the circumstances, Dr. Chowdhary could not, in the present case, control the driver in the way that I have stated, but the Daimler Co. were performing their service towards the doctor by lending him the services of their own servant, and not by transferring the servant himself to him. In my judgment, therefore, the first contention of counsel for the company fails, and on common law principles Gillot did not become the particular servant of Dr. Chowdhary.

C The second contention is that by the terms of the contract set out on the form, condition 4 of which I have already read, the servant of the company driving the customer's car must be deemed to be the servant of the customer who is liable for all liabilities incidental to the relationship of master and servant. No doubt, condition 4 on the back of this form is a valid condition and would be binding on the contracting party even if he had not read the conditions. My attention was drawn to *Hood v. Anchor Line (Henderson Brothers)* (8),

D and it is not disputed that that would be the position, but, in fact, Dr. Chowdhary never signed the form. He never saw the form on the material occasion, nor, indeed, was such a form in existence, nor did it ever come into existence. Even if it would or might have come into existence afterwards and have been signed by the doctor, I must make no assumption on that matter, and I cannot hold Dr. Chowdhary bound by a condition before it became an expressed condition.

E Even if he is to be taken to have contracted on the usual terms, whatever they were, I do not consider that condition 4 refers to a journey such as that which was undertaken in this case. I think that in its context, on an agreement which is called a repair order, the condition in question refers only to the driving of customers' cars incidental to the actual repairs carried out or to be carried out, e.g., a test, or taking the car from one garage to another—that sort of journey—but I do not consider that it covers the courtesy service of which we have heard in this case.

F I do not think that it could ever have been contemplated that, when the company were rendering a service of this sort to their own customer, this condition on the repair order made the driver the servant of that customer and that the customer who was being taken to the station should carry all the liabilities of the relationship of master and servant. For these two reasons, I think the second contention also fails, and I hold that at the time of the accident Gillot remained the servant of the Daimler Co., Ltd., his ordinary masters, and they are liable for his act of negligence.

G I, therefore, give judgment for the plaintiff Dr. Chowdhary for £1,100 and Mrs. Chowdhary for £151 16s. against the defendants, Gillot and the Daimler Co., Ltd., and I give judgment for the defendant, Jones, in each case with costs.

Judgment for the plaintiffs against the first and second defendants, with costs. Judgment for the third defendant with costs against the plaintiff, such costs to be recoverable by the plaintiff against the first and second defendants.

H Solicitors: *Neil Maclean & Co.* (for the plaintiffs); *A. D. Vandamm & Co.* (for the first defendant); *Ponsford & Devenish* (for the second defendants); *L. Bingham & Co.* (for the third defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

**Re AVARD. HOOK AND ANOTHER v. PARKER
AND ANOTHER.**

[CHANCERY DIVISION (Roxburgh, J.), October 14, 15, 1947.]

Wills—Condition—Right of pre-emption—Option to purchase freehold property—Option to be exercised within 3 months after death of testatrix's sister—Time of performance—Time specified of essence of matter.

By her will, the testatrix directed her trustees to convey certain freehold property to F.C., on receiving notice in writing from him "to be given by him within 3 calendar months after the death of" her sister, S.A., "and upon payment by him of the purchase price of £500." F.C. died during the lifetime of S.A., but it was held that the option given by the will was not personal to him and that it could be exercised by his personal representative. S.A. died on Jan. 1, 1946, and on Apr. 10, 1946, as soon as he was informed of her death, F.C.'s personal representative claimed to exercise the option:—

HELD: since the condition in regard to time had not been strictly complied with, the option was not validly exercised.

Brooke v. Garrod (1857), 2 De G. & J. 62) followed.

Re Goldsmith's Will Trusts, Brett v. Bingham ([1947] 1 All E.R. 451) not followed.

[AS TO TIME OF PERFORMANCE OF CONDITION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 119, 120, para. 153; and FOR CASES, see DIGEST, Vol. 44, pp. 474, 475, Nos. 2923-2934.]

Cases referred to:

- (1) *Taylor v. Popham*, (1782), 1 Bro. C.C. 168; 44 Digest 469, 2889.
- (2) *Re Goldsmith's Will Trusts, Brett v. Bingham*, [1947] 1 All E.R. 451; [1947] 1 Ch. 339; [1947] L.J.R. 775; 176 L.T. 321.
- (3) *Brooke v. Garrod*, (1857), 2 De G. & J. 62; 27 L.J.Ch. 226; 30 L.T.O.S. 194; 44 Digest 474, 2930; *affg.*, 3 K. & J. 608.
- (4) *Powell v. Rawle*, (1874), L.R. 18 Eq. 243; 44 Digest 476, 2946.

ADJOURNED SUMMONS to determine whether a right of pre-emption given by the will of the testatrix had been validly exercised although it had not been exercised within the time specified in the will. It was held, following *Brooke v. Garrod* (3), that it was not validly exercised. The facts appear in the judgment.

W. F. Waite for the trustees of the will.

Maurice Berkeley for the first defendant, the personal representative of Frederick Cornwall.

V. M. Pennington for the second defendant, a residuary legatee.

ROXBURGH, J.: The point which I now have to decide is very difficult. By her will, the testatrix directed her trustees:

... at the expiration of one month's previous notice in writing from the said Frederick Cornwall to be given by him ... within 3 calendar months after the death of my sister the said Sabina Avard ... and upon payment by him of the purchase price of £500 forthwith to convey to ... Frederick Cornwall the pair of freehold cottages [specified].

Frederick Cornwall died on Oct. 22, 1935, during the lifetime of Sabina, and, accordingly, he could never personally exercise the option, but I have already held that that is not fatal and that the option was capable of exercise by his personal representative. On Jan. 1, 1946, Sabina Avard died. On Apr. 10, 1946, Frederick Cornwall's personal representative claimed to exercise the option, and it will be observed that he was out of time. In his affidavit he stated:

The reason why I did not exercise the option ... earlier than Apr. 10, 1946, was that I was not aware of the death of Sabina Avard until I received on that date [a certain] letter dated Apr. 9, 1946 ...

It is plain that the circumstance that the personal representative of Cornwall was a few days out of time was of no detriment whatever to anybody and made no practical difference at all, and at first I was prepared to follow the line of authorities beginning with *Taylor v. Popham* (1) decided in 1782, and concluding with a decision of WYNN PARRY, J., in *Re Goldsmith's Will Trusts, Brett v. Bingham* (2), and to hold that the fact that the option was not exercised

within the time specified was not fatal to Cornwall's personal representative, but counsel have drawn my attention to a number of other authorities, and, as one of them [*Brooke v. Garrod* (3)] is a decision of the LORD CHANCELLOR sitting on appeal, I do not think it is for me to attempt to reconcile that other line of cases with the line of cases which begin with *Taylor v. Popham* (1). It seems to me that there may be differences between a gift subject to a condition precedent and an option which are sufficient to account for the different courses which the authorities have taken, and, if that is a possibility, it is clearly my duty to follow the decision of the Court of Appeal which is at least as near the present case as any of the other decisions and, probably, nearer.

A *Brooke v. Garrod* (3) was tried by PAGE WOOD, V.-C., and was heard by LORD CRANWORTH, L.C., sitting on appeal. In that case a person who had under a will a right of pre-emption of an estate for a given sum provided he signified to the trustees within one month of the testator's death his option to purchase and paid the purchase-money within a further period of 2 months, duly signified his option to the trustees and applied to their solicitor for an abstract of title. The solicitor acknowledged this application, and promised to take an early opportunity of seeing his clients thereon, but no abstract was furnished, and, hearing nothing further, the donee of the right of pre-emption allowed the two months to expire without paying his purchase-money or taking any further step in the matter. It was held that, according to the true construction of the will, the trustees were not under any obligation to furnish an abstract, and the purchase-money not having been paid within the 2 months, the right of pre-emption was lost, the rule being that such a right must be strictly complied with. In the course of his judgment PAGE WOOD, V.-C., said (3 K. & J. 612, 613):

D This right of pre-emption was a privilege given to Mallows, and, being so, the conditions were conditions with which he was obliged to comply strictly. The case is somewhat analogous to a case between vendor and purchaser where time is made of the essence of the contract, and the parties have not by their dealings waived their rights as to time being of the essence of the contract. Had there been anything in the shape of fraud on the part of the trustees, or had there been such a degree of laches on their part as to induce the court to say that such laches were the sole cause of Mallows not complying *modo et forma* with the conditions imposed by the testator—a more difficult case as regards those who take subject to the conditions not being complied with—it is possible, to say the least of it, that the court might have given Mallows some relief in that respect.

Sitting on appeal, LORD CRANWORTH, L.C., said (2 De G. & J. 65):

My first impression was in favour of the appellant, but that has been removed by the argument of *Mr. Dart*, for I concur with the VICE-CHANCELLOR in thinking, that *Mr. Garrod* has not brought himself within the conditions prescribed by the will . . . F Now, I have more than once had occasion to say, that I think this court has gone to too great an extent in departing from the precise terms of the contracts into which parties have entered, and so in effect making other contracts for them. If a contract can, by fair construction, be divided into two contracts, *i.e.*, one contract to do an act and another to do it at a certain time, the court may say that these are independent stipulations. But if the contract be that on payment of a sum of £1,000 at or before a specified day, a certain act shall be done on my part, I am at a loss to see why I can properly be called on to do the act if the money be not paid at the day: or why I should be compelled to perform not my contract but another contract into which I have not entered. If cases are found in the books, which go to that extent, I can only say that I cannot see the principle on which they are founded. No authority has, however, been produced, in which this court has varied the terms of a gift under which a benefit is to be taken. The rule there is—*cujus est dare ejus est disponere*—and if the donor choose to say that in the event of a person paying £2,500 on or before a specified day the gift shall take effect, I do not see how the court, G if the money is not paid on or before the day, can take anything as an equivalent for the payment at the prescribed time. There may be a distinction where a person, being ready and willing to comply with a condition, has been prevented from so doing. That raises a question of a different class, and I should be loth to say, that the court would not find the means of giving relief if the donee had done all that in him lay, and if the delay was to be attributed to the other contracting party.

Taylor v. Popham (1) was not cited, and I do not believe that LORD CRANWORTH, L.C., would have stated the proposition quite in the form in which he did if it had been, because he said (*ibid.*, 66, 67):

No authority has, however, been produced, in which this court has varied the terms of a gift under which a benefit is to be taken. The rule there is—*cujus est dare ejus est disponere*—and if the donor choose to say that in the event of a person paying £2,500 on or before a specified day the gift shall take effect, I do not see how the court, if the money is not paid on or before the day, can take anything as an equivalent for the payment at the prescribed time.

That proposition seems to me very difficult to reconcile with the line of cases beginning with *Taylor v. Popham* (1) and ending with the recent decision of WYNN-PARRY, J., in *Re Goldsmith's Will Trusts* (2). Two facts, however, remain. One is that LORD CRANWORTH, L.C., did—at any rate, in part—approach the question, not as though it was one between trustee and beneficiary, but as though it was one between two independent parties—one making an offer of a contract which it is at the will of the other to accept or not as he pleases. It is only, I think, on some such footing that the conduct of the trustees could be allowed to affect the rights of the beneficiaries, and it is clear that LORD CRANWORTH, L.C., thought that in certain circumstances the conduct of the trustees might affect the rights of beneficiaries. The other fact is that in *Brooke v. Garrod* (3), a case extremely like the present, an appellate court, as long ago as 1857, decided that the option was not well exercised.

There is one other case to which I think I should refer and that is *Powell v. Rawle* (4). The headline there is (L.R. 18 Eq. 243):

Direction by codicil to executors to invest £200 and pay the proceeds to testator's daughter, a single woman, for life, for her separate use, and after her death, the capital to be for her children; with a proviso that if the bequest should be not "duly claimed" by the daughter within 3 calendar months after testator's decease, the bequest should lapse. The legacy was not claimed by the daughter. She alleged that she did not hear of the legacy or of the testator's death till nearly 2 years after he died; and it was admitted by the executors that no notice was given to her by them:—*Held*, that the legacy had become forfeited, and had lapsed.

That, again, is a very strong case not altogether unlike the present, and it does not seem to have been possible to apply in that case the doctrine which has been applied in the line of cases beginning with *Taylor v. Popham* (1), and ending with *Re Goldsmith's Will Trusts* (2). In the circumstances, it seems to me that it is my duty to follow the decision in *Brooke v. Garrod* (3) and leave the proper reconciliation of the various streams of authorities to others. Accordingly, I must hold that the option was not well exercised.

[HIS LORDSHIP made the following declaration: *Notwithstanding the death of Frederick Cornwall in the lifetime of Sabina Avarad the option to purchase the property referred to in cl. 7 of the will of the testatrix was not personal to the said Frederick Cornwall and was capable of exercise by his legal personal representative but that by reason that it was not exercised within the time specified in the will the said option was not in fact validly exercised.*]

Solicitors: *Kenneth Brown, Baker, Baker*, agents for *Andrews & Bennett*, Burwash, Sussex (for the plaintiffs and the second defendant); *Shelton, Cobb & Co.* (for the first defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

R. v. SECRETARY OF STATE FOR FOREIGN AFFAIRS AND SECRETARY OF STATE FOR THE COLONIES; *Ex parte* GREENBERG AND OTHERS.

[VACATION COURT (Jenkins, J.), August 27, 29, 1947.]

Crown Practice—Habeas corpus—Illegal immigrants—Deportation order—Extra-territorial effect—Palestine Defence (Emergency) Regulations, 1945, reg. 112.

A ship conveying a party of illegal immigrants, which set sail from the south of France, bound for Palestine, was intercepted by H.M. ships. While the immigrants were in Palestine territorial waters, a deportation order was made by the High Commissioner under reg. 112 of the Palestine Defence (Emergency) Regulations, 1945 (which the Commissioner had made in exercise of the powers vested in him by art. 6 of the Palestine (Defence) Order in Council, 1937). Pursuant to that order the immigrants

were transferred to three British ships and were taken by those ships to a port in the south of France, where they were invited to land. On their refusal to do so, it was stated that, unless they landed by a certain date, the ship would sail and the immigrants would be disembarked at Hamburg. They still refused and the ships set sail. On an application for a writ of *habeas corpus* on the ground that the detention of the immigrants became illegal when they had passed out of the territorial jurisdiction of the government of Palestine :—

A HELD : (i) such extra-territorial effect should be attributed to reg. 112 and to the deportation order as was necessary to make the deportation effective, and, therefore, the effect of the order must extend to the placing of the individual deported in an outward bound ship and his conveyance in that ship to his destination.

B *R. v. Lesley* ((1860), Bell C.C. 220) distinguished. *A.-G. for Canada v. Cain, A.-G. for Canada v. Gilhula* ([1906] A.C. 542) applied.

(ii) the appropriate place to which the deportees should be taken was the country from which they embarked, but, as they had remained in the ships of their own free will after they had been invited to land in that country, they must be taken to have elected to go on to Hamburg, and, therefore, were not legally restrained.

C [AS TO PURPOSES FOR WHICH HABEAS CORPUS IS GRANTED, see HALSBURY, Halsbury's Laws of England, Vol. 9, pp. 713-719, paras. 1214-1223; and FOR CASES, see DIGEST, Vol. 16, pp. 250-255, Nos. 501-565.]

Cases referred to :

(1) *R. v. Lesley*, (1860), Bell C.C. 220; 29 L.J.M.C. 97; 1 L.T. 452; 24 J.P. 115; 11 Digest 413, 799.

(2) *A.-G. for Canada v. Cain, A.-G. for Canada v. Gilhula*, [1906] A.C. 542; 75 L.J.P.C. 81; 95 L.T. 314; 17 Digest 433, 126.

(3) *MacLeod v. A.-G. for New South Wales*, [1891] A.C. 455; 60 L.J.P.C. 55; 65 L.T. 321; 17 Digest 425, 66.

(4) *Re Adam*, (1837), 1 Moo. P.C.C. 460; 12 E.R. 889; 2 Digest 122, 13.

(5) *Co-operative Committee on Japanese Canadians v. A.-G. for Canada*, [1947] A.C. 87; [1947] L.J.R. 836; 176 L.T. 547.

(6) *Eliezer Zabrowski v. General Officer Commanding Palestine*, [1947] A.C. 246.

(7) *R. v. Chiswick Police Station Superintendent, Ex p. Sacksteder*, [1918] 1 K.B. 578; 87 L.J.K.B. 608; 118 L.T. 160; 82 J.P. 137; 2 Digest 196, 553.

(8) *R. v. Home Secretary, Ex p. Chateau Thierry (Duke)*, [1917] 1 K.B. 922; 86 L.J.K.B. 923; 116 L.T. 226; 81 J.P. 125; 2 Digest 196, 552.

MOTION for a writ of *habeas corpus* in respect of illegal immigrants deported from Palestine and *en route* for a German port after refusing to land in the south of France whence they had originally sailed. The motion was dismissed.

F *Pritt, K.C.*, and *S. N. Bernstein* for the applicants.

The Solicitor-General (Sir Frank Soskice, K.C.), *H. L. Parker* and *John Foster* for the respondents.

G **JENKINS, J. :** This is a motion directed to the Secretary of State for Foreign Affairs and to the Secretary of State for the Colonies for a writ of *habeas corpus* in respect of six named persons who are members of a party of some 4,500 persons on board one or other of three British steamships, "Empire Rival," "Ocean Vigour" and "Runnymede Park," which are now on their way from the south of France to Hamburg. The claim by these six persons is founded on the contention that they are unlawfully detained, and the motion has been launched to test the validity of the alleged detention.

H The circumstances in which these persons find themselves in their present situation are briefly these. The question of the immigration of Jews into Palestine has for many years been the subject of acute controversy, and His Majesty's Government and the Government of Palestine have found it necessary to impose certain restrictions on immigration. Those restrictions are strenuously objected to by many of the Jews, and it has become the common practice for the champions of unrestricted immigration to organise parties of Jews from Europe and to send them to enter Palestine, if they can, in defiance of the regulations restricting immigration. These six persons were members of a party of illegal immigrants which set sail from the south of France bound for

Palestine in a ship called the "President Warfield," with the intention either of getting into Palestine by stealth, or, if intercepted, of embarrassing the authorities who would then have on their hands a further 4,500 people to be dealt with somehow. When the "President Warfield" was nearing Palestine, it was intercepted by His Majesty's ships. Whether the actual interception took place inside or outside the territorial waters appears to be open to some doubt. On the whole, I think that the better view is that it took place inside territorial waters, but, be that as it may, the ship was escorted into territorial waters, and while it was within the jurisdiction of Palestine a deportation order was made in respect of the immigrants in the ship under the Palestine Defence (Emergency) Regulations, 1945. Pursuant to that deportation order, the immigrants were transferred to the three British ships I have mentioned and were taken in those ships to Port de Bouc in the south of France, arriving there on or about July 29, 1947. Port de Bouc was selected because it was in the south of France, and the south of France was the place from which these illegal immigrants had set sail. On arrival at Port de Bouc the immigrants were invited, and, indeed, pressed, to land in France. The French authorities were ready for them to land, but they refused to do so. Finally, an ultimatum was given that, unless they landed by 6 p.m. on August 22, the ships would sail and they would be disembarked at Hamburg in Germany. Substantially all the 4,500 or so people on board the ships refused to land, with the result that the ships set sail and are now on their way to Hamburg.

The only question for me, is whether the six persons named in the notice of motion are now under unlawful restraint by the orders, in effect, of the two Secretaries of State who are respondents to the motion. To decide that question, it is necessary to look, first, at the deportation order and the authority under which it was made. It is not in dispute that the High Commissioner had power to make the order that he did make, but the dispute centres about its extent, and, largely, its territorial extent. The relevant power to make such orders is contained in reg. 112 of the Defence (Emergency) Regulations, 1945, which were made in exercise of the powers vested in the High Commissioner by art. 6 of the Palestine (Defence) Order in Council, 1937. Regulation 112 provides:

(1) The High Commissioner shall have power to make an order, under his hand (hereinafter in these regulations referred to as "a deportation order") for the deportation of any person from Palestine. A person in respect of whom a deportation order has been made shall remain out of Palestine so long as the order remains in force.

(2) The High Commissioner shall have power to make an order under his hand (hereinafter in these regulations referred to as "an exclusion order") requiring any person who is out of Palestine to remain out of Palestine. A person in respect of whom an exclusion order has been made shall remain out of Palestine so long as the order remains in force.

(3) A deportation order or an exclusion order may be made subject to such terms and conditions as the High Commissioner may think fit.

(4) Any person in respect of whom a deportation order or an exclusion order has been made and is in force may be arrested without warrant by any member of His Majesty's forces or any police officer.

(5) A person in respect of whom a deportation order is made shall be liable, whilst awaiting deportation and whilst being deported, to be kept in custody in such manner as the High Commissioner may by the deportation order or otherwise direct, and all such custody shall be lawful custody.

(6) The master of a ship or the pilot of an aircraft about to call at any port or place outside Palestine shall, if so directed by the High Commissioner, receive a person in respect of whom a deportation order is made on board the ship or aircraft and afford him a passage to that port or place, and proper accommodation and maintenance during the passage.

(7) For the avoidance of doubt it is hereby declared that an order under this regulation may be made to relate to one person or to two or more persons and that it shall not be necessary to state in an order under this regulation the name or names of the person or persons to whom the order relates.

The order in the present case is dated July 18, 1947, and it is expressed to be made under reg. 112. It is in these terms:

Whereas I am of the opinion that it is expedient for securing the maintenance of public order to make an order under pt. X of the Defence (Emergency) Regulations, 1945, as from time to time amended, in respect of each and every one of the persons who entered Palestine on board a ship which arrived off Haifa in company with certain

ships of the Royal Navy on July 18, 1947, and is believed to be known as "President Warfield." Now, therefore, in exercise of the powers conferred upon me by reg. 112 of the Defence (Emergency) Regulations, 1945, as from time to time amended and of all other powers enabling me in that behalf, I, General Sir Alan Gordon Cunningham, K.C.B., D.S.O., M.C., High Commissioner for Palestine, hereby order the deportation of each and every one of the persons who entered Palestine on board a ship which arrived off Haifa in company with certain ships of the Royal Navy on July 18, 1947, and is believed to be known as "President Warfield." And I do further order that, whilst awaiting deportation and whilst being deported, the said persons shall be kept in the custody of the General Officer Commanding, British Troops in Palestine and Trans-Jordan, and the Commodore Palestine and the Inspector General of Police or any of the said officers and persons acting by the authority of any of the said officers.

The legality and the validity of that order in respect of all the immigrants on the "President Warfield" is not disputed, but it is contended that its efficacy is strictly limited to the territorial jurisdiction of Palestine, i.e., it can only extend to the coast and to the three miles limit of sea from the coast. Therefore, it is contended that so soon as the three British ships to which these immigrants were transferred crossed the three miles limit the immigrants in those ships were no longer in lawful detention but were in unlawful detention because they had passed out of the Palestine jurisdiction. In support of that contention, counsel for the applicants referred me to *R. v. Lesley* (1). That was a case in which the Chilean Government, wishing to banish two Chileans, made a bargain with the master of a British ship under which the latter was to convey them to Liverpool. On arrival at Liverpool the Chileans brought proceedings against the master for, among other things, false imprisonment, and those proceedings succeeded on the ground that, whatever the law of Chile might be, it could not justify the imprisonment of these Chileans in a British ship outside the area of the jurisdiction of Chile. By parity of reasoning, counsel says, whatever the situation might be within the jurisdiction of Palestine, once the immigrants were out of that jurisdiction the deportation order no more authorised the masters of the three British ships to keep them in the ships than the bargain with the Chilean government in *Lesley*'s case (1) authorised the detention of the banished Chileans on board the British ship once they got outside the jurisdiction of Chile. I find myself unable to accept that argument, because, as the Solicitor-General has pointed out, in *R. v. Lesley* (1) the matter was entirely one of a bargain. The captain of the ship undertook for reward to remove the people in question, but here the masters of the vessels were acting in pursuance of the deportation order. There could be no ground for suggesting that the bargain made by the Chilean Government in *R. v. Lesley* (1) had any extra-territorial effect, but it does not follow that the deportation order has no extra-territorial effect.

On the question whether or not it has such an effect, I was referred to a number of authorities, of which I have derived most assistance from *Cain's* case (2). The headnote is :

Held, that s. 6 of the Dominion stat. 60 and 61 Vict. c. 11, as amended by 1 Edw. 7, c. 13, s. 3, is *intra vires* of the Dominion Parliament. The Crown undoubtedly possessed the power to expel an alien from the Dominion of Canada, or to deport him to the country whence he entered it. The above Act, assented to by the Crown, delegated that power to the Dominion Government, which includes and authorizes them to impose such extra-territorial constraint as is necessary to execute the power.

The relevant section of the statute was in these terms :

The Attorney-General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person, partnership, company, or corporation violating s. 1 of this Act.

LORD ATKINSON said ([1906] A.C. 545) :

The validity of s. 6 was impeached on several grounds, and was held to transcend the powers of the Dominion Parliament, inasmuch as it purported to authorize the Attorney-General or his delegate to deprive persons against whom it was to be enforced of their liberty without the territorial limits of Canada, and upon this point alone the decision of the case turned,

Then this passage is significant (*ibid.*):

It was conceded in argument before their Lordships, on the principle of law laid down by this Board in the case of *MacLeod v. Attorney-General for New South Wales* (3), that the statute must, if possible, be construed as merely intending to authorize the deportation of the alien across the seas to the country whence he came if he was imported into Canada by sea, or if he entered from an adjoining country, to authorize his expulsion from Canada across the Canadian frontier into that adjoining country. . . No special significance was attached to the word "return." The reasoning of the judgment would apply with equal force if the word used had been "expel" or "deport" instead of "return."

At the top of p. 546 LORD ATKINSON says:

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government. . . But as it is conceded that by the law of nations the supreme power in every State has the right to make laws for the exclusion or expulsion of aliens, and to enforce those laws, it necessarily follows that the State has the power to do those things which must be done in the very act of expulsion, if the right to expel is to be exercised effectively at all, notwithstanding the fact that constraint upon the person of the alien outside the boundaries of the State or the commission of a trespass by the State officer on the territories of its neighbour in the manner pointed out by ANGLIN, J., in his judgment should thereby result. Accordingly it was in *Re Adam* (4) definitely decided that the Crown had power to remove a foreigner by force from the island of Mauritius, though, of course, the removal in that case would necessarily involve an imprisonment of the alien outside British territory, in the ship on board of which he would be put while it traversed the high seas.

Finally, LORD ATKINSON says (p. 547):

If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose had the statute never been passed.

The *Japanese Canadians* case (5) was also cited and I refer to it only for this passage in LORD WRIGHT's statement of their Lordships' reasons ([1947] A.C. 103):

Secondly, it was argued that, as a matter of construction, the War Measures Act, 1927, did not authorize the making of orders having an extra-territorial operation. This point was relevant by reason that the orders in question in terms authorized "deportation." This point may be shortly disposed of. Extra-territorial constraint is incident to the exercise of the power of deportation (*Attorney-General for Canada v. Cain* (2)), and was, therefore, in contemplation. Any lingering doubts as to the validity in law of an Act which for its effectiveness requires extra-territorial application were, it may be added, set at rest by the Canadian Statute, the Extra-Territorial Act, 1933.

Zabrovsky v. G.O.C., Palestine (6) was a case in which a deportation order had been made in respect of the applicant's son. He was removed to Eritrea under that order, and the applicant sought an order in the nature of *habeas corpus*. The decision was ([1947] A.C. 247):

That by virtue of s. 46 of the Palestine Order in Council, 1922, English common law rules evolved in respect of *habeas corpus* were applicable in Palestine, and that the detention must be illegal lay at the root of the whole matter. The order of deportation and the ancillary powers of providing a place to which the deportee might proceed were legal as being within the competence of the Palestine government under the relevant statutory emergency and defence provisions. No court in Palestine had authority to require production of the deportee in that country in defiance of an order lawfully made by its responsible government, . . .

In LORD WRIGHT's statement of their Lordships' reasons, this passage occurs (*ibid.* 262):

While the deportation order stands and its legality is not overruled its effect is that Eliezer is required to leave and remain thereafter out of Palestine. Such an order is not *ultra vires* of a limited territorial power like Palestine, nor are the further or ancillary powers of providing a place to which the deportee may proceed (see *Attorney-General*

for *Canada v. Cain* (2), recently followed and applied by this Board in *The Co-operative Committee on Japanese Canadians v. The Attorney-General of Canada* (5). The order, indeed, so long as it remains in force renders it unlawful for Eliezer to seek to enter Palestine, and no court in Palestine has authority to require his production in that country in defiance of an order lawfully made by its responsible government.

The last of the cases that I need mention is *R. v. Chiswick Police Station Superintendent; Ex parte Sacksteder* (7) [1918] 1 K.B. 578. The headnote is :

A The Home Secretary made an order under the Aliens Restriction Act, 1914, and art. 12 of the Aliens Restriction (Consolidation) Order, 1916, that a certain alien, who was a French subject of military age, should be deported from the United Kingdom and should remain out of the United Kingdom during the continuance of the war . . . The Home Secretary had previously given general directions that any person named in a deportation order which was intended to be enforced immediately should be arrested and conveyed by ship from the United Kingdom and should be detained between the time of his arrest and the sailing of the ship selected for his passage. Acting under those general directions an assistant secretary in the Home Office caused instructions to be given to the police for the alien's arrest and conveyance to the ship selected for his deportation. The alien was accordingly arrested. On an application for a writ of *habeas corpus* :—*Held*, that the order for arrest was a valid order, and that the applicant was in legal custody. *Semble*, an order for the arrest and detention of an alien against whom a deportation order has been made must be made by the Secretary of State himself in each individual case ; but *held* that in this particular case this had been done. *Semble* : . . . the court can go behind an order for arrest, which is valid on its face, as, for instance, if it is a mere sham not made bona fide.

C I was referred to this passage from the judgment of WARRINGTON, L.J. (*ibid.*, 587) :

D First, with regard to the construction of the Act and the Order. It has been determined by the Court of Appeal in the *Duke of Chateau Thierry's* case (8) that the power to make a deportation order does not confer the power to order the alien to be deported to any particular country. The members of this court who decided that case also expressed the opinion that the Order in Council did confer upon the Secretary of State the power to select the particular ship upon which the man is to be placed. The decision in the *Duke of Chateau Thierry's* case (8) was only that the deportation order was a valid order. What we have to decide is whether the man was in lawful custody, which is a different question. The power to select the particular ship indirectly undoubtedly involves a power on the part of the Secretary of State to send a man to a particular country selected by the Secretary of State. Whether it is desirable that such a power should be indirectly given when the statute and Order in Council do not give that power directly may be a serious question, but it does not arise in this case.

E Those are, I think, all the passages that I need cite from the authorities. The conclusion that I draw from them is that, on the principles stated in *Cain's* case (2), I must attribute to reg. 112 of the Palestine Defence (Emergency) Regulations, 1945, and to the deportation order made thereunder in the present case such extra-territorial effect as is necessary to make a deportation effective. Therefore, it seems to me that the effect of a deportation order must extend to the placing of the individual deported on a ship outward bound from Palestine on the footing that the person in question is to be conveyed in that ship to its destination whatever that may be. Unless that degree of extra-territoriality can be attributed to this regulation and to the order in question, it seems to me to be reasonably plain that no deportation could be effectively carried out at all. I think that one can go further, and say that the word "deportation" has implicit in it the taking of the person in question from the country from which he is deported to some other place, and I think that *prima facie*, as was stated in *Cain's* case (2), the appropriate place to which the deportee should be taken where he arrives by sea must be the country from which he embarked. Therefore, I cannot accede to the argument of counsel for the applicants that the effect of the deportation order in this case was exhausted when the ships passed out of the territorial waters of Palestine. I think that it continued in force so far as was necessary to place the deportee on the soil of some other country.

H The matter, however, does not rest there, for, as has been pointed out by the Solicitor-General and stated in evidence, when the immigrants arrived in these three ships at Port de Bouc they were pressed to land there and they refused. They were told that, if they did not land, they would be taken to Hamburg.

They refused to disembark, and when the ultimatum, which in the end had to be given, had expired, the ships left. It seems to me that these immigrants, having been given the warning and the choice, deliberately elected to go on in the ships to the next destination of which they had been informed. Therefore, in my opinion, it would be possible to dispose of this case really on the short ground that, whatever the position was at any point of time before arrival at Port de Boue, there can now be no question of illegal restraint, since the immigrants remained in the ships of their own free will after they had been invited to land at Port de Boue. For these reasons a case for a writ of *habeas corpus* has not been made out.

There is the additional difficulty that, if in other respects there had appeared to be grounds for granting a writ, the effect of the writ asked for would be an order of the King's Bench Division to bring before it here in London the bodies of the six persons named in the notice of motion. Those six persons are aliens, and it is difficult to see what the effect of the writ would be in view of the restrictions that are in force in this country as regards the landing of aliens. Those restrictions are contained in the Aliens Order, 1920, para. 1 (1) of which says :

Subject to any exemptions which may be granted under art. 14 of this Order, an alien coming . . . by sea . . . to a place in the United Kingdom . . . (a) shall not land in the United Kingdom without the leave of an immigration officer, and (b) unless he is a seaman, shall not land in the United Kingdom elsewhere than at an approved port : Provided that the Secretary of State may, in special circumstances, allow an alien to land with such leave as aforesaid at any specified port, notwithstanding that it is not an approved port.

There are provisions elsewhere in the regulations, to which I need not refer in detail, enabling the Secretary of State to make deportation orders in respect of aliens. In view of those regulations I find great difficulty in seeing how the court could direct a writ of *habeas corpus* in the circumstances of the present case, even though it otherwise appeared proper to do so, but, in my judgment, for the reasons that I have given, no case has been made out for the writ. I do not think that the persons concerned are, or at any material time have been, under illegal restraint. The motion fails, and I refuse it with costs.

Application dismissed with costs.

Solicitors : *Oppenheimer, Nathan & Vandyke* (for the applicants) ; *Treasury Solicitor* (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

HUGHES v. LANCASTER STEAM COAL COLLIERIES, LTD.

[COURT OF APPEAL (Tucker, Somervell and Evershed, L.JJ.), July 21, 1947.]

Workmen's Compensation—"Accident"—*Incapacity due to hernia—Existing condition aggravated by use of pneumatic drill—Cumulative effect.*

On Oct. 15, 1945, a workman, who had been engaged for some time in working a pneumatic drill, noticed a lump in his groin which developed into an inguinal hernia. He consulted his doctor on Oct. 31, but continued to work until Nov. 10. On Nov. 14, he underwent an operation, and was away from work until Feb., 1946. On his application for compensation under the Workmen's Compensation Act, 1925, for the period during which he was incapacitated, medical evidence was given that the use of the pneumatic drill contributed to the onset of the hernia (which was probably congenital) and that there must have been a slight aggravation of the condition each time the workman used the drill :

HELD : the workman had discharged the *onus* of showing that the incapacity from which he suffered was a personal injury by accident arising out of and in the course of his employment ; his claim was not to be rejected because he had not shown that the hernia had protruded simultaneously with some effort on his part ; and he was, therefore, entitled to compensation under the Workmen's Compensation Act, 1925, since aggravation of an existing condition was sufficient to bring him within the Act, provided that that aggravation amounted to an accident within the meaning of the Act.

Fitzsimons v. Ford Motor Co., Ltd. (Aero Engines) ([1946] 1 All E.R. 429), *Fife Coal Co., Ltd. v. Young* ([1940] 2 All E.R. 85), and *Oates v. Fitzwilliam's (Earl) Collieries Co.* ([1939] 2 All E.R. 498), *applied*.

Per curiam : Although a judge is, no doubt, entitled to use the knowledge that he has acquired in a similar class of case to understand and test the evidence of the witnesses called before him, he is not entitled to reject the uncontradicted evidence before him by reason of his preference for other evidence that has been given by other witnesses in other cases.

[As to "ACCIDENT" within the Act, see HALSBURY, Hailsham Edn., Vol. 34, pp. 816-822, paras. 1154-1159, and Supplement; and FOR CASES, see DIGEST, Vol. 34, pp. 267-275, Nos. 2272-2324, and Supplement.]

Cases referred to :

- (1) *Burrell (Charles) & Sons, Ltd. v. Selvae*, (1921), 90 L.J.K.B. 1340; 126 L.T. 49; 14 B.W.C.C. 158; *affg.*, S.C. *sub nom.*, *Selvae v. Burrell (Charles) & Sons, Ltd.*, [1921] 1 K.B. 355; 34 Digest 272, 2309
- (2) *Fitzsimons v. Ford Motor Co., Ltd. (Aero Engines)*, [1946] 1 All E.R. 429; 174 L.T. 233; 39 B.W.C.C. 26; Digest Supp.
- (3) *Fife Coal Co., Ltd. v. Young*, [1940] 2 All E.R. 85; [1940] A.C. 479; 109 L.J.P.C. 49; 162 L.T. 344; *sub nom.* *Young v. Fife Coal Co.*, 33 B.W.C.C. 107; Digest Supp.
- (4) *Walker v. Hockney Brothers*, (1909), 2 B.W.C.C. 20; 34 Digest 273, 2311.
- (5) *Oates v. Fitzwilliam's (Earl) Collieries Co.*, [1939] 2 All E.R. 498; 32 B.W.C.C. 82; Digest Supp.

APPEAL by the workman from an award of His Honour JUDGE L. C. THOMAS, at Tredegar, Abertillery and Bargoed County Court, dated Nov. 23, 1946.

The workman, who was engaged in working a pneumatic drill, had to give up work owing to an inguinal hernia, which necessitated an operation, and he was away from work for about 3 months. On his application for compensation under the Workmen's Compensation Act, 1925, medical evidence was given that the use of the pneumatic drill contributed to the onset of hernia and that each time the workman used the drill there was an aggravation of the condition. The county court judge dismissed the application on the ground that the workman had failed to discharge the *onus* which was on him of showing that the incapacity from which he suffered was a personal injury by accident arising out of and in the course of his employment. The workman now appealed and the appeal was allowed.

Beney, K.C., and *Salter Nichols* for the workman.
Marven Everett for the employers.

TUCKER, L.J. : This is an appeal by a workman from a decision of His Honour JUDGE L. C. THOMAS, given on Nov. 23, 1946, whereby he dismissed the workman's application for compensation under the Workmen's Compensation Acts.

The workman was an underground borer working in a coal mine, and he used a pneumatic drill. For some time before Oct., 1945, he had been engaged in working this drill, which, with the apparatus attached thereto, weighed about 75lbs. On Oct. 16, 1945, he noticed a lump in his groin, and that developed into a left inguinal hernia. He went on working after he noticed this, but on Oct. 31 he consulted his doctor and he gave up work on Nov. 10, went into hospital, and was operated upon on Nov. 14 for this hernia. He was away from work from Nov. 10, 1945, to Feb. 18, 1946. He then claimed compensation at the appropriate rate for the period when he was incapacitated from work. The question which arises is whether, on the evidence, the judge was entitled to come to the conclusion at which he arrived, namely, that the workman had failed to discharge the *onus* on him of showing that the incapacity from which he suffered was a personal injury by accident arising out of and in the course of his employment.

The workman himself gave evidence and said that he had to hold this drill close into his stomach when working below 4ft. He called a witness who gave evidence that the machine vibrates and sometimes sticks. A doctor, called on behalf of the workman, described the hernia as a very small left hernia which had not descended into the scrotum. He thought that the work with the machine contributed to producing the hernia. It was the intra-abdominal pressure which caused the protrusion. That was the evidence on behalf of

the workman. For the employers one witness only was called—a Dr. Idris Rhys—who said that he had examined the workman on Nov. 7, and had obtained a history from him which showed that he had felt no pain. He said that it was not possible to have a hernia for the first time without pain, and that constipation might cause protrusion, but that there must be some pain. In the course of cross-examination he said: “Any intra-abdominal pressure must tend to aggravate it”—that is, I understand, to aggravate the condition previously existing (such as exists in the case of congenital hernias, of which, I think it is agreed, this must be one). He said:

The machine would cause that. The use of the machine with other causes contributed to the onset of hernia. Each time he was using the machine there must be a slight aggravation of the condition.

That was the sum total of the evidence, and on it the judge rejected the workman's case on the ground that he had not discharged the *onus* that lay on him. In the course of his judgment he said:

The usual difficulty in this class of case arises from the fact that hernia results from natural causes, develops in persons who lead sedentary lives, and is, incidentally, often hereditary. In many years of experience the burden of proof which I have required has been that the hernia must be shown to have protruded simultaneously with some effort on the part of the workman.

That is clearly a misdirection. It is obviously wrong for any judge to apply a hard and fast test of that kind to all cases and say that, failing the discharge of that burden, the claim will be rejected. Later on the judge said:

The usual evidence in such cases is that the protrusion of the hernia is accompanied by severe physical pain to such an extent as to require that the workman should rest immediately after the accident and is sometimes accompanied by vomit. These features are entirely absent here, and, in order that the workman may succeed, I have to satisfy myself that the incapacity can in law and fact be the result of an accident within the meaning of the statute.

In conclusion, after referring to *Burrell v. Selvae* (1), he said:

Here the hernia might be due to natural causes, or to some strain outside his work, and I cannot accept the evidence of the two medical witnesses to the effect that the use of the machine contributed to the onset of the hernia as it is merely a matter of their opinion and is contrary to the volume of medical evidence I have had in previous cases.

There again the judge clearly went wrong, as he is not entitled to reject the uncontradicted evidence before him by reason of his preference for other evidence that had been given by other witnesses in other cases, although, no doubt, he is perfectly entitled to use the knowledge that he has acquired in this class of case in order to understand and test the evidence of the witnesses who are called before him.

It, therefore, appears that this arbitration was not a satisfactory one and that the judge's award cannot stand. The only question that has caused me some consideration is whether we should send this case for a fresh trial before a different county court judge, or whether, on the material before us, and on the uncontradicted evidence before the judge, there was only one conclusion at which he could properly arrive. I have come to the conclusion that the latter is the position and that on this evidence there was only one result which could reasonably be arrived at.

Counsel for the employers has urged that there was no sufficient proof of the occurrence of any accident or series of accidents producing the incapacity. He says that there must be some *nexus* to connect the incapacity with one or more personal injuries by accident, and he says that, even if it were established by evidence that the use of the machine had some harmful effect on the workman, there was no evidence that this effect was produced by one or more personal injuries by accident within the meaning of the authorities. He says that injury must be due to a series of accidents each of which is specific and ascertainable. He has referred us to a number of authorities, some on one side of the line and some on the other, some cases dealing with the controversial question when and in what circumstances the contraction of some disease can be said to be due to an accident, and other cases where it has been held that a number of small accidents may cumulatively amount to an accident within the meaning

of the statute. In the recent case of *Fitzsimons v. Ford Motor Co., Ltd. (Aero Engines)* (2) this court was dealing with a case of an injury from which a workman was suffering who had been continuously employed as a rotary fettler which involved his gripping tightly in the left hand a machine the movable parts of which revolved at 2,800 revolutions a minute. The resulting vibrations gradually damaged the tissues and nerves of his hand until he became incapacitated. SCOTT, L.J., in giving the judgment of the court, said ([1946] 1 All E.R. 430):

Each vibration caused by the rapidly rotating instrument was, as it were, an infinitesimal blow to the man's hand and arm, transmitted to the nerves, causing an infinitely small damage to their tissues, and in the end cutting off the flow of blood needed to keep the hand in a healthy condition. Some men may have better powers of resistance to such attacks than others, but the mere fact that the breakdown does not occur until the cumulative effect of the tiny blows from the vibrations produces a certain degree of alteration in the nerves does not affect the character of the cause.

I think that all those observations are applicable to the evidence in the present case, and that evidence was uncontradicted because it was the employers' own doctor who agreed in cross-examination that each time the workman was using this machine there was a slight aggravation of his condition. Of course, the aggravation of an existing condition would be sufficient, provided that that aggravation brought about something which amounted to an accident within the meaning of this Act.

Among other authorities, we were referred to *Fife Coal Co., Ltd. v. Young* (3), where VISCOUNT CALDECOTE, L.C., reviewed a number of these cases, and, after referring to *Walker v. Hockney Brothers* (4), where a man who had gradually over a period of five years acquired paralysis by riding a carrier bicycle and the decision was in favour of the employers, he said ([1940] 2 All E.R. 88):

There is no reason to doubt the correctness of the decisions in the three cases I have last mentioned. In all of them the facts were such as to make it impossible to identify any event which could, however loosely, be called an accident. In these cases, the workmen failed, not because a disease is outside the purview of the Workmen's Compensation Act altogether, but because the burden of proof that there had been an accident was not discharged.

At the conclusion of his speech, he said (*ibid.*, 90):

I apply the test of LORD M'LAREN, often quoted, and always with approval. The claimant sustained a definite physiological injury in the reasonable performance of his duties, and as the result of the work he was engaged in at the time of the injury. The fact that, in the course of his work for a month before the day when he first suffered from dropped foot, he had felt some loss of the power of dorsiflexion of the right foot seems to me in no way to affect his right to compensation.

In *Oates v. Earl Fitzwilliam's Collieries Co.* (5), CLAUSON, L.J., giving the judgment of the court, said ([1939] 2 All E.R. 502):

In our judgment, a physiological injury or change occurring in the course of a man's employment by reason of the work in which he is engaged at or about that moment is an injury by accident arising out of his employment, and this is so even though the injury or change be occasioned partly, or even mainly, by the progress or development of an existing disease if the work he is doing at or about the moment of the occurrence of the physiological injury or change contributes in any material degree to its occurrence. Moreover, this is none the less true though there may be no evidence of any strain or similar cause other than that arising out of the man's ordinary work.

Counsel for the employers has naturally emphasised the use of the words "if the work he is doing at or about the moment of the occurrence," but I think that what is there said in that judgment, in the light of the decision of this court in *Fitzsimons v. Ford Motor Co., Ltd.* (2), must be equally applicable where physiological injury or change has resulted as the cumulative effect of a number of personal injuries.

For these reasons I have come to the conclusion that it is not necessary in this case to remit the case for further hearing by the county court judge, because I think on the uncontradicted evidence there was only one conclusion at which he could arrive, and that was that the workman was entitled to compensation for the period for which he was incapacitated, and I think the appeal succeeds.

SOMERVELL, L.J. : I agree with the conclusion at which TUCKER, L.J., has arrived, and I also agree with the reasons which he has given.

EVERSHED, L.J. : I also agree.

Appeal allowed with costs.

Solicitors : *Theodore Goddard & Co.*, agents for *T. S. Edwards & Son*, Newport, Mon. (for the workman) ; *William A. Crump & Son*, agents for *A. J. Prosser & Co.*, Cardiff (for the employers).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

THE BALTYSK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), July 25, 28, 1947.]

Shipping—Towage—Liability of shipowners—Interrupted towage—Collision with third vessel while tug manoeuvring into position to continue towage—Condition in contract—Tug under control of ship “whilst towage . . . or assistance services being performed.”

Where a tug's contractual service of towage and assistance in its physical sense has been interrupted for the ship's purposes, an accident to the tug while, in response to orders from the ship, she is manoeuvring in close proximity to her tow for the purpose of making fast, occurs “whilst the towage or assistance services are being performed.”

A contract was entered into between the plaintiffs and the defendants to tow the defendants' ship down a canal contained the following clause : “ . . . on the hiring of the company's tugs . . . the master and crew of such tugs become in all respects the servants of and are identified with the ship and are under the control of the person in charge of the ship whilst the towage, docking, piloting or assistance services are being performed.” During the towage the ship was berthed to take in bunkers and the plaintiffs' tug cast off and berthed lower down the canal. Some hours later the tug was summoned by the ship, and, while manoeuvring to get into position to make fast, collided with another ship coming up the canal. A settlement was arrived at between the plaintiffs and the owners of the latter ship, and the plaintiffs claimed from the defendants under the towage contract such proportion of the damage sustained and inflicted by the tug as they did not recover under the settlement :—

HELD : the collision occurred “whilst the towage . . . or assistance services were being performed” within the contract, and, therefore, the defendants were liable.

[As to SPECIAL CONDITIONS RELIEVING TUGS, see HALSBURY, Hailsham Edn., Vol. 30, p. 660, para. 841 ; and FOR CASES, see DIGEST, Vol. 41, pp. 683-685, Nos. 5125-5138.]

Cases referred to :

- (1) *The Uranienborg*, [1936] P. 21 ; 105 L.J.P. 10 ; 154 L.T. 664 ; Digest Supp.
- (2) *The Clan Colquhoun*, [1936] P. 153 ; 105 L.J.P. 65 ; 155 L.T. 231 ; *sub nom.* *Port of London Authority v. Clan Colquhoun S.S. Owners*, [1936] 1 All E.R. 429 ; Digest Supp.
- (3) *The Ramsden*, [1943] P. 46 ; 112 L.J.P. 49 ; 168 L.T. 284 ; Digest Supp.

SUMMONS.

The plaintiffs, the owners of the steam tug, “Archer,” claimed against the defendants, the owners of the steamship, “Baltysk,” in respect of certain damage sustained and inflicted by the “Archer” on July 14, 1943.

On July 13, 1943, the plaintiffs were requested by the defendants' agents to supply two tugs to assist the “Baltysk” down the Manchester Ship Canal from Manchester to Eastham. The tugs were engaged by the defendants and supplied by the plaintiffs on the plaintiffs' usual terms and conditions which were contained in a document headed : “Tug Requisition and Agreement.” In pursuance of the arrangement so made, two of the plaintiffs' tugs, the “Archer” and the “Nymph,” proceeded to the “Baltysk” on the early morning of July 14, and assisted her down the canal to Partington, where the “Baltysk”

was berthed at about 8 a.m. at No. 7 coal tip, to take in bunkers. No. 7 tip was on the north side of the canal and the "Baltyk" was moored with her star-board side to the quay, heading down the canal. The tugs then cast off and the "Archer" proceeded to No. 3 coal tip, which was about 700 ft. farther down the canal than No. 7 tip. The "Archer" berthed at No. 3 tip, heading down the canal. It was at first thought that the "Baltyk's" bunkering operation would be completed by about midday, and the pilot of the "Baltyk" so informed the tugs, but during the morning the pilot was told that certain ballast on board the "Baltyk" had to be trimmed and that the vessel would not be ready to move till about 4 p.m. The pilot, accordingly, walked along the quay and told those on board the "Archer" that the "Baltyk" would not be ready till about 4 p.m. Shortly before 4 p.m. the "Baltyk" sounded a signal of five short blasts on her whistle which was intended to be a summons for her tugs and was so understood by the master of the "Archer" who cast off and tried to manoeuvre his tug astern up the canal. The distance which he had to go to reach the bows of the "Baltyk" where he intended to make fast was only just over a cable, but considerable difficulty was experienced in keeping the tug straight in the canal, as the effect of the wind and her reversed engines tended to set her stern to the southward and her bows to the northward. This effect was, however, counteracted from time to time by giving the tug's engines a touch ahead, and the "Archer" eventually reached a position about a tug's length from the stern of the "Baltyk" in which she was athwart the canal, heading to the northward. PILCHER, J., found that her manoeuvres at all material times were made with reference to the operation of getting into an appropriate position to give her towing wires to those on the forecastle head of the "Baltyk." In this state of affairs three short blasts were heard from a vessel called the "Salford City," which was coming up the canal, and almost immediately afterwards the "Salford City" with her stern struck the port side abaft amidships of the "Archer." At the time when the "Archer" and the "Salford City" were in collision the "Baltyk" was singling up her moorings preparatory to casting them off, and personnel were on her forecastle head ready to take the "Archer's" wires. On board the "Archer" the eye of the towrope had been placed on the towing hook, and her two towing wires in the form of a bridle were shackled to the towrope ready to be passed to the "Baltyk" and made fast, one on either bow. If the collision had not occurred a heaving line would have been thrown to the tug as soon as she was in position and the tow wires hauled aboard the "Baltyk." As a result of the collision both the "Archer" and the "Salford City" sustained damage.

A settlement was arrived at between the plaintiffs and the owners of the "Salford City" involving the "Archer" in a proportion of blame for the collision between her and the "Salford City." The defendants accepted this settlement as being a reasonable one, and the question which now fell for decision was whether the plaintiffs were entitled under their towage agreement with the defendants to recover from the defendants such proportion of the damage sustained and inflicted by the "Archer" as they had not recovered under their settlement with the owners of the "Salford City." By agreement the plaintiffs' claim was amended to include a prayer for a reference to the registrar and merchants so that the learned judge was concerned, not with questions of amount, but solely with liability.

Carpmael, K.C., and Gething for the plaintiffs.

Sir Robert Aske, K.C., and Roland Adams for the defendants.

PILCHER, J., [after stating the facts]: It is clear that the contract, which was entered into between the parties by telephone on July 13, was for the assistance of the "Baltyk" for the whole transportation from Manchester to Eastham. In the result, the progress of the "Baltyk" down the canal was interrupted for 8 hours at Partington. During this interruption the "Archer," by her negligence, sustained and inflicted damage, and it is on these facts that the terms of the towage contract have to be considered. The material clause of the contract is as follows:

It is further agreed that on the hiring of the company's tugs for towage, docking, piloting or assistance services the master and crew of such tugs become in all respects the servants of and are identified with the ship and are under the control of the person

in charge of the ship whilst the towage, docking, piloting or assistance services are being performed.

I have little doubt that technically the "hiring" of the two tugs was completed on the telephone on July 13. It is clear that the two tugs entered on the performance of the agreed services at the latest when they commenced to tow or assist the "Baltyk." The contract service was to tow and assist the "Baltyk" the whole way to Eastham and it would seem to follow that, the service contracted for having been entered on, the defendants are *prima facie* bound by the conditions of the contract, unless, on a reasonable construction of the wording of the contract, it can be shown that the operation of some or all of its terms was liable to suspension during the course of the service.

Counsel for the defendants submitted, quite rightly, that towage clauses imposing onerous responsibilities on the hirer of tugs should be construed *contra proferentem*. While constrained to agree that the tugs had entered on the performance of a service which was one and indivisible and had not been completed when the events occurred with which we are concerned, he submitted that the exemptive words of the clause only applied, namely, "whilst the towage . . . or assistance services are being performed." He pointed out that at the time of her collision with the "Salford City" the "Archer" was not physically towing or assisting the "Baltyk" in any way and submitted that in the circumstances the plaintiffs were not entitled to the protection of the clause.

Counsel for the plaintiffs submitted (1) that once the services had commenced the defendants remained subject to all the responsibilities imposed on them by the towage clause because the towage and assistance services were one and indivisible and not complete until the vessel was brought to Eastham, and (2) that, if this construction was too broad on the facts, the "Archer" at the time of her collision was actually performing the towage and assistance services in that she was, in response to a summons by the "Baltyk," endeavouring to manoeuvre herself under the steamer's bow to pass towing wires for the purpose of continuing the physical services of towage and assistance.

I was referred to a number of cases which have some bearing on the point I have to determine. In *The Uranienborg* (1), a tug which was approaching a moored vessel in pursuance of a towage agreement was so negligently handled that she collided with and damaged the ship. The towage contract provided that the conditions applied "whilst towing" and that those words were to be taken "to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the towrope has been passed to or by the tug, whichever is the sooner." SIR BOYD MERRIMAN, P., held on the facts of that case that the tug had not brought herself within the definition clause, and, consequently, that she was not entitled to the benefit of the conditions in the towage contract. In that case the towage contract had been concluded some days before, but the parties had specifically provided when the conditions of the contract enuring to the benefit of the tug were to operate. In *The Clan Colquhoun* (2), the parties had agreed that the towage was "deemed to commence when the tow rope had been passed to or by the tug." The contract was for two tugs. After the head tug was fast, the stern tug, while manoeuvring to make fast, was so negligently handled that she was damaged by the ship's revolving propeller. BUCKNILL, J., held that, in spite of the fact that the contract was for two tugs and one tug was already fast, the second tug was not entitled to the benefit of the provisions of the towage contract because she was not, in fact, fast at the time when she sustained damage. He said ([1936] P. 163, 164):

In a case of this kind I think the court ought not to interpret the clause in question in such a way as to entitle the P.L.A. to recover from the ship in respect of damage to their property through the negligence of the Authority's servants, if any other reasonable interpretation can fairly be given to the clause in question.

In that passage I do not understand the learned judge to be saying more than that, in the event of ambiguity of language in a contract, a clause exempting one party from the consequences of negligence for which he would otherwise be responsible or saddling an innocent party with liability for damage for which he would otherwise not be responsible must, in accordance with the ordinary principles of construction, be read *contra proferentem*. The last case to which

I need refer is *The Ramsden* (3), where a tug was ordered out to meet a steamship which was coming up channel. BUCKNILL, J., found that, in manoeuvring to get alongside the bows of the steamship to make fast, the tug was so negligently handled that she collided with and damaged the steamship. The contract under which the services were to be performed provided that "on the hiring of the tug for towage services the master and crew thereof become the servants of and are identified with the vessel towed,"

A and a further condition provided that "these conditions of towage shall apply to any damage . . . that may occur to the vessel . . . requiring the tug . . . whilst the tug is in attendance upon or engaged in any manoeuvre for the purpose of making fast to the vessel requiring the tug." The learned judge found that the "hiring" contemplated by the parties started when the tug was actually towing. I confess that I have had some difficulty in understanding this finding, because on that view the damage which formed the subject-matter of the action occurred before the hiring commenced, and, therefore, necessarily before the parties were bound by the terms of the towage contract. In the result, however, the learned judge found that the tug was at the material time "in attendance upon the ship and engaged in a manoeuvre for the purpose of making fast," that the towage conditions applied, and that the tug was entitled to succeed.

C While the cases to which I was referred indicate the attitude of the court towards clauses of exemption in towage contracts, none of them affords me any direct help in the solution of the present case. A contractual service of towage or assistance rendered by a tug to a ship is essentially one in which in practice the physical operation of towing or guiding the ship is rarely continuous throughout the performance of the whole service. Engaged tugs frequently escort a ship without any line fast. They frequently assist in turning a ship D by pushing her without the use of a towrope, and, provided they are within hailing or signalling distance of the ship, they are available for towage or assistance services at very short notice, as required. In these circumstances, even though not fast to the ship, they are, to use the common phrase, "in attendance" on her and ready to execute any order given to them by her. I have no doubt that in this sense at the material time, the "Archer" was in attendance on the "Baltic" and manoeuvring within 100 ft. or so of her E bows so as to get into a position in which she could pass her towing wires. In each of the cases to which I have referred the period during which the conditions of the towage contract were to apply was defined. In *The Uranienborg* (1), there was a definition of what was meant by "whilst towing." In *The Clan Colquhoun* (2), the point of time when the towage was "deemed to commence" was defined, and in *The Ramsden* (3), the conditions pre-requisite for the application of the towage condition were carefully set out in F the contract.

In the present case there is no question that the towage had commenced and the conditions had unquestionably commenced to be applicable on the passage to Partington. The condition which constituted the master and crew of the tug the servants of the ship only continued "whilst the towage . . . or assistance services are being performed." Counsel for the defendants argued G that these words meant "while some physical force is being exerted by the tug on the ship either by strain imposed on a towrope or by the tug pushing without a towrope." I am satisfied that such an interpretation is too narrow and that a tug is performing towage, docking, or assistance services when she is fast to the ship, whether at the material time she happens to be exerting any force on the movements of the tow or not. Similarly, it is clear that she may be performing docking or assistance services by pushing with her nose, H even though she has no towrope fast. What precisely is meant by "piloting" services when used in reference to a tug I do not know and counsel were unable to tell me. It is clear, however, that the conditions in the present contract are intended to apply when such a service is being performed and the word "piloting" seems at least susceptible of an interpretation which would permit of its being carried out without any physical connection or contact between tug and tow. In the present case the "Archer" only moved away from the "Baltic" and went alongside No. 3 tip because, if she had remained moored alongside the vessel, she would to some extent have obstructed the passage

of vessels up and down the canal. I am satisfied that the entries in her logbook with regard to "booking off" only had reference to the conditions of service of her crew with regard to overtime, and that the "Archer" was at all material times "under the control" of the "Baltyk" in that she was ready to obey orders received from the ship and that the accident occurred when, in pursuance of orders received from the ship, she was manoeuvring into a position to establish connection so as to continue the physical operation of towage and assistance which her owners had contracted to perform. Without expressing any view as to the situation which might obtain if the tug had been involved in an accident while navigating in the canal during the time she was "stood off" by the "Baltyk" for any purpose unconnected with the towage and assistance services on which she was engaged, I have come to the conclusion that when, as in this case, the contractual service of towage and assistance in its physical sense has been interrupted for the ship's purposes, it would be wrong to hold that an accident which occurs to the tug while, in response to orders from the ship, she is manoeuvring in close proximity to her tow for the purpose of making fast, did not occur, to use the words of the contract in this case, "whilst the towage or assistance services are being performed." To hold otherwise would, in my view, put an unduly limited construction on the words "towage or assistance services," even when those words appear in a clause of exception, which, as BUCKNILL, J., points out, has to be construed *contra proferentem*. I, accordingly, give judgment for the plaintiffs for the declaration which they seek and a reference to the registrar and merchants to assess the sum due to them. The plaintiffs are also entitled to their costs.

Judgment for plaintiffs with costs.

Solicitors: *Hill, Dickinson & Co* (for the plaintiffs); *Holman, Fenwick & Willan* (for the defendants).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

WILLIAMS v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), July 25, 1947.]

Royal Forces—Pensions—Attributability—Injury sustained while on leave—Command Paper disclaiming liability—Legal force—Pensions Appeal Tribunals Act, 1943 (c. 39), s. 1 (1) (a), s. 6 (2).

Command Paper, 1943, No. 6459, which states that an injury sustained by a soldier while actually on leave, the compulsions of service playing no part in the circumstances, cannot properly be regarded as attributable to service, has no legal force. Tribunals and the court decide appeals under the Pensions Appeal Tribunals Act, 1943, according to the Royal Warrant, in which the words "compulsions of service" do not occur, and not by reference to the Command Paper in question.

[AS TO WAR PENSIONS TO MEMBERS OF H.M. FORCES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 777-780, paras. 1094-1100; and FOR CASES, see DIGEST Supp.]

APPEAL under the Pensions Appeal Tribunals Act, 1943. The appeal was allowed.

G. H. Crispin for the appellant.

H. L. Parker for the Minister of Pensions.

DENNING, J.: The appellant was serving in the regular army at the outbreak of war. He came back to the United Kingdom in July, 1940. In May, 1941, he volunteered for service in India, and on May 18, after drawing a rifle, but not ammunition, from the quarter-master's stores, he went on embarkation leave. On May 21, having no pull-through and being unable to borrow one, he took a duster and wiped his rifle, which he held butt upwards with the barrel resting on his left foot. Then, knowing that the action was cocked, he pulled the trigger and shot himself through the left foot. He admitted he was careless in not having looked to see if the rifle was loaded, but it was a serious injury and he was discharged on account of it. He now claims a pension.

The first question that arises is whether, as a matter of causation, the injury was attributable to war service. The second question that arises is, whether, even if it was attributable to war service, it was due to the appellant's serious negligence or misconduct. On the first point, the tribunal held that the injury was not attributable to war service. In doing so, they relied on Command Paper, No. 6459, published in July, 1943, in which it was stated that an injury sustained while a man is actually on leave, the compulsions of service playing no part, cannot properly be regarded as attributable to service. That statement, however, has no legal force at all. These cases have to be decided by the tribunals and by this court according to the Royal Warrant, and not by reference to that Command Paper. The words "compulsions of service" do not occur in the Royal Warrant and are in no sense a guide to these cases.

This accident happened while the man was on leave. It was plainly attributable to war service. It may be that he was not compelled to clean his rifle at the moment in question, but it was an incident of his war service. It may be that he was negligent, but that does not mean that the accident was not attributable to war service. On the first point the decision of the tribunal was wrong.

The second point—whether the pension should be withheld under art. 5 of the Royal Warrant on the ground that the injury was caused or contributed to by the serious negligence or misconduct of the appellant—has not been dealt with by the tribunal. I express no view on what the finding should be. I send the case back for re-hearing on that question. The appeal is allowed.

Appeal allowed.

Solicitors: *Culross & Trelawny* (for the appellant); *Treasury Solicitor* (for the Crown).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

FARRUGIA v. GREAT WESTERN RAILWAY CO.

[COURT OF APPEAL (Lord Greene, M.R., Somervell, L.J., and Singleton, J.), October 27, 28, 1947.]

Negligence—Highways—Lorry laden with container driven under too low a bridge—Boy running behind lorry injured by fall of container—Extent of duty of care required of user of highway.

A lorry belonging to the defendant company was loaded with a large box or container. The driver attempted to drive under a railway bridge which was too low for the container to clear it and an accident occurred, the container being thrown off the lorry and injuring the plaintiff who was running behind the lorry at that moment. Shortly before the accident, the plaintiff had been on the lorry as a trespasser. It was contended by the defendants that they owed no duty of care to the plaintiff (a) because he was running along the highway to climb into it again, and was, therefore, a trespasser on the highway, and (b) because they had no reason to expect that he would be where he was at the time of the accident:—

HELD: (i) even on the assumption that an action for trespass could have been maintained against the plaintiff by the owner of the soil of the highway, the defendants were not discharged from their duty of care to him;

(ii) the defendants and their driver, having created a potential source of danger, owed a duty of care to anyone who might be on the highway in the near neighbourhood when the danger materialised, whether he was there lawfully or unlawfully, and the duty was not confined to someone whom they could have reason to expect to be there at the time.

Hay (or Bourhill) v. Young ([1942] 2 All E.R. 396) distinguished.

[AS TO VEHICLES ON HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 637-642, paras. 895-901; and FOR CASES, see DIGEST, Vol. 36, pp. 59-61, Nos. 372-383, and Supplement.]

Cases referred to :

- (1) *Harrison v. Rutland (Duke)*, [1893] 1 Q.B. 142; 62 L.J.Q.B. 117; 68 L.T. 35; 57 J.P. 278; 26 Digest 317, 491.
- (2) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; Digest Supp.

APPEAL by the defendants from a judgment of LYNSEY, J., at Swansea Assizes, dated Dec. 13, 1946.

The plaintiff claimed damages for personal injuries sustained by him as a result of the negligence of the defendants' servant, a lorry driver, in attempting to drive under a railway bridge a lorry which was so loaded that it could not clear the bridge. On the lorry was a large box, called a container, which was thrown off the lorry on to the roadway and fell on the plaintiff, injuring his leg. The plaintiff had been on the lorry, as a trespasser, shortly before the accident, but he had just got off and was running behind it. The defendants contended that they owed no duty of care to him because he was using the road for an unlawful purpose in that he was about to steal a second ride on the lorry. LYNSEY, J., held that, whether or not the plaintiff's ultimate object as a result of the use of the highway was to commit a trespass, it did not make the use of the highway a trespass, but he was lawfully on the highway and the defendants owed a duty of care to him. The defendants appealed on the grounds stated in the judgment of LORD GREENE, M.R., but the appeal was dismissed.

Glyn-Jones, K.C., and *George Bankes* for the defendants.

Edmund Davies, K.C., and *Owen George* for the plaintiff.

LORD GREENE, M.R. : Many ingenious arguments have been advanced as reasons why we should take a different view of this case from that taken by LYNSEY, J. I am not convinced by any of them. The first argument may, I think, fairly be summarised in this way. Counsel for the defendants was minded to establish as his first proposition that, at the moment when the plaintiff was struck by the container, he was, in effect, a trespasser to the defendants' goods, namely, their lorry and the container. [After reviewing the evidence, LORD GREENE, M.R., held that the plaintiff was not a trespasser to the defendants' goods at the time of the accident, and continued:] The second argument of counsel for the defendants was that the plaintiff, when he was struck by the container, was engaged in an unlawful user of the highway, because he was running on the highway, not to get from place to place on it, but to climb on the lorry, which was not a proper user of the highway. He being (it was said) a trespasser on the highway, the defendants owed no duty to him. Cases were cited to us where owners of the soil of highways successfully brought actions against persons who had used them on the ground that their user was not a lawful one. That, of course, is familiar law. The owner of the soil over which a highway runs, who dedicates it to the public as a public right of way, does not abandon his rights in the soil. His rights remain, subject to the right which is conferred, by dedication, on the public. If someone goes along the highway, and behaves as the defendant did in *Harrison v. Duke of Rutland* (1), thereby interfering deliberately with the sport of the owner of the soil of the highway, the owner, in right of his ownership, is entitled to maintain an action for trespass, because the defendant is not using the highway in a proper manner.

That seems to me to be far from establishing the proposition which the defendants have to establish, namely, that, not only can the owner of the soil of the highway bring an action for trespass against the person who is misusing it, but that another person using the highway is, by reason of that fact of trespass, relieved of any duty in law to take reasonable care for the safety of the trespasser. It appears to me that these two propositions have nothing to do with one another. It does not follow, because the Duke of Rutland was entitled to sue Mr. Harrison for trespass because he was misusing the highway, that another person lawfully driving along the highway was discharged of any duty to take care *vis-a-vis* Mr. Harrison. Indeed, it was conceded by counsel for the defendants that if a user of the highway saw a trespasser on the soil of the highway, he must, nevertheless, exercise due care towards him, notwithstanding that the latter was, as between himself and the owner of the soil, a trespasser.

In the present case, it was said that the plaintiff running, as he was, along the highway to climb on the lorry, was not making proper use of the highway, and, indeed, was a trespasser on the highway, and that, therefore, the defendants owed him no duty. I cannot agree with any such sweeping proposition. I think the facts of every case have got to be examined, as in all cases of alleged negligence, and the answer must depend on the facts of the individual case. Even if it be the fact—and I am not saying it is—that, when the plaintiff was running along the road, he was doing something in respect of which the owner of the soil of the highway could have maintained an action for trespass against him, it appears to me that that is a long way away from discharging the defendants from their liability to take care towards him.

That brings me to a consideration of the last point of counsel for the defendants, which, as I understood it, was of this nature. Assume either that the plaintiff was lawfully using the highway at the moment that he was struck, or assume that the defendants owed him a duty, notwithstanding that he was not lawfully using the highway. On that assumption, it was said that the defendants' driver could have no reason to expect that the plaintiff would be where he was, and, therefore, could owe no duty towards him. In support of that proposition, reliance was placed on *Hay (or Bourhill) v. Young* (2). In my opinion, that case does not support the proposition which counsel for the defendants wishes to found on it. The defendants loaded on their vehicle, and sent out into the streets of Cardiff, a container which, in certain circumstances, was bound to be a source of danger to persons in the near neighbourhood. The driver of the vehicle adopted—and, I must assume, properly adopted—a particular course which took him under a bridge so low that the container could not pass under it. In other words, at that moment, the peril that was inherent in the situation became effective. It appears to me that the defendants and their driver, having created between them a potential source of danger which would impinge on anybody on the highway in the near neighbourhood, must be taken to have owed a duty towards anybody who might be on the highway in the near neighbourhood, whether he was there lawfully or whether he was there unlawfully. I cannot see, on any ground of principle or common sense, why a distinction should be made between the plaintiff running in the road to get on the lorry and a foot passenger lawfully crossing the road immediately behind the lorry. I should have thought the duty was a duty to take care *vis-a-vis* anyone—not this plaintiff as such, but anyone—the general class of persons who, at the moment when the danger materialised, might happen to be in the near neighbourhood.

It was said that the driver and the defendants (his employers) had no reason to suppose that the plaintiff would be running behind the lorry, trying to get on it, at that particular moment. That appears to me not to be the question. The duty, as it appears to me, is a duty to anybody who happened to be at the crucial moment in the neighbourhood of this dangerous thing, and the fact that the plaintiff was not in the mind of the driver appears to me beside the point. It might have been somebody else. The duty on the defendants, as it seems to me, is a duty to take care in loading and sending out their vehicles, and a duty to drive them in such a way that anybody who happens to be on the highway nearby will not be endangered. They sent out this dangerous thing; the natural result happened. There was somebody who, at the moment, was in the neighbourhood, and he was struck. It appears to me that to confine the duty in the way counsel for the defendants would confine it would be really to re-write the law of negligence.

Bourhill v. Young (2), was a totally different case. There, a person suffered a shock as the result of hearing a collision between two motor vehicles, and it was held that she could not recover against the motor cyclist who was responsible for the accident because it could not be said that the motor cyclist could reasonably have contemplated that the danger would affect her. Quoting the language of LORD THANKERTON ([1942] 2 All E.R. 399):

Clearly this duty [*i.e.*, the duty of the motor cyclist on the public road] is to drive the cycle with such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care. It is now settled that such injury includes injury by shock, although no direct

physical impact or lesion occurs. If then the test of proximity or remoteness is to be applied, I am of opinion that such a test involves that the injury must be within that which the cyclist ought to have reasonably contemplated as the area of potential danger which would arise as the result of his negligence, and the question in the present case is whether the appellant was within that area.

If those words be applied to the present case, what was the area of potential danger here? It was the area, I should have thought, on which the container would fall when it was struck by a low bridge. It seems to me that the driver and the defendants ought to have reasonably contemplated damage to anybody who happened to be in that area of potential danger. The plaintiff in *Bourhill v. Young* (2), was held to have been outside the area of any reasonable contemplation of danger. Here the plaintiff was clearly within the only area of potential danger which existed, namely, the area in which the container would naturally fall if it were struck by the bridge. LORD RUSSELL OF KILLOWEN in *Bourhill v. Young* (2), put the case in this way ([1942] 2 All E.R. 401):

Can it be said that John Young could reasonably have anticipated that a person, situated as was the pursuer, would be affected by his proceeding towards Colington at the speed at which he was travelling.

Later (*ibid.*, 402) he quoted with approval—as, indeed, did LORD MACMILLAN—the language of LORD JAMIESON in that case, when he said:

“No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care.”

I ask myself this question: Was the plaintiff in the present case so placed that he might reasonably be expected to be injured by the omission to take such care? If he had not been so placed, the container would not have struck him. I shall not take up time with further quotations from *Bourhill v. Young* (2), a case which appears to me not to come within any appreciable distance of the present case.

The defendants were negligent and committed a breach of duty towards any person, it seems to me, who would be in the neighbourhood of that container and in the area where a person would be liable to be injured. It might have been a cyclist riding close behind; it might have been another vehicle; it might have been somebody crossing the road; it might have been somebody lawfully walking up the road—it happened to be a boy running up the road. The fact that, in running up the road, his intention was to climb on the lorry appears to me to have nothing to do with the case.

In my opinion, the appeal fails, and it must be dismissed with costs.

SOMERVELL, L.J.: I agree, and have only a few sentences which I wish to add. I agree with the conclusion of LYNSEY, J., which is imputed in the following two sentences in his judgment:

The result is, it seems to me, that he [the plaintiff] was lawfully on the highway. He was not trespassing on the highway; he was not trespassing on the defendants' vehicle.

I agree with the reasons which LYNSEY, J., gave for that conclusion, and with what has been said by LORD GREENE, M.R. I appreciate the submissions which have been made to invite us to interfere with that finding, but I cannot accept them.

SINGLETON, J.: I agree.

Appeal dismissed with costs.

Solicitors: *M. H. B. Gilmour* (for the appellants); *John T. Lewis & Woods*, agents for *C. James Hardwicke & Co.*, Cardiff (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. WILSON. *Ex parte* BATTERSEA BOROUGH COUNCIL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Singleton, JJ.), October 24, 1947.]

Public Health—Metropolis—Nuisance—Summons—Service—Summons on complaint of local authority—Public Health (London) Act, 1936 (c. 50), s. 301 (1) (a) (i)—London Government Act, 1939 (c. 40), s. 183 (1).

A A summons issued by a court of summary jurisdiction on a complaint by a local authority is a document issued on behalf, not of the local authority, but of the Crown, notwithstanding the fact that the penalty which may be inflicted on an offender on the hearing of the summons may be payable to the local authority. Where, therefore, a summons has been issued in the metropolis on the complaint of a local authority in respect of a nuisance, the Public Health (London) Act, 1936, s. 301—and not the London Government Act, 1939, s. 183—applies in regard to the service of the summons, since the Act of 1939 (by s. 207 and sched. VIII) repeals s. 301 of the Act of 1936 only “so far as it relates to a local authority.”

B *Per* HUMPHREYS, J.: Section 183 (1) of the London Government Act, 1939, which provides for the service by a local authority of “any notice, order or other document required or authorised by this Act, or by any other enactment or statutory order,” applies only to notices required or authorised to be served on behalf of a local authority and not to summonses (*e.g.* a summons served on a person under the Public Health (London) Act, 1936, sched. V, para. 7, for failure to comply with a nuisance notice). When s. 301 (1) of the Act of 1936 provides that a summons “may be served . . . where the person [to be served] is the owner or occupier of any premises, [by] delivering it to some person on the premises . . .”, the premises referred to are those in respect of which proceedings are proposed to be taken, and not different premises of which the person to be served is the owner or occupier.

C [AS TO SUMMARY PROCEEDINGS FOR NUISANCE IN THE METROPOLIS, see HALSBURY, Hailsham Edn., Vol. 24, pp. 105-107, paras. 183-188, and Supplement; and FOR CASES, see DIGEST, Vol. 36, p. 235, No. 740.]

D FOR THE LONDON GOVERNMENT ACT, 1939, s. 183, see HALSBURY'S STATUTES, Vol. 32, pp. 341-343.]

E APPLICATION for an order of *mandamus* directing the magistrate at the South-Western Magistrate's Court, London, to hear a summons which had been issued at the instance of Battersea Borough Council against one Benabo for failing to comply with a notice served by the council requiring her to abate a nuisance in respect of a defective roof. The magistrate held that the Public Health (London) Act, 1936, s. 301, was the relevant statutory provision in regard to the service of the summons, and, since it had not been complied with, he was not entitled to hear the summons. The council contended that the relevant section was s. 183 of the London Government Act, 1939, and not s. 301 of the Act of 1936. The Divisional Court now held that the magistrate was right and refused the application. The facts appear in the judgment of LORD GODDARD, C.J.

Vernon Gattie for the applicants.

H. L. Parker for the magistrate.

LORD GODDARD, C.J.: Counsel for the local authority obtained leave to move for an order of *mandamus* addressed to the magistrate at the South-Western Magistrate's Court calling on him to hear a summons which had been issued at the instance of the local authority against one Rebecca Benabo, trading as C. Benabo & Sons, the summons being a complaint that she had failed to comply with a nuisance notice served by the local authority.

The points raised are of a highly technical nature. The first question which the court has to decide is which of two Acts of Parliament applies to the facts. By the Public Health (London) Act, 1936, s. 301 (1), it is provided:

Without prejudice to any special provisions of this Act, any notice, order or other document required or authorised by this Act to be served on any person (not being such a notice as is referred to in the next following sub-section) may be served—(a) by addressing the notice, order or document or a copy thereof to the said person and by delivering it to him or at his usual or last known place of residence in England or,

where that person is the owner or occupier of any premises, (i) delivering it to some person on the premises . . .

Under the Public Health (London) Act, 1936, provision is made for a local sanitary authority serving a person with what is called a nuisance notice specifying the nuisance that is alleged to exist and requiring its abatement: [sched. V, para. 4]. If that is not complied with, proceedings can be instituted by summons before a petty sessional court to obtain an order calling on the person to abate the nuisance, and, whether or not such an order is made by the court, it can impose a fine of £10 on the person for not having complied with the nuisance notice: [sched. V, paras. 6, 7, 8]. The London Government Act, 1939, s. 183 (1), contains elaborate provisions for the service of:

. . . any notice, order or other document required or authorised by this Act, or by any other enactment or statutory order, to be served by or on behalf of a local authority . . .

Among other places where such a notice can be served is the person's residence or place of business [s. 183 (1) (d)]. By s. 207 of that Act the enactments contained in sched. VIII to the Act were repealed, and among the repeals was s. 301 of the Act of 1936 "so far as it relates to a local authority." Under the Act of 1936 [sched. V, para. 20], a private person can make the complaint with regard to nuisance and obtain a summons from a petty sessional court, as well as a local authority.

It was argued here by counsel for the local authority that the controlling section in this case with regard to service is s. 183 of the London Government Act, 1939, because he contends that the summons which is issued by the petty sessional court is a document issued on behalf of a local authority. In my opinion, that is not right. A summons is the result of a judicial act. It is the result of a complaint which has been made to a magistrate, on which a magistrate must bring his judicial mind to bear and decide whether or not on the information or complaint before him he is justified in issuing a summons. When he has issued a summons, the summons is not issued on behalf of the local authority. It is issued on behalf of the Crown, and, when it is served, it is served on behalf of the Crown. The result of the service of the summons is that the party is thereby called on to appear before a court, and on his appearance he may have an order made against him and a penalty inflicted on him. The fact that provision is made for the penalty to be paid to the local authority [s. 281 (1) of the Act of 1936] does not, in my opinion, make any difference. It is not a civil debt which is being recovered. It is a penalty, and a penalty is only imposed in English law for crime, except under certain Acts of Parliament when certain persons may sue for penalties, but we need not consider that.

In my opinion, therefore, s. 183 of the Act of 1939 does not apply to this case, since it repeals s. 301 of the Act of 1936 only in so far as it applies to a local authority. Section 183 applies only to notices served on behalf of a local authority and does not, in my opinion, apply to summonses. Therefore, I think the magistrate was right in holding that s. 183 of the Act of 1939 was not the section under which this summons ought to have been served. It follows that service should have been under s. 301 of the Act of 1936, and under that section, which is very general in its terms, a summons can be served at any premises of which the person summoned is the owner or occupier by delivering it to some person on those premises. When the summons was before the magistrate, the borough council were represented, but they called no evidence. The magistrate himself took the objection—and I think it was right, considering that the defendant did not appear—that he must be satisfied that the summons had been lawfully served. The only evidence before the magistrate was the indorsement by the warrant officer who had served the summons:

I hereby certify that I served the defendant with the summons of which this is a true copy by leaving it for the defendant this day with a female clerk at the address on this copy, being the defendant's last place of business.

That may have been the defendant's last place of business, but it was not shown that the defendant was the owner or occupier of those premises at the time the summons was served. The address which is referred to is 3, St. Stephen's Parade, Westminster, and the premises in respect of which the order was sought

were not 3, St. Stephen's Parade, Westminster, but 38, Shillington Street. The magistrate thereupon took the point that there was nothing before him except something which showed that the summons had been left at the defendant's last place of business. It might have been that she was there at some time, but had now left. A representative of the local authority contended that the summons was properly served under s. 183 of the Act of 1939, and there, I think, he was in error. For the reason I have given, I do not think s. 183 applies. No application was made to the magistrate to adjourn the case or to call the warrant officer who had served the summons. If that officer had been called and he had proved that he had served it at premises of which the defendant was the occupier and where she was carrying on business, it would have been patent to the magistrate that the summons had been properly served under s. 301 of the Act of 1936.

The magistrate has told us in his affidavit that he took the view that s. 301 was the governing section, and he had no evidence before him that the summons had been duly served under that section. In my opinion, his refusal to hear the summons was right because the certificate of service did not show good service under s. 301, and no evidence was given that s. 301 had been complied with. It turns out now, on evidence produced before this court, that the summons had been properly served, but it would be wrong to issue a *mandamus* against the magistrate to hear the summons when his refusal was right. The local authority can take out a further summons, serve it properly, and call evidence before the magistrate that it was served properly, but in the circumstances this order of *mandamus* is refused.

HUMPHREYS, J. : I am of the same opinion. On the whole I come to the conclusion that s. 183 of the London Government Act, 1939, does not apply to this case. I think the words :

... any notice, order or other document required . . . to be served by or on behalf of a local authority . . .

mean such documents as are required or authorised to be served by, or by direction or order of, a local authority, and do not include a document which is described as being issued by some other person, in this case a court of justice, at the instance of the local authority. Turning to s. 301 of the Act of 1936, the first question which arises is whether, on the material before the magistrate, he was wrong in the conclusion at which he arrived. I think he was right on the evidence before him, which did not include any evidence as to the ownership or occupancy by the proposed defendant of any premises, in refusing process.

I am not prepared myself to say that I am satisfied now on the affidavits before us that this summons was properly served under s. 301. It was served by delivering it to some person on certain premises. What premises? On the premises at 3, St. Stephen's Parade, Westminster. Those are not the premises to which the summons refers or in respect of which the proposed proceedings were to be brought. It is true that they are premises. It is true that the defendant is the owner or occupier of those premises, but I think it is at least arguable, and at the moment, if I had to decide this question, I should hold, that the provision in s. 301 does not mean that, where a person is alleged to have done something wrong in respect of premises A and that person is also the owner of premises at B, which may be miles away, the summons in respect of premises A can be served by leaving it with some person at premises B. I do not think that is what the statute intended or what the language conveys. In my opinion, the premises which are referred to in s. 301 (1) (a) (i), the words of which are that the notice, order or other document may be served by "delivering it to some person on the premises," relate to the premises in respect of which the proceedings are proposed to be taken. That view is strengthened by the language of the summons, which begins in this way :

To Mrs. Rebecca Benabo, trading as C. Benabo & Sons, of [and then her address] the owner of certain premises situate at 38, Shillington Street . . .

In my view, while it would have been good service to leave this with some person at 38, Shillington Street, of which premises the defendant is the owner, I am by no means satisfied that it would have been good service to leave it with some person for her at premises, where she happened to carry on business, in a wholly different district.

SINGLETON, J. : I agree that we ought not to grant the relief for which application is made. I cannot help feeling that there must have been some misunderstanding. If the matter had been gone into a little more fully, and if perhaps, as my Lord said, application for an adjournment had been made, I feel that the local authority might well have satisfied the magistrate that there had been proper service under s. 301 of the Act of 1936, and, as the magistrate thought that that was the section which applied, if he had been so satisfied, he would have heard the summons.

Motion dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.* (for the applicants) ; *Treasury Solicitor* (for the respondent.)

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

BRANNAN v. PEEK.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Singleton, JJ.), October 23, 1947.]

Gaming and Wagering—Betting—“Public place”—Bets taken in public house—Street Betting Act, 1906 (c. 43), s. 1 (4)—police—conduct.

Licensed premises which are not a common inn do not constitute a “public place” within the Street Betting Act, 1906, s. 1 (4), because there is no right of entry, restricted or otherwise, into such premises. Therefore, an information laid under s. 1 of that Act, charging the defendant with frequenting such premises for the purpose of receiving bets, is bad, because the Act has no application.

Observations on the undesirability of a police officer being sent to commit an offence with the object of detecting offences by other persons.

[FOR THE STREET BETTING ACT, 1906, s. 1 (4), see HALSBURY'S STATUTES, Vol. 8, p. 1171.]

CASE STATED by Derby justices.

The appellant, Brannan, was convicted by a court of summary jurisdiction sitting at Derby on Mar. 4, 1947, on an information preferred by the respondent, Peek, an inspector of police, of frequenting a public house on behalf of one William Wragg for the purpose of receiving bets, contrary to s. 1 of the Street Betting Act, 1906, and was fined £3. The Divisional Court held that the Act had no application and allowed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

P. C. Lamb for the appellant.

Gerald Howard for the respondent.

LORD GODDARD, C.J. : This is a Case stated by the justices of the borough of Derby, and it raises the short point whether or not any offence has been committed against the Street Betting Act, 1906.

It appears that a police constable named Allen visited licensed premises known as the Chesterfield Arms, Derby, on a day in Jan., 1947, and saw two men writing on slips of paper on the bar counter. They handed the slips to the appellant with money, and the appellant used the words : “I hope it wins.” Allen, who was in plain clothes, told the appellant that he had come from Stoke-on-Trent to see the football match between his team and the Derby County football team (which was, in fact, untrue), and he offered to bet with the appellant a pint of beer that the Stoke team would win. The appellant agreed. Then Allen asked the appellant if he could make a bet on a horse in a race taking place that day. The appellant agreed, and Allen thereupon made a bet with him, writing out a slip with the name of the horse and handing it to the appellant with 2s. 0d. cash. On the following Tuesday, Allen again went to the Chesterfield Arms with another police constable in plain clothes. The appellant seems to have been on that occasion reluctant to bet. I suppose he wondered why it was that a man who said he had come to see Stoke play was still in Derby on Tuesday. Allen, however, told him he had been staying the week-end with friends at Derby. Allen again made out a betting slip which he handed to the appellant with 2s. 0d. in money. The justices expressly found that the appellant

was reluctant to take the bet, but that he did so eventually. He was accosted by the police officers after leaving the Chesterfield Arms, and they found on him a bag containing betting slips and a certain sum of money.

There was no question that the appellant had been taking bets in this public house. An information was laid against him under the Street Betting Act, 1906, not under the Betting Act, 1853. The point that was taken on his behalf before the justices, and is taken on his behalf here, is that the Street Betting Act, 1906, has no application to this case.

In the opinion of the court, that is a perfectly good point. The Street Betting Act, 1906, s. 1 (1), prohibits a person from :

... frequenting or loitering in streets or public places, on behalf either of himself or of any other person, for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager, or paying or receiving or settling bets . . .

Sub-section (4) provides :

For the purpose of this section the word "street" shall include any highway and any public bridge, road, lane, footway, square, . . . and the words "public place" shall include any public park, garden, or seabeach, and any unenclosed ground to which the public for the time being have unrestricted access, and shall also include every enclosed place (not being a public park or garden) to which the public have a restricted right of access, whether on payment or otherwise, if at or near every public entrance there is conspicuously exhibited by the owners or persons having the control of the place a notice prohibiting betting therein.

To bring this case within the Street Betting Act it is necessary to find that a public house is a public place to which the public have an unrestricted or a restricted right of access.

It is clear that a public house is not a public place under any of the words used in s. 4 (1). The justices may have been misled by the fact that in common parlance licensed premises are called a public house. There is no finding here that the premises were a common inn. If they were a common inn, the case might require some further consideration because travellers have a right to be taken into an inn if there is room in the house. A public house, however, is only a place where a person holding a justices' licence is entitled to sell drink, and is no more a public place than a draper's shop. The public, it may be, are invited to enter, but that does not give them a right of access, because the invitation may be withdrawn at any moment. As a rule, any person who desires refreshment is welcomed as a guest to the public house. He is invited to enter so long as the doors are open, unless the publican refuses to have him in his house, as he has a perfect right to do. The publican can close the doors of the house at any time, and the fact that the licensing justices might interfere if they thought the publican was acting unreasonably is neither here nor there. There is no right of entry into a public house, restricted or otherwise. In any circumstances it could only be said there was a restricted right of entry, and, if there was, then it is necessary, to bring the premises within the definition of "public place" in s. 1 (4) of the Act of 1906, that a notice prohibiting betting should be conspicuously exhibited at or near the public entrance, which was not done in this case.

We are told that the justices thought that, as the word employed in the sub-section is "include" and not "mean"—in other words, as it is not a definition section in the strict sense of the term, but only a section prescribing what the words "public place" shall include—they could hold that something was a public place although it did not fall within the actual words of the sub-section. In my opinion, that cannot be upheld because, at any rate, it has to be shown that a public house was a place to which the public had a restricted right of access and that the notice prescribed by the Act was exhibited. I decide this case entirely on the ground that a public house is not a public place within the meaning of the Street Betting Act. Therefore, the information was bad because it charged an offence against a statute which has no application, and the conviction must be set aside.

There is another point of much greater public importance. The court observes with concern and disapproval the fact that the police authority at Derby thought it right to send a police officer into a public house to commit an offence. It cannot be too strongly emphasised that, unless an Act of Parliament provides for such a course of conduct—and I do not think any Act of Parliament does so provide—it is wholly wrong for a police officer or any other person

to be sent to commit an offence in order that an offence by another person may be detected. It is not right that police authorities should instruct, allow, or permit detective officers or plain clothes constables to commit an offence so that they can prove that another person has committed an offence. It would have been just as much an offence for the police constable in the present case to make the bet in the public house as it would have been for the bookmaker to take the bet if in doing so he had committed an offence. I hope the day is far distant when it will become a common practice in this country for police officers to be told to commit an offence themselves for the purpose of getting evidence against someone; if they do commit offences they ought also to be convicted and punished, for the order of their superior would afford no defence.

HUMPHREYS, J. : I agree with the judgment of my Lord. I doubt whether from any point of view this public house could be properly described as a public place. If it could, it could only be because it was an enclosed place to which the public had a restricted right of access, whether on payment or otherwise, and because a notice prohibiting betting was exposed there. The Case finds that there was no such notice. The matter is really beyond argument.

SINGLETON, J. : I agree.

Appeal allowed.

Solicitors : *G. A. Hathway*, agent for *Flint, Bishop & Barnett*, Derby (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *C. Ashton*, town clerk, Derby (for the respondent).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

LOMAS v. PEEK.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Singleton, JJ.), October 23rd, 1947.]

Gaming and Wagering—Betting—Licensed premises—Licensee permitting betting—Wording of information—Omission of “knowingly and wilfully”—Betting Act, 1853 (c. 119), s. 3—Criminal Justice Act, 1925 (c. 86), s. 32 (3).

The appellant was convicted by a court of summary jurisdiction on an information alleging that he, being the holder of a justices' licence, did suffer his premises to be used in contravention of the Betting Act, 1853, s. 3, (which provides that any person who is the occupier of any house or other place and shall knowingly and wilfully permit the same to be used for the purpose of betting shall commit an offence) and the Licensing (Consolidation) Act, 1910, s. 79. The appellant submitted that the information was bad because it did not disclose an offence known to the law in that, while the offence under s. 3 was “knowingly and wilfully permitting,” the particulars of the offence given in the information were “in that he permitted . . .”, the words “knowingly and wilfully” being omitted.

HELD : the words were technical, and need not appear in the particulars.

[AS TO CONTENTS OF INFORMATION, see HALSBURY, Hailsham Edn., Vol. 21, pp. 599-602, paras. 1044-1046 ; and FOR CASES, see DIGEST, Vol. 33, pp. 322-324, Nos. 367-388.]

Case referred to :

(1) *Brannan v. Peek*, ante p. 572.

CASE STATED by Derby justices.

The defendant appealed against his conviction under the Betting Act, 1853, s. 3, and the Licensing (Consolidation) Act, 1910, s. 79, on the ground that the information was bad. The Divisional Court dismissed the appeal.

The facts appear in the judgment of LORD GODDARD, C.J., and are summarised in the headnote.

P. C. Lamb for the appellant.

Gerald Howard for the respondent.

LORD GODDARD, C.J. : In this case the landlord of the premises on which the defendant in *Brannan v. Peek* (1) had taken the bets was prosecuted :

... for that he being the holder of a justices' licence did suffer to be used his premises, namely, the Chesterfield Arms, Nottingham Road, in the county borough of Derby, in contravention of the Betting Act, 1853, s. 3, and the Licensing (Consolidation) Act, 1910, s. 79.

A The justices convicted, having found that Brannan was betting there with the knowledge or connivance of the licensee, and the only point that arises in the case is highly technical. It is objected that the information is bad, because it does not disclose an offence known to the law.

The offence, which is correctly stated, is against the Licensing Act, 1910, s. 79, which provides that the holder of a justices' licence shall not suffer his premises to be open, kept or used in contravention of the Betting Act, 1853. The Criminal Justice Act, 1925, s. 32, provides :

B (1) Every information, complaint, summons, warrant or other document laid, issued or made for the purpose of or in connection with any proceedings before examining justices or a court of summary jurisdiction for an offence, shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

C It is to be observed that there must first be made a charge of the breach of the statute, and then such particulars must be given as may be necessary for giving reasonable information to the defendant to show what is the case he has to meet. Section 32 further provides :

(2) The statement of the offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence.

D (3) After the statement of the offence, necessary particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be required.

Sub-section (2) was complied with in this case, and the only point that arises is that under the Betting Act, 1853, s. 3, the offence is stated to be "knowingly and wilfully permitting," and "knowingly and wilfully" is omitted from the particulars in the information. In my opinion, those words "knowingly and wilfully" can properly be described as technical terms. If a man permits a thing to be done, it means that he gives permission for it to be done, and if a man gives permission for a thing to be done, he knows what is to be done or is being done, and, if he knows that, it follows that it is wilful. The words in the information, "in that he permitted one Charles Brannan to receive bets there," are merely the particulars of the offence. The offence was the offence of suffering

E the house to be used in contravention of the Act, and the defendant is told that the particulars which will be relied on are that he permitted Brannan to receive bets there. It tells him who is alleged to have received the bets and where that person is alleged to have received the bets, and that is the substance of the offence which is going to be alleged against him. In my opinion, that gives the defendant such particulars as are necessary for giving reasonable information of the nature of the charge, and the fact that the words "knowingly and wilfully" are not inserted, to my mind, makes no difference. In my opinion, there is nothing in this objection, the magistrates were justified in convicting, and the appeal will be dismissed.

HUMPHREYS, J. : I agree.

SINGLETON, J. : I agree.

H Solicitors : *G. A. Hathway*, agent for *Flint, Bishop & Barnett*, Derby (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *C. Ashton*, town clerk, Derby (for the respondent).

Appeal dismissed.

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BLOWS v. CHAPMAN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Singleton, J.J.), October 17, 1947.]

Street and Aerial Traffic—Motor vehicle—Using vehicle on road without policy of insurance being in force—Disqualification for holding licence—"Special reasons" for refraining from disqualification—Farm labourer driving uninsured tractor—Road Traffic Act, 1930 (c. 43), s. 35 (2).

A farm labourer, who was employed, *inter alia*, to drive tractors, was ordered by his master to convey manure over part of a highway in a vehicle drawn by a tractor which, unknown to him, was not insured in accordance with the Road Traffic Act, 1930 :—

HELD : there were special reasons within s. 35 (2) of the Act for refraining from disqualifying the labourer for holding or obtaining a driving licence under Part I of the Act.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 35, see HALSBURY'S STATUTES, Vol. 23, p. 636.]

Case referred to :

(1) *Whittall v. Kirby*, [1946] 2 All E.R. 552; 175 L.T. 449; Digest Supp.

CASE STATED by Cambridge County Quarter Sessions.

The respondent was convicted by a court of summary jurisdiction sitting at Arrington in the county of Cambridge on an information preferred by the appellant, an inspector of the Cambridge County Constabulary, under s. 35 of the Road Traffic Act, 1930, of unlawfully using a motor vehicle, a motor tractor, on a road, there not being in force at the time in relation to the user of the vehicle such a policy of insurance or such a security in respect of third party risks as complied with Part II of the Act. He was fined £1 and the justices ordered him to be disqualified for holding or obtaining a driving licence for twelve months. The respondent appealed to Cambridge County Quarter Sessions, who quashed the order disqualifying him for holding or obtaining a licence. The appellant appealed to the Divisional Court, who dismissed the appeal.

J. Burge for the appellant.

The respondent did not appear and was not represented.

LORD GODDARD, C.J. : The question of law raised is whether there existed on the facts of this case special reasons for refraining to impose on the respondent an order of disqualification for holding a motor licence. He is a farm worker, and was employed, among other things, to drive tractors. One of the tractors he was accustomed to drive was covered by a policy of insurance. One day his employer told him to cart some manure, which involved driving a tractor along a public road for 100 yards. The tractor used on that occasion was not covered by insurance, but the respondent had no reason to know that his employer had not covered it by insurance. In the first instance the justices fined the respondent and imposed a disqualification on him, and the respondent appealed to quarter sessions, who removed the disqualification, but not the fine. I should have thought that this was a case which it would have been proper for the justices to have dealt with under the Probation of Offenders Act, which would have involved the dismissal of the summons without recording a conviction against the respondent, and then no question of disqualification could have arisen.

The learned chairman of quarter sessions, who has stated the Case, states that their special reasons for removing the disqualification were that "the respondent had driven the tractor in question and other tractors of his employer for many years without trouble, and had been almost exclusively employed in field work, and it was not unreasonable for him to obey without question his employer's orders to cart manure from one field to another. In the circumstances of this case he had no reason to suppose or suspect that the insurance policy held by his employer did not cover what he was being ordered to do." If ever there was a case in which special circumstances stared one in the face, it was this case. The appeal fails and must be dismissed with costs.

HUMPHREYS, J. : I agree with the result proposed by my Lord. I desire to add a word or two on what I think is a very difficult and troublesome matter which has to be dealt with by justices from time to time.

A The offence that was committed by the respondent was using a motor tractor on a road, there not being in force at the time in relation to the user of the vehicle a policy of insurance complying with the requirements of the Road Traffic Act. That he should be convicted of that offence, it was not necessary for the prosecution to show that he knew that there was no policy of insurance in force, nor was it any answer for him to say he did not know. He was convicted and fined. If I had been a justice, it may be that I should have taken the course, in the peculiar circumstances of this case, of saying : " I shall not register a conviction. I shall dismiss this matter under the Probation of Offenders Act, and there will not be any conviction," but I realise it was entirely a matter for the justices to decide, and I do not think I can say they were wrong in fining B the respondent £1. Then comes quite a different matter. They thought that they were bound to make an order disqualifying him for driving because there were no special reasons, which must be proved if a person convicted of this offence is not to be disqualified. Again, I have no doubt that the justices applied their minds to the matter and came to the honest conclusion that no special reasons in this case were established. The matter then went to quarter sessions, who allowed the appeal and quashed the order of disqualification C on the ground that there were special reasons. I think they applied the law to the facts properly and came to the right conclusion.

SINGLETON, J. : I agree, and I add a few words because of the importance of this case and the difficulties which confront those who have to deal with cases of this nature.

D The information was laid under s. 35 of the Road Traffic Act, 1930. The justices came to the conclusion that the offence was proved. They fined the respondent and ordered that he be disqualified for holding or obtaining a licence under Part I of the Act for 12 months from the date of his conviction. On appeal to quarter sessions, it was held that the disqualification should be removed, because quarter sessions were satisfied that there were special reasons within s. 35 (2) of the Act. That section requires disqualification to be imposed E " unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification." The appeals committee at quarter sessions were satisfied that there were special reasons in the circumstances of this case. So am I. Special reasons must be, as my Lord said in *Whittall v. Kirby* (1), reasons special to the facts of the particular case. In the case before us, the respondent was a workman who had F driven tractors for his employer for many years without complaint. On the day on which he was seen by the police, he was driving a tractor which was not covered by insurance. He did not know that. He was, in my view, entitled to assume that his employer had complied with the law on that day as he had the day before. It is not, I think, the duty of a workman to ask his employer each day : " Is this vehicle insured ? " I have no doubt the justices in coming to the conclusion at which they arrived in the court of first instance thought G they were following the decisions of this court, but, in fact, they were not. In my opinion, quarter sessions arrived at the right conclusion. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors : *Vizard, Oldham, Crowder & Cash*, agents for *Wild & Hewitson*, Cambridge (for the appellant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Affirmed. C.A. [1948] 2 All E.R. 297.

PEEK v. PEEK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Wallington, J.), October 14, 15, 1947.]

Divorce—Practice—Re-hearing—Tribunal—“Error of the court”—Petitioner concealing material evidence—Matrimonial Causes Rules, 1944, r. 36 (1).

On a true construction of r. 36 of the Matrimonial Causes Rules, 1944, where the applicant for a re-hearing of a petition alleges, either expressly or by necessary implication, that the trial judge made such an “error” as resulted in a wrong conclusion, the application should be made by way of appeal to the Court of Appeal. Where, however, the applicant makes no such allegation, but alleges that he or she has in his or her possession evidence, not previously before the judge, which is material to the determination of the real issue between the parties and which the other party has concealed from the judge, the Divisional Court of the Probate Division has both the jurisdiction and the duty to deal with the matter and it is immaterial whether the case was or was not defended.

On an undefended petition for divorce on the ground of the wife’s desertion the husband’s case was that in 1920, after a period of residence with his wife in Australia, he took up employment in Nigeria, and, so that he could see her from time to time during his leave and for other reasons, he asked her to reside in England, but that she refused to do so and had continued to refuse up to the date of the presentation of the petition, in which he asked the court to exercise its discretion in his favour for an adulterous association with a named woman from 1924. The trial judge exercised his discretion in the husband’s favour and granted a decree *nisi*. On an application by the wife for a re-hearing of the petition under r. 36 of the Matrimonial Causes Rules, 1944, the wife produced documentary evidence, of which the husband had knowledge, which tended to show that the husband had formed an intention before 1924 of no longer cohabitating with the wife. This evidence was not disclosed by the husband at the trial.

HELD: interpreting the words “no error” being “alleged” in the broad sense, the matter being one of substance and not of form, no “error” within the meaning of the rule, had been made by the judge, and, consequently, the Divisional Court had jurisdiction to hear the application, which, in the circumstances, should be allowed.

Per LORD MERRIMAN, P.: The court has a duty under s. 178 of the Supreme Court of Judicature Act, 1925, as amended by s. 4 of the Matrimonial Causes Act, 1937, to inquire for itself into the allegations made in the petition, and although *ex parte* statements by an absent spouse are no sort of evidence on which to come to a decision, they may be and should be recognised for what they are, *viz.*, pointers to the sort of inquiry which the judge should make.

Observations on the course to be followed regarding a communication to the court by a respondent spouse who has not appeared to contest the petition.

[AS TO APPLICATIONS FOR RE-HEARING, see HALSBURY, Hailsham Edn., Vol. 10, p. 779, para. 1233; and FOR CASES, see DIGEST, Vol. 27, p. 490, Nos. 5220-5233.]

Cases referred to:

- (1) *Petty v. Petty*, [1943] 2 All E.R. 511; [1943] P. 101; 112 L.J.P. 97; 169 L.T. 224; Digest Supp.
- (2) *Herod v. Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; Digest Supp.
- (3) *Manners v. Manners and Fortescue*, [1936] 1 All E.R. 41; [1936] P. 117; 105 L.J.P. 26; 154 L.T. 271; Digest Supp.
- (4) *Winter v. Winter*, [1942] 2 All E.R. 390; [1942] P. 151; 111 L.J.P. 95; 167 L.T. 258; Digest Supp.
- (5) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest 321, 2995.

APPLICATION by the wife under the Matrimonial Causes Rules, 1944, r. 36 (1), for a re-hearing of the husband’s divorce petition on which a decree *nisi* had been granted. The facts appear in the judgment of LORD MERRIMAN, P. The application was allowed.

J. Montgomerie for the wife.
Fairweather for the husband.

LORD MERRIMAN, P. : This is an application by a wife for a re-hearing of her husband's divorce petition on which BARNARD, J., pronounced a decree *nisi* on June 18, 1947. The application is made under r. 36, the material words of which are as follows :

(1) An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate Division . . . (2) Any other application for re-hearing shall be made by way of appeal to the Court of Appeal.

I must say at the outset that I adhere to what I said in my judgment on the same topic in *Petty v. Petty* (1). I shall have to refer to that case later, on the merits. For the moment, I repeat the determination of this court to avoid any semblance of trespassing on the exclusive jurisdiction of the Court of Appeal. It is only if this court is satisfied that a case comes within the rule that it is justified in entertaining an application of this character, though, if it is so satisfied, it ceases to be a matter of discretion, and the court is bound to deal with it because no other court can do so.

Manifestly, on any such application, there are two primary issues :—(1) Should there be a new trial at all ? and (2) If any question of a new trial arises (and this is the point which concerns us) by which court should it be ordered ? The wording of the rule speaks of "no error" being "alleged." In my opinion, those words must be interpreted in the broad sense, and the matter must be considered in the light of the implications involved in what is being asserted and not of a mere formal disclaimer of attributing any error to the court below. It is a matter of substance and essence, and not of form. In the present case the husband, by his own admission, had been living in adultery with a woman since 1924. He disclosed that fact in his discretion statement, which also contained the positive assertion that he had not committed any other adultery. It goes without saying that that admission of adultery not merely raises the question whether discretion should be exercised in his favour, but is also a vital fact in connection with the determination of the question whether his charge of desertion is or is not proved. It was for the husband to prove affirmatively, on the lines laid down in *Herod v. Herod* (2) and approved by higher authorities since, that, in spite of the facts disclosed in his discretion statement, during the material three years his wife had deserted him. Then, and only then, does the question of the exercise of the discretion by the court arise. In other words, the facts connected with his own adultery are at least equally material on the main issue as they are on the issue of discretion. Of course, one can put it another way. The two things are separate issues, the question of proof of desertion and the exercise of discretion, but in a case like this, if no desertion is proved by reason of, among other things, the husband's own misconduct, then the question of discretion falls to the ground, whereas, on the other hand, if, notwithstanding his own adultery, the court holds that the desertion is proved, it is extremely unlikely, having so held, that it will refuse to exercise its discretion in respect of the same adultery which it has already held was no bar to the finding of desertion.

We have read and considered with great care the transcript of the case before BARNARD, J., and that transcript provides a model of the way in which such a case should be presented. Every possible fact was brought to the knowledge of the court, and the difficulties were faced as fully and frankly as they could be and were overcome. It is perfectly true that we now know that all the material available was not put before the court, but that was not the fault of counsel for the husband or those advising him. I should, of course, in any case accept without any hesitation that counsel's statement that the material of which we are now aware was not available to him, but, as it happens, it does not depend only on counsel's statement, for we have correspondence between the wife and the senior registrar which shows conclusively that some of this additional material was sent to the court, with a covering statement to which I shall have to allude in a moment, and was returned, with a perfectly proper letter by the senior registrar to the wife, with advice as to the way in which she should proceed, while, in accordance with the invariable practice, the wife's own letter was retained and placed before the learned judge at the trial. It is shown conclusively by that circumstance that the papers were in the wife's custody,

and not in the custody of those instructing counsel for the husband. I shall have to deal with those papers and what they show later, but I wish to say something, first, about the wife's own letter, because it raises a question which, speaking for myself, has troubled me in connection with the submission that no error is alleged. It is plain from the shorthand note that the most careful enquiry was made into this matter by the learned judge, who was obviously fully alive, as one would expect, to all the possible implications of what was being put before him. My only criticism is in connection with this letter. At first, counsel for the husband was inclined to object to the learned judge reading the letter, because he did not wish it to be treated as evidence. Later, he not merely withdrew that objection, but also invited the learned judge to read it. I want to say a word about this, because it is material in this case, and may possibly be helpful in others. *Ex parte* statements in a letter written by an absent spouse, or, for that matter, by anybody else, cannot, of course, possibly be evidence in a case. No one for a moment would suppose that they could be, but it must always be remembered that the court has a duty under s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 4 of the Matrimonial Causes Act, 1937, to inquire for itself into the truth of the allegations made in the petition, and, although *ex parte* statements by an absent spouse are no sort of evidence on which to come to a decision, they may be and should be recognised for what they are, *viz.*, pointers to the sort of enquiry which the judge should make. I have always adopted the practice of handing such a communication to counsel, and, if necessary, of giving him the opportunity of an adjournment to enable him to become fully instructed about the matter. In most cases I find that counsel has already become apprised of the nature of the communication, either in the course of earlier correspondence between those instructing him and the other spouse, or otherwise, but he may be taken by surprise and in that case an adjournment may be necessary. Then one of two things happens. Either the petitioner himself disposes to the satisfaction of the judge of the matters raised and the court can proceed without more ado to pronounce a decree, or things are left in doubt and some further investigation is called for. The case may, in certain events, be properly sent to the King's Proctor for his assistance in investigating the facts. In my opinion, that is the correct practice in connection with the consideration of communications of this sort.

My only criticism of the way in which this particular letter was dealt with is that it seems to me, from an observation of the learned judge, that the full implications, or, at any rate, the possible implications, of what was said in that letter were somewhat underrated. To deal with the point satisfactorily, I must now see what are the real gaps in the case which was presented to BARNARD, J. I would like, first, to make this general observation. It is indisputable that there is all the difference in the world, in a desertion case where the petitioner is admitting adultery (and, in particular, a long course of adultery), between the case in which he has—to use a neutral word—left his wife for another woman or a series of women, and the case in which, having been left or thrown over by his wife, he has taken up an association or formed a connection with another woman or women. In the case of the man who has left his wife for another woman and lived in adultery with her ever since, the distinct question of the exercise of discretion is unlikely to arise at all, whereas in many cases where the man has been left by his wife, being satisfied that the wife was the original deserter, I have held (and I am quite sure that other judges must have held) that a proper case for the exercise of the discretion is shown. It is precisely in this connection that (although, as I have already said, without the slightest possibility of reproach to counsel presenting the case or his advisers), the court was not merely not informed, but, in my opinion, was positively deceived.

The husband proved what was common ground, that after cohabitating with his wife in Australia he took a job in Nigeria, and it was impossible for him to go back for his leave to Australia, because there would not have been time for him to do so. I am prepared to assume in his favour that when he left Australia what he was contemplating and wishing was that, being himself compelled to make England his headquarters, and, particularly, his headquarters for the purposes of leave, his wife and children would leave Australia and come to England.

A It is clear that this matter was considered, in the first instance, from the point of view of domicile, and the learned judge was satisfied that the husband had assumed an English domicile of choice, but when the husband went on to assert, as he did, that he hoped that his wife would make her home in England from 1920, when he went to Nigeria, until her persistent refusal to come to this country finally broke his heart and he was driven to form this other liaison in 1924, which, be it remembered, he swore was the only adultery he had ever committed, one sees why it was that on that material, thus presented to him, the learned judge, though plainly after a certain amount of hesitation, was prepared to exercise his discretion.

B That brings me to a consideration of the new material and the implications of the letter to the court, and I must consider how far, if at all, the learned judge was put on his guard by that letter. The material which is now before us, some of which was sent to the registrar and returned to the wife before the hearing, is exhibited to her affidavit. I only propose to read a few short passages, all bearing on the suggestion that the husband had deserted the wife, and made it clear to her that he had done so, long before there was any question of his association with the woman named in his discretion statement. I am not going to read the affidavit itself, which makes the point even clearer. I prefer to rely on the documents, about which there is no dispute. But let me say at once that I am not engaged in deciding whether the wife's case is right. All C that I am examining is what was the evidence which was withheld from the learned judge, in her absence, by the husband himself. I begin with a letter which was written in 1922 by the husband, on the second page of which these words appear: "Providing I am left alone, neither you nor the children will want while I am above ground." "Providing I am left alone." This is the man who says that his wife had deserted him before he formed this association in D 1924. He discusses his future, and his prospects of being able to maintain a particular allowance, and then there occurs, on the same page, this sentence: "Simply ridiculous your saying if I return to you that you will never refer to the past. Not human nature. I could not do it, and no use saying so. I could not be so two-faced." He reverts to the question of money, and continues: "I have been back here six months or more, and have given the matter very serious thought, and no use denying the whole fact, I cannot ever return to you as before. What is the use of playing a double life any longer? While I E respect you in every way, I do not love you as I should. The children, yes, I do, and I know they are absolutely safe with you." The next letter is dated Dec. 12, 1922, and is written from the office of his firm in London: "Enclosed find bills from two hotels, where I have stayed with a lady." (Incidentally, I am prepared to accept the assurance that this is not the woman mentioned in the discretion statement.) F "Should you wish to take proceedings you can get information from these addresses. I again repeat I shall never return to you." The bills enclosed were in respect of a visit to a London hotel in Mar., 1922, which lasted a week, and also to two visits to another hotel in Nov. and Dec., 1922. In Apr., 1923, still a whole year at least before this association with the woman mentioned had started, he wrote to his mother a letter, which somehow has come into the possession of the wife, in which he says that he had received G a letter from the wife saying that on no account would she give him his freedom, on account of the mother's sake and the children's sake, and then this sentence follows: "I have, therefore, decided that since she refuses to take divorce proceedings, that being the only freedom I want, I am compelled, much against my wish, to carry out my intentions, namely, cease sending remittances and disappear." He goes on: "Should she change her mind a cable to me at" such and such an address "will find me, and I will immediately give instructions H to renew payments." It is only fair to say that, so far as I know, he never carried out that threat, in the sense that he did not disappear, and, on the contrary, I gather that he did renew payments.

The point is that the attitude of mind described in this letter—not described as having been come to at the moment, but as being the carrying out of intentions already formed—is completely and absolutely contradictory of, or, at least, inconsistent with, the case that he was presenting to BARNARD, J. I will discuss presently the implications and bearing of that documentary evidence on the question on which we are engaged, but before doing so I feel bound to see

what material the learned judge had before him to induce or oblige him to enquire deeper into the case which the husband was putting forward, for one of counsel's arguments, and one which requires serious consideration, is that "error" may, among other things, include a failure on the part of the court to prosecute its statutory enquiries far enough. The point having been taken, it must be dealt with, and dealt with frankly.

BARNARD, J., had before him the statement, the letter to the court, and two letters, one by the husband and one by the wife. I propose to look, first, at the statement to the court, without reading it all. After saying, as she did, that, if this case were allowed to go through the court, it would be on perjury, and that the evidence she was enclosing, *viz.*, a bundle of correspondence, including the letters to which I have just referred, would explain better than she could, as she was no good at letter-writing, she proceeds: "I was 35 years old when deserted, and have devoted my life to the welfare of the children." After explaining that she was not able to instruct solicitors, etc., she says: "Mr. Peek was the guilty one, and is using the High Court to get his freedom, so as to get back to Australia with this woman, who has ruined my life. She has used my name for 25 years." At the end she reiterates that it was her husband who was the deserter. I am bound to say that, although it is true that the husband had sworn that he had asked her to come to England, or, at least, that that was the understanding on which they parted, I should not myself have been content (again repeating that I am not dealing with it from the point of view of evidence, but only of the indication it gives as to the line of enquiry to be followed), to dismiss this letter to the court in these words addressed to counsel: "The only thing that really affects you and that is at all material is that she says Mr. Peek never at any time definitely said, 'Come to England,' which is what the learned judge said about it. She said a great deal more than that which was very material, and I say that because I agree that one of the points which we have to consider is whether the case now disclosed was so sufficiently indicated as to put the learned judge on his guard and to make it an error on his part not to have discovered it.

From that I turn to the concrete evidence that was put before him, two letters, one by the wife and one by the husband. On Aug. 1, 1926, the wife wrote a letter which begins:

I am just out of hospital after four months, and have to go as an out-patient every day for treatment. I may be months or even years before I am quite well again, or I may be a cripple for life, and it is *you* I have to thank, for nothing but worry has caused it; and then to get an insulting letter from that woman, and also to send back a photo of our children with a child of shame with it, that is more than I can stand. I thought you were more of a man than that, to allow her to do it. But never mind, there will come a time when you both will have to pay. I do not want a divorce, but you are making me get one, and I will only do it on two conditions . . . I will give this letter time to get to you, and the reply by cable, before I do so. Remember, never come to Brisbane with that woman, because she will never leave here again, I can promise you that. Somebody must pay, and why not her? . . . P.S.—I am still willing to forgive and forget.

It would, of course, be ridiculous to pretend that a letter like that does not require very serious consideration when the question of desertion or no desertion by the writer is in issue, and, more particularly, when it is read in conjunction with the husband's own letter, the correctness of the copy of which he admitted, written on Jan. 21, 1945:

Dear Jennie, Some years ago you wrote me that you would not divorce me so long as my mother was alive. As she has now been dead for some years there is no reason why, if you feel so disposed, you should not now do so. You can, I understand, divorce me in Queensland on the ground of desertion. We have now been separated for 25 years, and you have known for a great portion of that time that I have no intention of returning to live with you.

Both those letters are plainly susceptible of the interpretation that they were written in the light of the known association with the woman mentioned in the discretion statement, but there is nothing that I can see in either of those letters which necessarily places any intention of the husband to keep away from his wife at an earlier date than 1924, the year in which that connection was formed. It is only from the letters which were not disclosed, to which I have already referred, that that information appears.

I have now dealt with all the material facts necessary to raise the issue and I must now deal with the submissions that have been made at the Bar on the dividing line between this court and the Court of Appeal, as disclosed by the reported cases. There are three authorities. The first is *Manners v. Manners* (3). That was a clear case where, through no fault of the absent spouse (the wife), there had been miscarriage over the service and the wife was not aware of the hearing. The two cases which need careful consideration are *Winter v. Winter* (4) and *Petty v. Petty* (1). As I have already ventured to say in *Petty v. Petty* (1), it is obvious that, if a party comes to the court for a re-hearing of a case which has been decided against him or her, he or she does so because it is being asserted that the decision was wrong, but it is equally obvious that that fact alone cannot determine that there has been error on the part of the court or even that such an error is being alleged, for otherwise it would make complete nonsense of the rule, and, apart from some purely academic argument, there never could be any case which could come within the rule if that consideration were to exclude the jurisdiction of this court. Founding himself on these two cases, counsel for the wife argued that the real test was whether the case was defended or undefended. It does, undoubtedly, happen that *Winter v. Winter* (4), where the court, composed of the late LANGTON, J. and HENN COLLINS, J., decided to grant a re-hearing, was an undefended case. Equally, it happens that the court over which I presided in *Petty v. Petty* (1) was dealing with a case in which there had been a contest. In my opinion, those are accidental, and not decisive, circumstances, for it seems to me that the argument in the present case shows as plainly as is possible that there may arise an undefended case in which the court has been in error, and, although it is not necessary to pursue the topic, I can well imagine that there may be defended cases in which it can be shown very well that the court was not in error. I can remember one such case, though it would not be covered by this rule because there was a jury, in which, precisely for that reason, there was no fault on the part of the court, but some evidence came to light which could not have been discovered before the trial. The Court of Appeal granted a new trial, and the whole decision was reversed.

Winter v. Winter (4) raised two distinct points. First, unlike *Manners v. Manners* (3), there was deliberate abstention from taking any part in the proceedings on the part of the applicant for a re-hearing, and the first question was, whether, on a very well-known line of authorities which binds ordinary litigants in appellate tribunals, the applicant could be heard to put forward the motion at all. About that, without repeating what I said in *Petty v. Petty* (1) or reading the judgment on this part of the case in *Winter v. Winter* (4), the court, if I may say so, was clearly right in coming to the view that the public interest in these matters transcended any technical rules about shutting out litigants who had deliberately stood by, and impelled the court to allow full investigation of the alleged new case. The other question raised the point which counsel for the husband has put forward, namely, whether insufficient investigation by the court was of itself error. The point is dealt with in the following sentence of the judgment of HENN COLLINS, J. ([1942] P. 155) :

As the wife swore that the husband had left her on a named date it could not be said that there was no evidence on which the learned judge who tried the case could find that he had deserted her, but to find that one party left the other without saying more about the circumstances of the parting is not a satisfactory way of disposing of a case.

I have before me the transcript of *Winter v. Winter* (4), and the question put to the wife to which that comment alluded reads as follows :

I think he [the husband] had some trouble with a motor car in rather unpleasant circumstances, and he left you just after that ? (A.) Yes.

That was the whole of the evidence about the parting between those people. It was uncertain whether the affirmative answer to this compendium of questions related to the existence of trouble about the motor-car, or the fact that the trouble arose in unpleasant circumstances, or the fact that the husband had left the wife, or that, if he had left her, it was just after the trouble referred to, and it was plainly to that circumstance that HENN COLLINS, J., directed the observation which I have just read.

I ventured in the course of the argument to put what I will assume is an entirely hypothetical case so as to test the matter. Supposing there was in the petition the usual paragraph making the charge of desertion, with a certain amount of particulars, and supposing that the witness, having given formal evidence about marriage and the rest of it, was asked this question and this question only, (having the petition put into his or her hands):—" (Q.) Is paragraph so-and-so true? (A.) Yes," it would be possible on that to use precisely the words used by HENN COLLINS, J. The point underlying the observation is that where the court has been satisfied by the evidence given, and (I do not say that what follows applies literally to the court here, because there was some other evidence) there being no other evidence before the court below and nothing to qualify the evidence given in support of the charge, it is impossible to say that the court was in error merely because the judge did not conduct some more exhaustive enquiries. That is the real point on that part of the decision in *Winter v. Winter* (4).

It is said that *Petty v. Petty* (1) shows that this rule can never be applied except in an undefended case where there is no information at all from the other spouse, or, putting it more accurately, the submission of counsel for the wife goes as far as this, that the principle laid down in *Petty v. Petty* (1) does not apply at all when the other spouse is not there, even if there is some material relevant to his or her case. That argument was founded on a passage in my judgment in *Petty v. Petty* (1), where, after dealing with the point of public interest, etc., on the authority of *Harriman v. Harriman* (5), I continued as follows ([1943] P. 104):

Those two cases, which, so far as I know, are the only two cases in which a decision of this court on this point has been reported, are, as I think, clearly on the right side of the line. Equally, however, it seems to me impossible to assert that a case in which a judge, having seen both spouses and their respective teams of witnesses, has deliberately attached credibility to one side and not to the other, and in which this court is asked to say that the production of further evidence will induce some other tribunal to say that the judge believed the wrong set of witnesses, is on the same side of the line, so that it can be asserted of such a case that "no error of the court at the hearing is alleged."

HENN COLLINS, J., said the same thing, if I may be permitted to say so, very much better (*ibid.*, 105):

One thing, however, seems to me to be clear, and that is that, if it is alleged that, on the materials before it, the court has arrived at a wrong conclusion, that is an error of the court. What exactly is meant by "the materials before the court" is another matter. In the present case the material before the court was the evidence of witnesses on one side and the other. The judge accepted the credibility of one set of witnesses and rejected that of the other. It is now said that he believed the wrong set of witnesses, and that, if he had known some further facts which it is proposed to adduce, he would have discredited those whom he believed and believed those whom he discredited.

It is said because these things were so, and it was emphasised that there were two sets of witnesses, that these observations can only apply to a defended case. I do not agree, and I would venture to recall another passage later in my own judgment, where, after calling attention to the fact that, even in a case where the party was not there at all because a false affidavit of service had been sworn, the judge would, so to speak, have believed the wrong witnesses, I went on (*ibid.*, 104):

Again it may be mistaken identity, or it may be deliberate perjury, [*i.e.*, about the swearing of the service of the petition] but, although it is true that what is being asked is that it shall be held that the judge believed a witness wrongly, and although at a re-hearing, the court is to be invited to believe witnesses who will swear exactly the opposite, still, in those circumstances, unless there was something which made the story self-condemnatory, the judge had no option but to believe the witness.

Counsel for the wife says that is this case, and that it clearly comes within the rule. It was not a defended case, it is true. In that sense it is the same thing, but to assert of this case that any judge had no option but to come to the conclusion he did is, and must be, nonsense. I say that because the very request for the exercise of the discretion of the court itself implies, whether it is a defended or an undefended case, that the judge has an option. Otherwise, the discretion is meaningless. The real point, as I see it, is in those words with

which the phrase "no option" is prefaced—"unless there was something which made the story self-condemnatory"—for if ever there was a case, undefended though it be, in which it is perfectly plain, not merely because the discretion was asked for, but also because there was on the face of the case as it was presented to the judge, and avowedly and openly presented, the gravest possible doubt whether any court could hold that desertion had been proved, the plainest possible option to the judge to decide the case otherwise.

A It seems to me that the real point, bearing in mind that the question whether error is alleged is a question of substance and not a question of form, as I said earlier in this judgment, is this: Is the allegation which is made against the decision an allegation that the court went wrong on the materials before it, or is it an allegation that the court went wrong because evidence on a vital matter was concealed from the court? To my mind, it cannot make the slightest difference, logically, whether that question falls to be decided in an undefended or a defended case. To bring the thing to a point, can there be any true distinction between cases, both of them undefended, in the first of which the petitioner says: "I assert desertion, but I ask for the discretion of the court," and a case in which the petitioner presents a case of desertion without confessing any adultery? To enlarge on that, if he gives evidence in support of a charge of desertion while concealing an act of adultery on his part, one has a plain case where the court is helpless unless there is something on the face of it which is self-condemnatory. Where desertion is proved, and there is a candid admission of the whole of the misconduct of which the petitioner is guilty, though it is impossible to say that the court has no option in the matter, nevertheless (again subject to the decision as to how the discretion shall be exercised) there is no material before the court to divert it from the sole issue: "Shall I or shall I not exercise my discretion?" But, in the third case, where the petitioner not only gives evidence in support of the charge of desertion and discloses adultery, but discloses it in such a way as to conceal that part of his misconduct and all the other evidence which bears, for example, on such a vital factor as the inception of the separation, I ask myself what logical difference can there possibly be between that kind of case and the plain undefended case where there is no disclosure of adultery at all?

C I reject altogether the argument that this matter depends solely on the question whether the case is defended or undefended, and I come back to what I said just now, for, in my opinion, this case is an illustration, not of a case in which the court went wrong on the materials before it, but rather of a case in which it is alleged that the court went wrong because evidence on a vital point was concealed from it. I repeat and desire to emphasise that every case coming within this rule must be considered on its own merits, and, in my opinion, when one analyses this case, the only thing which can be said to be error on the learned judge's part is a failure to appreciate, in the light of the documents which were not produced before him the full possible implications of those which were produced before him. But, when one has said that, it still remains that it was the husband's concealment of those documents, of the existence of which we are now aware, which may induce some other tribunal to come to a different conclusion. In my opinion, this case is as near the line as it is possible for any case to be, but I have come to the conclusion that it is just on the right side of the provisions of r. 36, and, we having arrived at that conclusion, it means that we are the court who have to make the decision. There then arises the first essential question which I propounded, *viz.*, whether it is a case in which a re-hearing ought to be ordered? About that I have no doubt whatever. For these reasons, in my opinion, this application should succeed.

I WALLINGTON, J.: I agree. It seems to me that one of the objects of r. 36 is to enable this court to secure, as far as possible, that there shall be a trial of the real issue between the parties before permitting an appeal to the Court of Appeal. It matters not, as my Lord has said, whether the question arises in a defended or an undefended case. The only difference between the two probably is that undefended cases of this kind will be more numerous than defended cases, but there is no difference in the application of the principle. The effect of the rule, as I understand it, is this:—If a party to a motion comes to this court and, either expressly or by necessary implication, alleges that the

judge who heard the case to which the motion relates made such a mistake or error as resulted in a wrong conclusion, then the matter is not one for this court but is one that must go to the Court of Appeal in the ordinary way. On the other hand, where the applicant on the motion comes to this court and says, in effect, *e.g.*, "There was no error on the part of the court below in dealing with the material then before it, or any other error of the court, but I was not able to attend at the trial, I had much material in my hands that I would have put before the court, and I desire an opportunity of having the real case tried," and if, added to that, as in this case, it is plain that the petitioner has concealed from the judge who tried the case very material—indeed, vital—facts affecting the real case between the parties, it seems to me to be plain that this court has both the jurisdiction and the duty to deal with the matter. It cannot properly be said that the learned judge came to a wrong conclusion (or was otherwise in error) in dealing with the materials before him. The real case between these parties has never been tried, and it could not be tried for two reasons: (1) because it was impracticable, without any fault on her part, for the wife to be present at the hearing of the suit and to place vital facts before the court, and (2) because at the hearing of the suit the husband gave to the court information that, to his knowledge, must have omitted vital facts that would, if disclosed, have enabled the learned judge to try the real case. In those circumstances, in my opinion, there is no answer to this application, and I agree with the order that my Lord has indicated.

Application allowed.

Solicitors: *G. Parry Jones* (for the wife); *C. R. Enever, Freeman & Co.* (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LTD. v. OCEAN STEAMSHIP CO., LTD.

[HOUSE OF LORDS (Lord Thankerton, Lord Wright, Lord Porter, Lord Uthwatt and Lord Normand), June 30, July 1, 3, 4, 7, 8, 9, October 30, 1947.]

Insurance—Marine insurance—War risks—Warlike operations—"Consequences of warlike operations"—Ship carrying war material including heavy deck cargo—Necessity to maintain speed and take zigzag course for fear of enemy submarines—Damage caused by effect of heavy seas on deck cargo and aggravated by reason of speed of ship.

The *Priam*, which was requisitioned by the government, was insured by war risks insurers against "the consequences of hostilities or warlike operations." On Dec. 2, 1942, she sailed from Liverpool for Alexandria, *via* the Cape of Good Hope, with a heavy cargo, consisting mainly of war material needed by the army in North Africa and including cases of aeroplane parts and a heavy bridge layer as deck cargo. Under Admiralty instructions the ship was to proceed right out into the North Atlantic, zigzagging all the way. Between Dec. 7 and 12, the *Priam* encountered very heavy weather and cargo stowed on the forward well deck came adrift and caused part of the hatch covers to be stripped away, with the result that the No. 2 hold was flooded and the forward well deck also suffered damage. Further damage was caused by water getting into the forepeak and to the after well deck and the poop, but this latter damage was not connected with the coming adrift of the cargo on the forward well deck, but was heavy weather damage, possibly caused, and, at any rate, accentuated by the fact that, in spite of the heavy seas and the damage suffered, the ship continued at the maximum speed possible, zigzagging continuously, for fear of attack by enemy submarines. The question to be determined was whether the damage suffered by the ship was, as a matter of law the consequence of warlike operations within the meaning of the policy.

HELD: a vessel in war time sailing from one port to another with a

cargo of war stores was engaged in a warlike operation, but every loss which occurred on such a voyage was not to be treated as a war loss. The damage to the forward well deck and to No. 2 hold, although due *prima facie* to a marine peril, was a loss recoverable under the war risk insurance, not simply because it was sustained while the vessel was on a warlike operation, but because an integral element of the operation involved a specific and special war peril and the loss resulted therefrom. On the other hand, the damage to the forepeak and the after well deck and poop was not such a loss because it was caused solely by the force of wind and sea, even though it would not have occurred if the vessel had not zigzagged or kept her speed, her action in doing so not differing from that which a ship carrying an ordinary mercantile cargo would have taken under war conditions.

Decision of the Court of Appeal ([1946] 2 All E.R. 355) and order of ATKINSON, J. ([1946] 1 All E.R. 123) varied in part and affirmed in part.

[As to WAR RISKS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 314-318, paras. 439-442, and Supplement; and FOR CASES, see DIGEST, Vol. 29, pp. 226-230, Nos. 1836-1861, and Supplement.]

Cases referred to:

- (1) *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport, The Coxwold*, [1942] 2 All E.R. 6; [1942] A.C. 691; 111 L.J.K.B. 512; 167 L.T. 349; Digest Supp.; *revsq.*, [1941] 3 All E.R. 214.
- (2) *A.-G. v. Adelaide S.S. Co. (The Warilda)*, [1923] A.C. 292; 92 L.J.K.B. 537; *sub nom. Adelaide S.S. Co. v. R.*, 129 L.T. 161; 29 Digest 228, 1850.
- (3) *A.-G. v. Ard Coasters, Ltd., Liverpool and London War Risks Insurance Assocn., Ltd. v. S.S. Richard De Larrinaga Marine Underwriters*, [1921] 2 A.C. 141; 91 L.J.K.B. 31; 125 L.T. 548; 29 Digest 228, 1851.
- (4) *Ionides v. Universal Marine Insurance Co.*, (1863), 14 C.B.N.S. 259; 2 New Rep. 123; 32 L.J.C.P. 170; 8 L.T. 705; 29 Digest 229, 1854.
- (5) *Clan Line Steamers, Ltd. v. Board of Trade, The Clan Matheson*, [1929] A.C. 514; 98 L.J.K.B. 408; 141 L.T. 275; Digest Supp.
- (6) *Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool and London War Risks Insurance Assocn. (The Petersham and The Matiana)*, [1921] 1 A.C. 99; 89 L.J.K.B. 881; 123 L.T. 721; 29 Digest 230, 1860; *affg.*, [1919] 2 K.B. 670.
- (7) *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 29 Digest 229, 1858.
- (8) *Canada Rice Mills, Ltd. v. Union Marine & General Insurance Co., Ltd.*, [1940] 4 All E.R. 169; [1941] A.C. 55; 110 L.J.P.C. 1; 164 L.T. 367; Digest Supp.
- (9) *Athel Line, Ltd. v. Liverpool and London War Risks Insurance Assocn., Ltd. (The Atheltemplar)*, [1945] 2 All E.R. 694; [1946] K.B. 117; 115 L.J.K.B. 141; 174 L.T. 81; Digest Supp.
- (10) *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service (The Geelong)*, [1923] A.C. 191; 92 L.J.K.B. 142; 29 Digest 226, 1838.

APPEAL by the defendants (the war risks insurers) from a decision of the Court of Appeal (SCOTT, TUCKER and BUCKNILL, L.JJ.), dated June 4, 1946, and reported *sub nom. Ocean Steamship Co., Ltd. v. Liverpool and London War Risks Insurance Association, Ltd. The Priam* ([1946] 2 All E.R. 355), dismissing an appeal by the defendants from a judgment of ATKINSON, J., dated Nov. 16, 1945, and reported ([1946] 1 All E.R. 123).

The plaintiffs were the owners of the motor vessel, *Priam*, which suffered damage in bad weather while engaged on a warlike operation. The shipowners claimed on the war risks insurance policy and contended that the special circumstances of the particular warlike operation on which the ship was engaged created additional risks and perils which were the proximate cause of the damage. The war risks insurers contended that they were not liable on the policy because the damage was caused solely by heavy weather. ATKINSON, J., held that (with a slight exception) the damage was the result of the additional perils incurred by the ship owing to the nature of the operation, and was, therefore, the consequence of the warlike operation. His judgment (except for the slight exception) was affirmed by the Court of Appeal. The insurers appealed to the House of Lords.

Sir Valentine Holmes, K.C., Devlin, K.C., and H. L. Parker for the appellants (the insurers).

Willink, K.C., and A. J. Hodgson for the respondents (the shipowners).

The House took time for consideration and now held that, in regard to some part of the damage, the shipowners had discharged the *onus* resting on them of showing that it was caused by a war peril and was not a purely marine loss due to heavy weather, but that they had failed in regard to the remainder of the damage, which was purely sea damage. The facts appear in the opinions of LORD WRIGHT and LORD PORTER.

Oct. 30. The following opinions were delivered.

LORD THANKERTON : My Lords, I have had an opportunity of considering the opinions about to be delivered by my noble and learned friends, and I desire to express my concurrence with them.

LORD WRIGHT : My Lords, the respondents claimed on a policy of marine insurance signed on May 6, 1942, against war risks, including the consequences of warlike operations. The policy covered the motor vessel *Priam* of which the respondents are owners. The *Priam* is a motor vessel of 10,029 gross tonnage. She was valued in the policy at £807,800. The period covered by the policy was originally from June 30, 1942, until Sept. 29, 1942, but was later extended to Dec. 29, 1942. The proceedings arose out of a voyage of the *Priam* round the Cape of Good Hope in Dec., 1942.

The *Priam* is a twinscrew vessel 486ft. in length, and 66ft. beam. She had been requisitioned by the Minister of War Transport. On the voyage in question she was loaded with about 6,846 tons of cargo. Of the cargo 78.5 per cent. were war stores needed for the war in the East. Before the trial it was agreed between the parties that the appellants would accept for the purposes of these proceedings the contention that the *Priam* was at all times engaged on a warlike operation since she was going from one war base, Liverpool, to another war base, Alexandria, and the great bulk of her cargo consisted of war stores. The issue in the case has been whether, in the light of that admission, the damages claimed or any part of them were to be treated as in respect of war damage within the meaning of the policy in suit, or were to be regarded as marine damage such as would have been recoverable under a marine policy against perils of the seas in the ordinary form. The issue can be correctly stated in this way though the respondents were, in fact, their own insurers (to use the common phrase) in respect of marine risks. The policy in suit stated :

This insurance is only to cover the risks (in this policy referred to as "King's enemy risks") of capture, seizure, arrest, restraint or detainment by the King's enemies and the consequences thereof or any attempt thereat ; also of the consequences of hostilities or warlike operations by or against the King's enemies whether there be a declaration of war or not.

There is an exception, not here material, of civil war or piracy. In cl. 7 (b) of the policy it is further stipulated (by sub-para. (3)) that where a ship is requisitioned as the *Priam* was "war risks" means "the risks of war which which would be excluded from an ordinary English policy of marine insurance by the familiar form of clause generally described as the f.c. & s. clause."

The material facts, apart from what has already been set out as to the ports of departure and destination and the nature of the cargo, can be shortly summarised. The *Priam* was directed by the government to sail north of Ireland, west of the Azores and round the Cape of Good Hope, and up the East Coast of Africa. This would have been in peace time an abnormal route, but was necessitated by the conditions then prevailing in the Mediterranean. The *Priam* sailed on the prescribed course on Dec. 2, 1942. She was a fast vessel, her speed being $17\frac{1}{2}$ knots at 105 revolutions. She did not proceed in convoy, her speed being considered sufficient protection ; she did, however, zigzag whenever the master thought it necessary. The trouble arose out of a storm into which the vessel ran on Dec. 7, 1942. There followed a period of exceptionally heavy weather which the master afterwards described as the longest period of severe gales which he had experienced during his forty years at sea. The vessel, having sustained a certain amount of damage, put into Freetown, where she arrived on Dec. 23, 1942. It was there found to be necessary to restow the cargo in No. 2 hold by reason of the disturbance of the stowage created by the heavy weather. Other damage sustained by the same cause was also put right. The claim for ship damage was not heavy, amounting to about

£1,632, a very small percentage of the total insured value. It was agreed that only questions of liability should be dealt with at the trial, but in order to decide the question of liability it is necessary to state in a little detail the relevant facts, and, in particular, some portion of the general arrangement plan must be examined and the manner of stowage of the cargo, so far as material for the purposes of this case, must be described.

A In the very head of the ship there was placed a 12-pounder gun, raised above the forecastle by supporting pillars, which were riveted to the deck. Under the forecastle there are a number of compartments known as the forepeak, including the windlass motor room, some store rooms and the chain locker. Below these was the forepeak tank which does not come into the picture here. At the after end of the forecastle was the forward well deck, in which was No. 2 hatch opening into No. 2 'tween decks and lower hold. At the end of the forward well deck was the centre castle, and aft of that was the after well deck in which hatches 5 and 6 were situated, and beyond that was the poop. It must here be noted that on the starboard side of the forward well deck abreast of No. 2 hatch there was stowed on deck a bridge layer weighing 21 tons and on the hatch itself wooden cases containing aircraft parts were stowed. Similarly B was stowed on the after well deck a Crusader tank on the starboard side of No. 6 hatch and on the hatch itself were cases containing aircraft parts. This, I think, is all that it is necessary to note in this connection. It will appear that, apart from the gun platform and the forepeak, the main part of the damage C sustained was in respect of damage caused by the bridge layer breaking loose and opening up the tarpaulins and hatches of No. 2 hold, so that No. 2 hold was opened to the sea and was eventually flooded with 2,286 tons of water so that the vessel was about 11ft. down by the head. This was, however, after the second gale next to be mentioned. From the deck log and the master's D reports, it is possible to summarise what happened. On Dec. 8 the cases on No. 2 hatch broke and damaged the hatches and tore the tarpaulins and on Dec. 9 the bridge layer broke adrift and broke several hatch covers on No. 2 hatch. The ship had been compelled to heave to on Dec. 8 and on Dec. 9 the master wore her. The forepeak was, on Dec. 9, full of water and the soundings in No. 2 hold on that day showed 11 or 10 ft., owing to the damage to the hatch covers and tarpaulins. On Dec. 10 the master reported further damage to the E fore part of the ship, but was able to repair the No. 2 hatch. On Dec. 11 the weather became worse, a whole gale with hurricane squalls and rough high sea. Before that time the master had hove the vessel to and later wore her. In the early morning of Dec. 12 the bridge layer broke loose again and crashed across No. 2 hatch and stripped completely the after end of 2½ sections of hatch covers with the result that No. 2 hold was flooded and soundings showed 32ft. 6ins. of water in the hold. The forepeak was also full. Next day the weather F moderated, the hatch covers were temporarily repaired and the vessel reached in due course a port of refuge.

The *prima facie* cause of all the damage was the exceptionally heavy weather which swept the ship's decks, especially when she was down by the head, so that the worst damage was in the fore part, and, in particular, when the bridge layer broke adrift, breaking the hatch covers and thus opened up No. 2 hold G to the sea. The Crusader tank on the after well deck did not break loose, and though there was some heavy weather damage in that region, it was comparatively slight.

It is clearly necessary to distinguish the damage sustained in different parts of the ship because of the difference in conditions operating at different parts of her length. The trial judge found that all the damage fell under the war risk policy except the damage to the gun platform which he held should be distinguished. The Court of Appeal held that all the damage was war risk H damage, founding on the proposition that the whole adventure was a warlike operation and as was the whole so were the parts. While I agree that it is now settled by a number of decisions in this House, and last of all in *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport (The Coxwold)* (1), that a vessel in wartime sailing from one war base to another with a cargo of war stores is engaged on a warlike operation, it has not been laid down except in general terms that every loss which occurs on such a voyage is to be treated as a war loss. The decisions, as I shall show later, have not gone so far and I should

be sorry to extend them without good reasons. In the present case I think that the damage in the way of No. 2 hold is, though due to a marine peril, a loss recoverable under the war risk insurance, not simply because it was sustained while the vessel was on a warlike operation according to the now established definition, but because of the particular fact that an integral element of the operation involved a specific and special war peril and that loss resulted therefrom. This was *the* cause. But I distinguish the damage sustained in the after well deck, because, as I understand the facts, it was solely caused by the heavy seas sweeping over the vessel and there was no complicating circumstance which could be classed as a war risk contributing to the damage in that area. Hence the cause of that damage was a peril of the seas independent of any specific war peril. This involves the simple issue whether damage caused by the onslaught of heavy seas to a vessel engaged on a warlike operation is *ipso facto* to be classed as war damage, or, in other words, whether a marine peril is excluded from the marine policy if it operates while the ship is engaged on a warlike operation in the conventional sense established by the cases. LORD SUMNER in *A.-G. v. Adelaide S.S. Co. (The Warilda)* (2), after stating that by admission the voyage of the Warilda was a warlike operation throughout, added ([1923] A.C. 301):

... and as was the whole so were the parts.

But no case, so far as I know, has held that heavy weather loss or damage sustained by a vessel engaged like the Priam in what is now technically described as a warlike operation is necessarily a war peril under a policy such as that in suit and is recoverable from the war risk underwriters. Though LORD SUMNER's *dictum* may be true of that other type of sea peril, *viz.*, a collision or a stranding such as is illustrated in *A.-G. v. Adelaide S.S. Co.* (2) and in *The Coxwold* (1) LORD ATKIN [in *The Coxwold* (1)] qualified LORD SUMNER's *dictum* by adding the word "almost." He said ([1942] 2 All E.R. 11):

If the warlike operation includes the direction of the war vessel [*i.e.*, in the conventional sense] through the water from one war starting point to another war destination, it seems to remain true that almost every casualty to a ship during such an operation will be the consequence of a war operation. Not all, for there may be circumstances of accident on board or the result of wind and wave that may not come within the definition, though I should find it necessary to know all the facts relating to a suggested accidental fire or a suggested great wave before I was able to draw the line. However, if in the course of a warlike operation the direction of the ship's course against another ship is a consequence of a warlike operation (*A.-G. v. Ard Coasters, Ltd.* (3)), it is surely impossible to distinguish the case where the course of the ship is directed against a rock, and this whether negligently or without negligence, and whether the ship is deflected by tide or current or wind.

That last sentence contains all that was necessary to decide that appeal, and I think states the whole rule in accordance with the authorities which I cited in my speech in the same appeal. I did, indeed, in that case go beyond the issues before the House and, by way of observation not necessary for the decision of that appeal, express doubts whether the same reasoning which has been applied to collision, or stranding, or the like, could be extended any further beyond the point to which the cases had carried it—which is what has now to be decided. I said (*ibid.*, 18):

It might indeed be said that damage by heavy weather is consequent on the ship moving while executing her warlike operation to the position where she was damaged by the heavy sea. In particular, it might plausibly be said that, if she were deliberately forced at full speed ahead, when a prudent navigator would heave to, or deliberately taken in the area of a cyclone for some warlike purpose, resulting damage would be a consequence of warlike operations.

I did not there think it necessary further to discuss this contention, plausible though it might appear. The warlike purpose might itself be a war risk. I went on, however, to point out that the relevant words had not been construed as applying to the impact of water and added (*ibid.*):

My own view at this moment is that this absence of precedent is no accident, but is due to this, that the hypothetical case is outside the contemplated purview of the words, however the matter might be regarded on lines of exact logic.

That is still my opinion which I shall later here develop.

I may, perhaps, find some support for this line of thought in one of the instances given by ERLE, C.J. (14 C.B.N.S. 286), in *Ionides v. Universal Marine Insurance Co.* (4). The Chief Justice puts the case of a vessel driven into a bay and then getting out on a change of wind but, in pursuing her voyage, encountering a storm which, but for the delay, she would have escaped, and being overwhelmed and lost. There, he said, the loss would be due to perils of the seas and not the attempt at seizure. I do not desire unduly to stress these words because ERLE, C.J., was directing his mind to questions of remoteness. The other instances he gave were cases of stranding or mines or capture. WILLES, J., who agreed, observed in the course of his judgment (*ibid.*, 289) that in considering the exception we can only look at the proximate causes. He expressly treats the word "consequences" as equivalent to "effects." At the end of his judgment [on the point in question] he added (*ibid.*, 291):

... it seems to me that the loss was a consequence of the perils of the sea, and not a consequence of hostilities.

I quote these words in passing because they seem to me to negative the view of SCOTT, L.J. ([1946] 2 All E.R. 361) [in the present case] that "consequences" in the f.c. & s. clause means causes or perils, not effects, and expands the scope of the words. I do not think it would necessarily matter which meaning was given to them, but, in my opinion, "hostilities" denotes the peril and "consequences" the resulting loss. This, I think, was the deliberate view of WILLES, J., though, not unnaturally, there has been some vagueness at times in the use of these words, perhaps even by ERLE, C.J., in *Ionides v. Universal Marine Insurance Co.* (4). But WILLES, J., was a great judge, peculiarly exact in his use of words. I agree with him. Indeed, the authorities conclusively support him. I may note that "consequences" applies also to "warlike operations" in the clause.

On the main issue, however, it seems to me that there is a real difference of substance in this context between the ship striking a rock or colliding and being struck by a sea. It is true that it is while she is pursuing the contemplated warlike operation that the sea strikes her and that her striking the rock or colliding is as little purposed as her being struck by a heavy sea, but in the former case she is an active agent *quoad* striking the ship or rock, in the latter she is merely passive. I think that this is a sufficient distinction on the authorities for this purpose. The distinction between activity and passivity is emphasised in *Clan Line Steamers, Ltd. v. Board of Trade, The Clan Matheson* (5). In that case a vessel not engaged on a warlike operation in the artificial sense of the cases, while she was proceeding in convoy, swerved out of line because of a sudden failure of her steering gear and impaled herself on the corresponding vessel in the next line. That vessel was engaged on a "warlike operation." She did thus, in one sense, run into and sink the "non-warlike" vessel, but her warlike operation was held not to be the cause of the other vessel's loss. Nothing she could have done or omitted could have averted the loss. The "warlike operation" vessel was merely passive and equally the vessel which was sunk by the collision was merely a passive victim. It was said by LORD SUMNER that the latter vessel was a lost ship the moment her steering apparatus failed. That was the cause of the whole casualty; the fact that the lethal blow was struck by the vessel engaged on a warlike operation made no difference. *A.-G. v. Ard Coasters, Ltd.* (3) was not applied. Wartime conditions do not abolish the distinction between sea perils and war perils. The f.c. & s. clause does, indeed, remove the war perils from the scope of the marine policy if the war peril is the dominant cause, but the marine policy with its obligations save as so limited still remains. The discussion in this House on *The Coxwold* (1) as to heavy weather damage was induced by the judgments in the Court of Appeal which held that the damage in that case, which was a "warlike operation" case, was due to a marine peril, namely, stranding, caused by an unexpected current, a specific marine risk. I may quote a few words from the judgment of that distinguished authority on marine insurance, MacKINNON, L.J. ([1941] 3 All E.R. 220):

In the result, this seems to me clearly to have been damage to this ship proximately caused by perils of the seas, and I do not think that the marine risk underwriters could resist a claim for that loss by contending that, by reason of the nature of her cargo and her port of destination, the loss came within the f.c. & s. clause as a consequence...

If the true effect of the f.c. & s. clause is to exclude every sort of marine damage occurring while the ship was engaged on a warlike adventure, then, as it seems to me, the marine policy is simply otiose during that adventure. But no one has gone so far as that. Nor has the category of marine perils laid down by the majority of this House in regard to non-military voyages under war conditions in *Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insurance Assn.* (6) (known as the *Petersham* and *Matiana* cases) been abolished while the ship is engaged on a warlike operation, save as the decisions cited have gone. One of the vessels concerned in those cases, the *Matiana*, was proceeding on a westerly course down the Mediterranean as a trading ship, i.e., not on a warlike operation, but she was sailing in convoy, without lights, zigzagging and on an unusual and unlighted course where the currents were variable and as directed by the senior naval officer, but all the same the loss of the ship through stranding on the rock was held to be a marine loss. The reasoning was that not one of these features nor their totality constituted war perils. The voyage was not a warlike operation. Zigzagging is an ordinary incident of navigation in wartime conditions and may here be disregarded. This House did, indeed, unanimously reverse the judgment of the Court of Appeal in *The Coxwold* (1), partly on grounds of fact, but also on the grounds that the ship stranded while engaged on a warlike operation, that stranding was for this purpose equivalent to collision, and that, therefore, the decision was governed by express authority. Further than that the House did not decide. Outside of the particular concept of the "warlike operation" or particular war risks, the sea peril remains and must still be held to be the operative peril for which the marine underwriters continue to be liable, except in the case of collision, stranding or the like, due to the ship, a "warlike operation" ship, being actively directed into the obstacle on her warlike course. For other cases a purely marine loss due to heavy weather must still be held to be the liability of the marine underwriters. It has always been held that the *onus* to show that a loss, which on its face is due to purely marine perils, is, in truth, caused by a war peril, is on the party so maintaining. That *onus* was discharged in *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (7), where it was clear that, though the final cause of the loss was a sea peril, the real cause was a war peril, the final but decisive effect of which was postponed. The same rule applies in the "warlike operation" cases. In my opinion, the "warlike operation" cases do not state a general principle applicable to all kinds of damage, but have to be applied to the particular classes of fact on which they proceeded. It is now clear that LORD SUMNER's *dictum* [in *A.-G. v. Adelaide S.S. Co.* (2)], that "as was the whole so were the parts," cannot be applied without qualification. It has been corrected [in *The Coxwold* (1)] by LORD ATKIN with whose opinion I agree.

If I may revert to what LORD ATKIN said, two things may be particularly noted. One is that he excludes definitely the idea that all casualties occurring to a vessel engaged on a warlike operation can be regarded as the consequences of the warlike operation. He said "almost" all. Secondly he treats the essential distinction as being whether the course of the vessel is *directed* against another vessel or against a rock. LORD SUMNER, so far as I can see, would also have accepted as essential this element of direction against a physical obstacle, whether another ship or land. It must not be ignored that any sea damage such as heavy weather damage is a peril of the seas and that, whenever such a claim is brought under a war risks policy for a loss which is *prima facie* due to a marine risk, the plaintiff "must show that, under the circumstances of [the] case, the damage would be excluded from the protection" of a marine policy by the f.c. & s. or similar clause. So it was said by LORD SUMNER ([1923] A.C. 301), in *A.-G. v. Adelaide S.S. Co.* (2). That is the well-established rule which I only note here because LORD SUMNER states it specifically in regard to a warlike operation vessel and negatives the idea that there is in such cases any alteration in the *onus* of proof. What, however, LORD ATKIN is emphasising [in *The Coxwold* (1)] is, indeed, that the facts of the particular case must be scrutinised, but he also gives a guiding clue. I am not clear, however, what particular importance he attached to the question whether the wave was "great" ([1942] 2 All E.R. 11). There is a loss by a peril of the sea wherever damage is done by the fortuitous incursion of sea water: so it was held by the

Judicial Committee in *Canada Rice Mills, Ltd. v. Union Marine & General Insurance Co., Ltd.* (8). I mention this because the unqualified rule that "as is the whole so are the parts," stated by LORD SUMNER, might seem to cover any fortuitous accident or casualty of the seas outside the ordinary action of the wind and wave and capable, therefore, of being regarded as a peril. This would, indeed, place a heavy burden on the war risk underwriters because in this context I can see no difference between a heavy wave and any sea damage so long as the latter comes within the flexible category of perils of the sea, but I do not think LORD SUMNER contemplated such a case or was thinking of damage due merely to the incursion of water consequent on a wave—whether great or small—not connected with or motivated by a war risk, as, in my opinion, was the sea damage in the way of No. 2 hold. I do not regard LORD SUMNER's general aphorism as covering such cases at all, or, indeed, any cases except such as were being discussed in that case.

My conclusion, then, is that on the facts of this case the respondents have satisfied the *onus* resting on them in regard to the ship damage at No. 2 hatch and hold, and that they have shown that it was caused by a war peril, but have failed as to the damage to the after well deck. Still more clearly have they failed as regards the damage to the gun platform which was erected on supports riveted to the forecastle deck, right in the head of the ship. The carriage of this small gun, merely for defensive purposes, was not in itself a warlike operation. What happened was that in the heavy seas the rivets started and water came into the motor room, which became flooded. This, it seems, was before the flooding of No. 2 hold, which, of course, put the vessel's head down. The damage was purely sea damage. The store rooms in the fore peak also flooded. The precise facts are not very clear, but it is, perhaps, enough to say that all the fore peak damage was either simply sea damage, or that, at least, it is not proved that any element of warlike operation contributed to that damage, and hence the loss should not, in my opinion, fall on the war risk policy. The same is, I think, true of the minor damage in the after part of the ship. In the result, my conclusion is that, except the damage to the ship in or in the way of No. 2 hold, the remaining other items of damage are not recoverable from the war risk underwriters, and so far the appellants succeed.

I may add that I do not find (if it is material to find) that the master was driving the ship recklessly during bad weather. He says expressly in his report to his owners that at no time did he drive the vessel recklessly. He adds :

In fact, the speed was so much reduced at times to preserve the deck cargo and security of hatches that I felt in grave danger from submarines. There was no evidence of actual submarine danger. His log, which has been carefully examined, and his evidence confirms this statement, which I accept. That complication, for what it was worth, need not, therefore, be considered. He wore ship or hove to frequently, whenever he thought it necessary, and I am sure his judgment was sound, but, as I have already said, I do not regard this question as material in a case like this.

On the whole case, I should affirm the judgment of both courts below in regard to the ship damage at No. 2 hatch and hold, and hold that this damage was due to a consequence of the warlike operation on which the vessel was engaged. As to the other heads of damage, ATKINSON, J., was not satisfied that the damage to the gun platform was in consequence of the warlike operation, but thought it was caused by the marine perils. I agree with him, but the same is true of the other heads of damage to which I have referred, as to which my conclusion is either that they were not caused by the war operation, or, at least, have not been shown to have been so caused. The result is that, in my judgment, the decision of the Court of Appeal appealed from should be varied by holding the respondents liable in respect of all the ship damage other than that at No. 2 hatch and hold. I have read the order which my noble and learned friend on the Woolsack is about to propose, and I agree with it.

LORD PORTER : This case raises once more the much debated question what risks are insured under a policy of marine insurance covering the consequences of hostilities and warlike operations.

The policy on which the action was brought originally covered those risks from June 30 to Sept. 29, 1942, but it was extended so as to cover losses incurred up to Dec. 29, 1942. The vessel insured was the *Priam*, a new ship of about

11,000 tons sailing on her second voyage and proceeding from Liverpool to Alexandria, which was then a principal war base in the Mediterranean. She started her voyage on Dec. 2, 1942, carrying a full cargo, about 80 per cent. of which consisted of war stores, including a deck cargo of cases of aeroplanes, a bridge layer weighing 21 tons, a heavy tank, and a quantity of contact fuses and land mines in her holds. In these circumstances she was admittedly engaged on a warlike operation. Her draught, when she sailed, was 28ft. 4ins. forward and 30ft. 9ins. aft. As a result of war conditions she, like any other British ship, was instructed to take a route round the north of Ireland, *via* the Clyde, then slightly north of west until she reached 30 to 35 degrees west, thence south keeping west of the Azores, and eventually rounding the Cape. Again like any other vessel, she was under orders to zigzag and proceed without lights.

She sailed from the Clyde on Dec. 5 with large cases of planes stowed over each hatchway except No. 1 hatch. She had two well decks, one forward and the other abaft the centre castle. The bridge layer was stowed on the starboard side of the forward well deck abreast No. 2 hatch and the heavy tank on the after well deck abreast No. 6 hatch, again on the starboard side. Unfortunately, she met with bad weather almost from the start of her voyage and from Dec. 7 to 12 encountered a succession of gales with the result that on Dec. 8 the violence of the waves broke the cases containing the aeroplanes carried on No. 2 hatch and caused the planes themselves to see-saw across the hatch. At the same time the bridge layer came adrift and the combined effect of the two was to split the tarpaulins covering the hatch and lay it open to an incursion of sea water which flooded the hold to a depth of 11ft. The weight of this water brought her 3ft. down by the head, but by the next morning the hatchway was covered up again and the cargo secured. The pumps were then put on to clear the hold, but were not very effective owing to the quantity of shavings and debris from the broken packages which had been swept into it. At some time during the early period of the gales the rivets by which the gun fitted for the vessel's protection was fastened to a platform on the forecastle and those holding the platform itself were loosened so that water percolated into the three forepeak compartments. The windlass motor room was also partially filled, probably from the same cause, and possibly also through the door in its after portion. About the same time the chain locker was invaded by water entering through the chain pipes, the canvas covers of which were broken and the wood plugs swept out by the force of the sea. Success in closing the hatches and securing the deck cargo was accomplished by wearing the ship and heaving her to, and by Dec. 9 the hatch covers and spare tarpaulins were fastened in place and in spite of the gale the water in No. 2 hold had been reduced to a depth of 7ft. 2ins., and in the forepeak from 11ft. to 5ft. 8ins. In the early morning of Dec. 12, however, the gale once more increased in force and by 4 a.m. the deck cargo had broken loose for the second time and was careering across the deck. According to the master's report to his owners, the bridge layer crashed across the hatch and completely stripped the after end of about two and a half sections of hatch covers though the fringe of the destroyed tarpaulins was still secured behind the battens. Water was swirling about the 'tween decks and a sounding showed 32ft. 6ins. of water in the hold. Moreover, the hatch contained a mass of broken war stores and was littered with detonators and by this time the fore deck was awash and the vessel 11ft. down by the head. Some damage was caused to the forward end of the centre castle because the ship was down by the head so that the seas washed over the forecastle and descended on her central structure. The only other damage was that caused in the after well deck. It is not clear when this occurred, but in any case it was neither caused nor increased by the vessel's trim. In fact, the master in evidence said that her condition probably protected the after well deck from, rather than exposed it to, damage. She would be higher out of the water there and less exposed to injury. During all this time the master continued to zigzag so far as he was able to do so and to drive the ship forward at such speed as he deemed safe. Undoubtedly he feared torpedo attack, and, therefore, continued to press on and to zigzag under conditions in which, in peace time, he would have heaved to, keeping his ship's head to the wind, or, where he did not deem that action necessary, would have reduced speed sooner and more drastically than he did. But, as he says :

At no time was the vessel recklessly driven during bad weather. In fact, the speed was so much reduced at times to preserve the deck cargo and security of hatches that I felt in grave danger from submarines.

It was this fear and no haste to bring his cargo to its destination which made him keep up the engine revolutions at times when otherwise he would have reduced speed. In other words, he followed the same practice which any merchant seaman would have done in war conditions, whether he had been in command of a ship carrying war stores or engaged in an ordinary commercial venture.

In submitting his case, counsel for the respondents very conveniently divided the damage suffered into three classes: (i) that caused to the forward well deck and No. 2 hold, which was directly attributable to deck cargo coming adrift and either causing damage by contact or stripping the hatch covers so that water got into the holds; (ii) that caused by water getting into the forepeak and chain locker, windlass motor room and upper store. This water, it was submitted, and the evidence appears to bear out the submission, entered (a) through the started rivets of the gun platform; (b) through the ventilators and air pipes; (c) through the plugs and canvas covers of the hawse pipes; (d) through the forward doors of the windlass room; and (e) possibly through the doors on either side of the crew's galley; (iii) that caused to the after well and poop. This last-mentioned damage was admitted not to be due to the ship being down by the head, but was attributed by the master to heavy weather, to zigzagging and to changing his position in order to avoid the risk of being torpedoed.

It was, I think, conceded by the appellants that the second head of damage was not necessarily due to the ship being down by the head. In any case, the result of the evidence appears to be that the time of its occurrence has not been established and it may as well have occurred before as after the water was admitted to No. 2 hold. It was, therefore, unconnected with the carriage of the deck cargo on or abreast of No. 2 hatch and, like the damage done to the after well deck, was heavy weather damage, possibly caused, and, at any rate, accentuated, by the zigzagging and the driving of the ship through the seas in order to lessen the danger of being torpedoed. The claim to recover these two heads of damage may, therefore, as I think, be treated as subject to the same considerations and determined on the same principles.

The policy on which the claim is made was in the ordinary form in use when the risk was underwritten and its material provisions are as follows:

1. This insurance is only to cover the risks (in this policy referred to as "King's enemy risks") of capture . . . ; also of the consequences of hostilities or warlike operations by or against the King's enemies whether there be a declaration of war or not . . . 7 (b). If this ship is requisitioned by or on behalf of His Majesty this policy shall, so long as the requisition remains effective, have effect subject to the following modifications, that is to say (1) notwithstanding anything contained in cl. 1 hereof this policy shall extend to cover not only King's enemy risks but also war risks as hereinafter defined . . . (3) "War risks" means: (A) the risks of war which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause: "Warranted free of capture, seizure and restraint or detainment and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations whether there be a declaration of war or not, civil war, revolution, rebellion, insurrection or civil strife arising therefrom or piracy." (B) loss of or damage to the ship caused by: (i) hostilities, warlike operations, civil war, revolution, rebellion, insurrection or civil strife arising therefrom. (ii) mines, torpedoes, bombs or other engines of war.

The Priam was under requisition, and, therefore, cl. 7 (b) of the policy applies. It will be observed that that clause first of all insures the risks deleted from an ordinary marine policy by the f.c. & s. clause and then goes on to insure those very risks positively. The material words for your Lordships' consideration are "consequences of hostilities and warlike operations" and the policy first covers risks taken out of the cover given under the marine policy by the exception of those risks and then covers those risks *eis nominibus* in the succeeding sub-clause. I do not myself regard this fact as material. Whether either or both of these forms is adopted, I think the cover effected is the same, *i.e.*, against the consequences of hostilities or warlike operations. I may add, as has often

been said, of the two expressions "warlike operations" is the wider, and it is probably simpler to confine one's attention to that expression, but, in order to deal with one aspect of the case discussed in the court below, I propose to assume without deciding that the words "consequences of" precede and apply to "warlike operations" as well as to "hostilities."

It was argued by the appellants, and accepted, I think, by SCOTT, L.J., that the insurance was against "the consequences of hostilities or warlike operations" and not confined to loss caused by hostilities or warlike operations, *i.e.*, that the consequences were a risk and not a loss. It was said, therefore, that the insurance covered such risks as would have been covered if the wording ran "this policy is against loss caused by the consequences of hostilities or warlike operations." I presume the result of this reading of the clause would be—at any rate, it was submitted to be—that the cover would embrace a more remote loss than would be covered if the words "consequences of" were omitted.

Even apart from authority I should not so read the language. When one finds an insurance, first, against the *exception of the consequences of hostilities and warlike operations* and, in a succeeding clause, against *hostilities and warlike operations*, the words "the consequences of" being in this second case omitted, I should myself construe the two expressions as intended to cover the same thing. When, moreover, the authorities are considered, I think they support this view. The historical development of the phrasing of the exceptions clause is to be found in the judgment of ATKIN, L.J. ([1919] 2 K.B. 692, 693), in the *Petersham* and *Matiana* cases (6). Starting with "free of capture and seizure," it had become "free of capture, seizure and of hostilities or the consequences thereof," by 1863. In 1883 "warlike operations" was added and the clause reached its present form. "Consequences," then, combined with "hostilities" has been in use since 1863 and was construed by both ERLE, C.J., and WILLES, J., in *Ionides v. Universal Marine Insurance Co.* (4), the former pointing out that the consequences must be proximate in the legal sense of that word and the latter saying (14 C.B.N.S. 289, 290):

It has been argued that the ordinary rules of insurance law are not applicable to this policy, by reason of the words of the warranty "all consequences of hostilities" . . . I apprehend it is a fallacy to say that a larger sense is to be given to this exception by reason of the use of the word "consequences" than if the word used had been "effects." In construing the exception we can only look to the proximate consequences of hostilities . . . The words "all consequences of hostilities" refer to the totality of causes, not to their sequence, or their proximity or remoteness.

LORD SUMNER uses language to the same effect when he says ([1921] 1 A.C. 131, 132) in the *Petersham* and *Matiana* cases (6):

It is stated in *Ionides v. Universal Marine Insurance Co.* (4) that "the word 'consequences' is a compendious description of the perils to be excepted, and not a description relating to the loss. Instead of saying what particular results are to be excepted, the word 'consequences' is introduced to denote the class of perils which may result from hostilities" . . . Further, as WILLES, J., says [14 C.B.N.S. 290]: "the words 'all consequences of hostilities' refer to the totality of causes, not to their sequence." They are used to save a long enumerative description of incidents of capture seizure or detention or of hostilities or warlike operations, as if one had said "all forms of hostilities or warlike operations of whatever kind," and some form or kind of hostility or warlike operations must have proximately caused the loss. Things of which it can be predicated that they were caused by hostilities are not themselves causes of loss additional to hostilities, or a new description of perils insured against, so that a remote consequence of hostilities would become a recoverable loss, if proximately caused by something itself describable as a consequence of hostilities.

Indeed, to hold that a loss was recoverable if caused by the consequences of consequences of hostilities would, if logically pursued, lead to the conclusion that in an ordinary Lloyds policy in the form set out in the Marine Insurance Act, 1906, losses caused by the consequences of the consequences of capture would be covered since the insured risks are stated to be "capture," etc., "and the consequences thereof," a result which is pointed out by LORD SUMNER at the end of the judgment quoted above and found unacceptable.

My Lords, expressions of opinion to a similar effect might be pointed out in later judgments, and I know of no contrary opinion. I have, however, dealt with the question somewhat at length lest it should be thought that the insurance

of the consequences of hostilities or of warlike operations or, for the matter of that, of capture, seizure, arrest, restraint or detainment by the King's enemies and the consequences thereof, in any way abrogated or lessened the effect of the rule stated in s. 55 (1) of the Marine Insurance Act, 1906, that the insurer is not liable for any loss which is not proximately caused by a peril insured against, or that it widens the insurance so as to cover the consequences of consequences.

In my opinion, the true effect of the language used is to insure the ship-owner against loss due to hostilities and warlike operations of all kinds and I proceed to consider the respective rights of the appellants and respondents on this basis. In reaching a conclusion as to what those rights are, your Lordships are, of course, bound by a series of previous decisions in this House beginning with the *Petersham* and *Matiana* cases (6) and ending with *The Coxwold* (1), and it is neither advantageous nor, indeed, possible to try to lay down a fresh standard. I have already stated in the last-mentioned case what I believe the results of the previous decisions to have been and would only add that the opinions expressed in that case, or, at any rate, those of the majority, were to the effect that, when a ship is engaged in the warlike operation of proceeding with war stores from one war base to another, a collision with another ship or a grounding which is the result of that operation is a war loss. *Athel Line, Ltd. v. Liverpool & London War Risks Insurance Assocn., Ltd. (The Atheltemplar)* (9), in the Court of Appeal, does not, I think, carry the principle any further. It is true that the vessel was at anchor, but she had deliberately put herself in the position in which she grounded so that it was her act that caused the loss, though she did not know what its consequences would be.

The present case in some aspects seeks to extend the effect of the previous decisions. It raises two main issues: (i) Is a loss occurring in the course of a warlike operation caused by that operation in a case where the operation itself is carried out in the same way as every operation of that kind, whether warlike or not, must be carried out under war conditions; and (ii) Does the carrying of war stores on the deck of a vessel engaged on a warlike operation at a time when normally no stores would be so carried make the loss of or damage to the ship a war loss, if their carriage in that position was the direct cause of the loss, and would the same result follow if the loss were due to the carrying of ordinary mercantile cargo in that position?

My Lords, undoubtedly the loss occurred in the course of a warlike operation, but was it caused thereby? Admittedly, not every loss so occurring is occasioned by such an operation and *prima facie* damage by wind and weather is a marine casualty. On the other hand, the mere fact that the ultimate cause of damage was a peril of the sea is not conclusive. A ship embayed in escaping from an enemy vessel of war, as in the example given in *Ionides v. Universal Marine Insurance Co.* (4), or a torpedoed ship which sinks in harbour some days after she was hit but before she could be repaired, as in the *Leyland Shipping* case (7), are cases in which the immediate cause was a sea peril, but the dominant cause was a consequence of hostilities. The question has to be treated, not as a philosophical speculation, but broadly in order to ascertain what, as a practical solution, would be regarded as the cause which produced the result. Both sides take up this challenge. The loss, the appellants say, was due to the winds and waves, and is, therefore, a peril of the seas. The vessel was subjected only to the same risks as any ship engaged on sailing the seas at that time on a commercial venture. There was nothing to connect the loss with a warlike operation, not even the carriage of cargo on deck, which any ship might undertake in order to transport goods from one country to another when tonnage was short. On the other hand, the respondents maintain that the warlike operation was the passage of the ship through the water and any damage occurring to her as a result of that passage is caused by that operation, but if, they say, having regard to the decision of *The Clan Matheson* (5), and to the limitations suggested by LORD WRIGHT and by myself in *The Coxwold* (1), the ship which is engaged in the warlike operation must be an active participant in causing the damage which it is sought to recover, here she was an active participant. She did not merely suffer the blows of the waves, she zigzagged and failed to reduce speed or to heave to on occasions in which she would have done so had it not been for the danger of submarine attack. As the master

says, if he had been conducting this voyage in peace-time he would have hove to and wore the ship earlier and no damage would have occurred.

My Lords, I do not find myself able to accept fully the arguments of either side. Whatever might have occurred in other circumstances, in fact, this vessel was carrying war stores on deck and that carriage exposed her to the danger which she actually encountered, *i.e.*, the breaking adrift of those stores, with the consequent tearing of the hatch tarpaulins and carrying away of some of the hatch covers. The damage was caused, not merely by the buffeting of the sea, but also by the deliberate increase of the risk in carrying stores on deck in a voyage from one war base to another, and was, therefore, a war risk. I leave undetermined the question whether the same result would follow if the stores carried on deck were not material of war. It follows that such damage as can be said to be due to the opening of the No. 2 hatch, *i.e.*, the first head of damage set out by counsel for the respondents, was, in my opinion, caused by a warlike operation.

The damage to the forecandle head and the after well deck is a different matter. It was not strenuously argued on behalf of the respondents that a ship merely passive when damaged by the waves would suffer a war loss though when so damaged she was engaged on a warlike operation, but here, it is said, the *Priam* was not merely passive. She was taking the active steps of zigzagging and continuing to keep her speed, so far as she was able, where under other than war conditions she would have reduced it or hove to.

No doubt, every active step taken by the vessel herself in proceeding to her destination is part of the warlike operation, but every step taken in the course of her voyage is not necessarily part of that progress. The damage to the forepeak and after well deck was caused, not by the progress itself, but by something done in the course of that progress—a method used in accomplishing the task, not the mere carrying out of the task itself, and that method was common to all Allied vessels sailing the sea at that time, whether engaged in a warlike operation or not.

As LORD WRIGHT pointed out in *The Coxwold* (1), the basis of the decisions seems to be that the casualty can be traced to definite action on the part of those on board the *quasi*-warship in directing the course of the vessel to carry out the warlike operation. That direction may take her into collision with another vessel or on to a rock, but incidents may occur in the course of the voyages without being caused by such definite action on the part of those directing it. In the case of stranding or collision the progress of the ship brings her on to the rock or into the other vessel. The rock does not move; it is static. If the other vessel runs into her and it is that vessel's action which causes the injury, it is the progress of that ship and not that of the damaged vessel which causes the injury, and whether that injury is a war or marine loss depends on whether the other ship, not the damaged vessel, is engaged on a warlike operation or on an ordinary mercantile adventure. Where the ship is struck and injured by the sea, in substance it is not the movement of the vessel, but the motion of the sea which causes the damage. The doctrine has never been extended to cover mere sea damage without more. Possibly, it may cover a case where the ship is pressed into the sea for war purposes, but that is a deliberate extension of the risk in order to assist in the war effort. No such act was done in the present case, and damage caused by the force of wind or sea is not, in my view, war damage even though it would not have occurred if the vessel had not zigzagged or kept her speed, provided, of course, that her action in doing so did not differ from that which a ship carrying an ordinary mercantile cargo would undertake in the conditions of war.

The result of this opinion is, in my view, that the respondents succeed as to all the damage to the hatches and hatch covers of No. 2 hold and to the damage caused by the flooding of that hold, including the damage due to the ship being down by the head as a result of that flooding, but do not succeed as to the damage to the forepeak or to the after well deck. The damage caused to and by the two fires is admitted and has I gather been paid for. At any rate, it is not in issue. The appellants have, therefore, to some extent succeeded and to some extent failed and I should leave the costs below as they are, but make no order as to costs in your Lordships' House.

My Lords, I am asked by my noble and learned friend LORD UTHWATT to

say that he concurs in the opinions which have been expressed and will be expressed.

LORD NORMAND: My Lords, the question in this appeal is whether the whole or any part of the damage suffered by the Priam in bad weather in the Atlantic in Dec., 1942, was a "consequence of warlike operations," as these words are used in the war risks insurance policy to which her owners and the appellants were parties, and is, therefore, a loss falling on the appellants as war risk underwriters. There is an express admission that the Priam was at all material times engaged on warlike operations. The admission was properly given because she was carrying a cargo of military weapons and stores from Liverpool to Alexandria, both of them war bases. (*Commonwealth Shipping Representative v. Peninsular & Oriental Branch Service (The Geelong)* (10).)

The facts relating to the cargo and its loading, the voyage, the weather encountered and the damage suffered have been fully dealt with in the speech of my noble and learned friend, LORD PORTER, and I need not repeat what he has said. I find myself in full agreement with the conclusions which he has drawn about the part played by the deck cargo in causing the damage, and also with his observations upon the terms of the policy, and, in particular, the meaning and effect of the words "consequences of hostilities or warlike operations."

Both before ATKINSON, J., and in the Court of Appeal the respondents submitted alternative contentions: (i) that all damage suffered by a ship by bad weather while she is on a warlike operation is a consequence of that operation, and (ii) that the operation on which the Priam was engaged had in the circumstances of the case to be conducted in such a way as to create additional risks and perils and that these were the "proximate cause" of the whole damage. The first of these contentions was not the ground of judgment either of ATKINSON, J., or of any of the Lords Justices in the Court of Appeal, and it was not the ground on which counsel for the respondents rested his case in this House. It is, therefore, not necessary to consider it at length. It is clear that *The Clan Matheson* (5) is inconsistent with the proposition that every casualty in which a vessel engaged on a warlike operation is involved is a consequence of the warlike operation. The casualty must be shown to have been caused by the warlike operation, or, as was said by LORD PORTER ([1942] 2 All E.R. 21) in *The Coxwold* (1), to have befallen the vessel as the result of her own action in proceeding on the voyage.

I agree with my noble and learned friend, LORD PORTER, in thinking that the damage proved to have been caused by the breaking adrift of the deck cargo is attributable to a voluntary increase of the risk by the carrying of military equipment on deck in the execution of a warlike operation, and that this damage was a consequence of the warlike operation. And, like my noble and learned friend, I leave undetermined the question whether the same result would have followed if the stores carried on deck had not been military equipment. But it was the causation of the other damage which was most anxiously debated. A question of causation is a question of fact depending on the particular circumstances connected with the event. The numerous authorities cited can, therefore, have only a limited bearing on the present issue. They may afford useful guidance on the way in which to approach the problem, but they will easily lead to error if it is attempted to extract from them a principle of law to solve what is a question of fact. These authorities down to the year 1942 are summarised by LORD PORTER ([1942] 2 All E.R. 19) in *The Coxwold* (1), and they are discussed by him in the pages which follow. I accept what he has there said and I shall have little occasion to make further reference to them. There are also *The Coxwold* (1) itself and the later case, *The Atheltemplar* (9), to which I shall make brief reference later. All these cases are concerned with loss by collision or stranding, and only in *The Coxwold* (1) is there some discussion *obiter* of loss by storm. That is an additional reason for caution in applying what has been said in these authorities to the present case. When two ships, one of them being engaged in warlike operations, collide, the collision is the cause of the damage suffered by both ships, and, if the collision is occasioned by the acts or omissions (whether negligent or not) of those in charge of the vessel which is engaged on warlike operations, the loss will be borne by war risk underwriters. It does not matter whether those in charge of the other vessel also

contributed to the collision by their acts or omissions. Though it may be convenient to personify the ships, it is almost necessarily the conduct of those in charge of one or of both of them that brings about the collision. *The Clan Matheson* (5) is an exceptional case, for there the collision was not caused by the acts or omissions of those in charge of the ship at the time but by a defect in her steering gear and the consequent inability of those in charge of her to control her movements. In the stranding cases, since the rock, or the shoal, or the bottom of the sea, are merely passive and inert, there is in the normal case little difficulty in coming to the conclusion that those in charge of the ship by their acts or omissions, negligent or not, caused the damage. There may, of course, be some force operating such as an unknown set of the tide, and, if it caused the collision or the stranding, the result will be that the damage will be classified as caused by a marine peril and not by a war risk. The different conclusions arrived at in the Court of Appeal and in this House in *The Coxwold* (1) were, as I read the judgments, the result of a difference of opinion about the cause of the stranding. For if, as was thought in the Court of Appeal, an unknown set of the tide had baffled and thwarted the acts of the officer navigating the *Coxwold*, and had borne the ship ashore in spite of the best efforts of his skill, it would have been untrue and absurd to say that his action was the proximate, or the predominant, or the effective, cause of the stranding.

The present is a case of damage by storm, and, therefore, by an active force which may have an immeasurably destructive energy. Yet in some cases the predominant cause of damage by storm may not be the storm itself, but the way in which the ship was managed or handled, and if that be the cause, and if the ship was engaged on a warlike operation, it may be that the loss will be borne by the war risk underwriters. The question to put in approaching this problem of causation is not whether the warlike operation was one of the things which contributed to the damage, but on what would the ordinary man conversant with marine insurance business fasten as the predominant cause?: see VISCOUNT SIMON, L.C. ([1942] 2 All E.R. 10) in *The Coxwold* (1). To this question the answer is, I think, that what caused the damage to the *Priam's* after well deck, poop, forepeak and windlass motor room was bad weather complicated and aggravated by war conditions. The wind and waves would probably not have caused more than negligible damage in peace conditions, for the master would then have been able by reducing speed or heaving to or wearing ship to avert or mitigate the violence of the storm, but the risk of submarine attack prevented him from taking what he knew to be the best means of preventing damage to his ship. On the other hand, the damage here under consideration was not due to the warlike nature of the voyage, for any merchant ship engaged on a purely mercantile voyage and encountering the same storm would have been navigated just as the *Priam* was navigated and would (apart from the speciality of the *Priam's* deck cargo) have been exposed to just the same risks and have suffered the same, or, perhaps, greater damage. For the facts are clear. The master was doing his utmost to prevent damage by storm; he nearly succeeded and would probably have succeeded completely but for the war conditions which prevented him from using his skill to full advantage. It would, therefore, be both false and absurd to affirm, as we were invited to affirm, that the master co-operated with the storm in causing the damage, or that he was an active participant in the damage, or that by his conduct of the voyage he created new risks. Nor can it fairly be said that the master contributed by his omissions, for the only omissions that matter were just those forced on him by the war conditions. If the damage was not caused by the conduct of those in charge of the *Priam* in prosecuting the warlike operation in which she was engaged, and if it cannot be attributed to the special risk undertaken in loading military equipment on her deck, there is left no ground for holding it to be a war risk loss. That result is, in my opinion, consistent with the previous cases. It has been expressly decided that loss attributable to war conditions is not a war risk loss (the *Matiana* and *Petersham* cases (6)), and war conditions played an important part in the causation of the damage suffered by the *Priam*. As for the loss caused by wind and wave, though there is no decision, there are to be found in *The Coxwold* (1) opinions which would exclude it from the category of war-risk loss, though it is suffered by a ship while engaged in warlike operations. I refer to the opinion of MACKINNON,

L.J. ([1941] 3 All E.R. 219) in the Court of Appeal, and to the opinions of VISCOUNT SIMON, L.C. ([1942] 2 All E.R. 10), LORD WRIGHT (*ibid.*, 18) and LORD PORTER (*ibid.*, 21) in this House. These opinions were expressed in a case in which the decision of this House attributed the damage to the action of the ship's officers in so directing her course as to drive her on to the rocks and it was immaterial to inquire whether there was negligence or fault on the part of those officers. In *The Atheltemplar* (9) the damage was by taking the ground when the ship was at anchor for the purpose of unloading, and that damage was attributable to the conduct (whether negligent or not) of those in charge of her in bringing her to anchor at the place where she suffered the damage. But the Priam's master was in no sense that practical people could accept the author, however, innocent, of damage to his ship. He was striving with all his skill to prevent the damage, and he would have succeeded but for the war conditions. For these reasons I agree that the appeal should be disposed of as proposed by my noble and learned friend LORD PORTER.

Order of the Court of Appeal varied in part and affirmed in part. No order as to costs.

Solicitors: *Hill, Dickinson & Co.* (for the appellants); *Bentleys, Stokes & Lowless*, agents for *Alsop, Stevens & Collins Robinson*, Liverpool (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

RHODES v. CORNFORD.

[COURT OF APPEAL (Scott, Asquith and Evershed, L.JJ.), October 15, 16, 28, 1947.]

Landlord and Tenant—Rent restriction—Possession—Hardship—Hardship to landlord's relative—Reasonableness—Consideration of matters material to claims under specific paragraphs—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1) (b), sched. I (h), proviso.

A landlord claimed possession of her house for her own occupation under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h), and also under paras. (a), (b) and (d) of that schedule on the grounds that the tenant had (i) failed to afford access to the landlord for doing some repairs, (ii) committed acts of waste, and (iii) unlawfully sublet part of the premises. The county court judge found against the landlord except as regards the refusal of access, but he held that it was not reasonable to make an order for possession and dismissed the claim. The landlord appealed on the grounds that (i) the judge, in deciding the question of reasonableness, took into account matters of fact proper to be considered only in reference to the claims under paras. (a), (b), (d) and (h) of sched. I, and particularly para. (h), and, in so doing, he had misdirected himself in law; and (2) in considering the claim under para. (h) and also the question of reasonableness, the judge misdirected himself by excluding consideration of hardship to the landlord's daughter.

HELD: (i) in considering hardship in relation to para. (h) it was relevant to consider not only the hardship suffered by the landlord, but also the hardship suffered by the landlord's daughter, and in excluding such consideration the county court judge had misdirected himself;

(ii) it could not be accepted that the test of reasonableness must be applied without consideration of facts material to claims under any paragraph of sched. I or under s. 3 (1) (b), but, on the contrary, on the question of reasonableness it was the duty of the judge to take into account all the relevant circumstances as they existed at the date of the hearing.

Dictum of LORD GREENE, M.R., in Cumming v. Danson ([1942] 2 All E.R. 655), *applied*.

Briddon v. George ([1946] 1 All E.R. 609), *distinguished*.

[AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-334, paras. 392-399; and FOR CASES, see DIGEST, Vol. 31, pp. 576-581, Nos. 7256-7297.]

Cases referred to :

- (1) *Baker v. Lewis*, [1946] 2 All E.R. 592 ; 175 L.T. 490 ; Digest Supp.
- (2) *Cooley v. Walsh & Cooney*, [1926] I.R. 239 ; Digest Supp.
- (3) *Harte v. Frampton*, post p. 604.
- (3) *Cumming v. Danson*, [1942] 2 All E.R. 653 ; 112 L.J.K.B. 145 ; *sub nom. Cumming v. Dawson*, 168 L.T. 35 ; Digest Supp.
- (5) *Bell London & Provincial Properties, Ltd. v. Reuben*, [1946] 2 All E.R. 547 ; [1947] 1 K.B. 157 ; Digest Supp.
- (6) *Briddon v. George*, [1946] 1 All E.R. 609 ; 174 L.T. 380 ; Digest Supp.

APPEAL by the landlord from an order made by HIS HONOUR JUDGE ANDREW at Ilford County Court on Dec. 9, 1946, refusing possession of a dwelling-house.

The county court judge found against the landlord on the question of hardship under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h), and on the question of reasonableness. In so finding he excluded consideration of hardship to the landlord's daughter. The Court of Appeal now held that he thereby misdirected himself and ordered a new trial. The Court of Appeal also held that the county court judge, in considering whether it was reasonable to make an order under the general terms of the schedule, was entitled to take account of facts which were material under the specific paragraphs of the schedule.

A. E. Holdsworth for the landlord.

D. G. Lowe for the tenant.

Cur. adv. vult.

Oct. 28. **EVERSHED, L.J.**, read the following judgment of the court : The landlord's claim had been formulated under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h), and also under paras. (a), (b) and (d), (*i.e.*, on the alleged grounds that the tenant had failed to afford access to the landlord for doing some repairs, that the tenant had committed acts of waste, and that the tenant had unlawfully sublet part of the premises). On these claims the county court judge found against the landlord on the first, third and fourth, but in his favour on the second, namely, refusal of access. The county court judge held, nevertheless, that it was not reasonable to make an order for possession and dismissed the action. It is to be noted that six months previously the landlord had brought similar proceedings before the same judge against the tenant in respect of the same premises, basing herself on para. (h) of the schedule alone. In those previous proceedings the landlord had also been unsuccessful.

The landlord's case falls into two parts. First, it is said that it appears from the judgment that the county court judge, in deciding the question of reasonableness, took into account matters of fact proper to be considered in reference to the claims under the paragraphs of sched. I, particularly the claim under para. (h), and that, in so doing, he misdirected himself in law inasmuch as the question of reasonableness ought to be considered and determined without regard to those matters which by the Act are assigned to the specific grounds of claim set out in the several paragraphs of sched. I to the Act or s. 3 (1) (b) of the Act. It is said that, in considering the claim under para. (h) and also in considering the question of reasonableness, the county court judge misdirected himself by excluding from his consideration hardship to the landlord's daughter and confining himself to considering hardship suffered by the landlord herself. We will deal with the second point first.

The material facts are these. The landlord was formerly a music teacher, but, owing to her health, she is not now working. She is dependent on the daughter, who lives with her at her present home in Catford. Since Sept. 1, 1946, the daughter has been employed as a deputy warden at a youth centre at Ilford. From the house where the daughter lives to where she works in Ilford involves a complicated journey of two hours' duration each way and this imposes both fatigue and considerable expenses for fares and food away from home.

We now turn to the judgment. After referring to the new facts proved in regard to the comparative hardship claim since the earlier action, the note of the judge's judgment is as follows :

If I had tried it on these grounds I would still be bound to say that the [tenant] had discharged the onus of proof. There is greater hardship on the tenant, and this is the chief ground for possession. [His Honour referred to *Baker v. Lewis* (1) and

continued:] And here I think *Mr. Jewers'* point is right, that it is the personal hardship of the [landlord] rather than that of the daughter that I must consider. On the ground of greater hardship the claim has failed and the [landlord] only succeeded in one allegation. The overriding consideration is that it must be reasonable to make an order. There is no evidence of any outward deterioration although ceilings cracked, etc., the first-aid repairs have been done and therefore it is not reasonable to make an order, but if there be further breaches different consideration will apply and he may be assured I will take a strong view.

A In the note on p. 230 of "Rent and Mortgage Interest Restrictions" by the Editors of "Law Notes" it is suggested that in cases of hardship under para. (h) hardship only to the landlord or to the tenant, as the case may be, must be considered, and hardship to relatives or others who are part of the landlord's or the tenant's household must be excluded. This view is founded on the Irish decision of *Cooley v. Walsh* (2) cited in the note. The validity of this opinion is B directly raised in *Harte v. Frampton* (3), and in our judgment in that case we give reasons for our conclusion that the Irish view is erroneous and contrary to the tenor of English decisions. In the present case counsel for the tenant has not sought to justify the view suggested in the "Law Notes" book. His answer to this part of the landlord's argument is (i) that, fairly read, the judge's judgment amounts only to this, that, in considering comparative hardship under para. (h), hardship to the landlord herself must be given greater weight than C hardship to the landlord's daughter, and (ii) that, in any case, there is no reason to assume that, in considering the question of reasonableness, the county court judge did not properly consider all relevant matters, including the hardship suffered by the landlord's daughter.

D In fairness to the county court judge, what we have got before us is not a judgment written or prepared by the judge himself, but a note of what he said, taken by counsel at the time and agreed for the purposes of the appeal. Having regard to that fact and to the general conditions under which the arduous work of county courts has to be prepared, it is not right, as has been said by this court, to subject notes of the judgments in county courts to over-critical analysis. Nevertheless, in this case we are unable to resist the conclusion that, on the view we take of the law, the county court judge has misdirected himself in dealing with the issue of comparative hardship under para. (h). In fairly interpreting E the note of this part of the judgment, it is relevant to observe from the judge's own note what was *Mr. Jewers'* argument to which he plainly alluded. The note of that argument is as follows:

Hardship to plaintiff, *not* to daughter, had to be considered.

F In the light of this note it is reasonably plain that in the material part of the judgment the county court judge intended to say that, in considering comparative hardship under para. (h), he must confine himself to hardship suffered by the landlord and exclude from his mind that suffered by the landlord's daughter.

Although his judgment on the para. (h) claim cannot stand, can it nevertheless be maintained that the conclusion of the county court judge on reasonableness is not open to objection? True it is that, where a judge has expressed a decision on the question of reasonableness, it must *prima facie* be assumed that he has properly applied his mind to all relevant considerations. In the present case and fairly reading the notes of the judgment, we are unable to satisfy ourselves that the judge's misdirection with regard to the para. (h) claim may not also have affected his view on reasonableness. As we read the notes of the judgment, G the judge (rightly in our view) regarded the matters of fact relevant to the hardship claim under para. (h) as both admissible and important in reference to the question of reasonableness, and, having disposed, as he did, of the claim under para. (h), he seems to have regarded those facts as out of the way, as it were, H for the purposes of reasonableness. In any case, we cannot feel sure that, had he reached a different conclusion on the hardship claim, as apart from his misdirection he might conceivably have done, he would have made the order he did in favour of the tenant, of whose conduct in certain respects he did not altogether approve.

In the result, this appeal must, in our judgment, succeed on the second part of the landlord's argument, and it is, accordingly, unnecessary to deal at length with the first part of her case. We think it, however, right to say that we cannot

accept as sound an argument which would place on the word "reasonable" in the first part of s. 3 (1) of the Act of 1933 a most restricted and artificial meaning. Counsel for the landlord conceded that, according to his argument, the test of reasonableness must be applied without consideration of any facts material to claims (whether formulated or not) under any paragraphs of sched. I or under s. 3 (1) (b). As counsel admitted, if a landlord on this view, establishes any claim under any of the paragraphs mentioned, an order for possession could not be refused unless its making were oppressively unreasonable to the tenant. In our judgment, there is no warrant in reason or authority for putting this gloss on the language of the section. We do not think it necessary or desirable to attempt any further definition of the word "reasonable." We cite this passage from the judgment of LORD GREENE, M.R., in *Cumming v. Danson* (4) ([1942] 2 All E.R. 655), quoted in *Bell London and Provincial Properties, Limited v. Reuben* (5) ([1946] 2 All E.R. 551):

In considering reasonableness under s. 3 (1), it is, in my opinion, perfectly clear that the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad, common-sense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account.

In our judgment, no qualification is required to that general formula.

Finally, there is, in our judgment, nothing in the decision in *Briddon v. George* (6) or in the paragraph in the judgment of SCOTT, L.J., ([1946] 1 All E.R. 610) so much relied on by counsel for the landlord, which can be regarded as establishing the proposition contended for. The only question material to this appeal which was decided in *Briddon v. George* (6) was whether the county court judge had misdirected himself in taking into consideration the date of the landlord's purchase of the premises in question (a matter made by the terms of the statute material to a claim under para. (h)) when considering the question of reasonableness to which such date would have no apparent relevance. If the passage in the judgment referred to taken by itself might appear to lend support to counsel's proposition, the other parts of the judgment including the paragraph immediately preceding show that it cannot have been so intended.

We were invited to make an order for possession in favour of the landlord, but it is not right for us so to do. The question of hardship and reasonableness in the case involve issues of fact and the balance of numerous considerations, some favourable to the one party and some to the other, matters peculiarly appropriate to a trial judge and by the scheme of the Act assigned to the judges of the county courts. In the circumstances, the right course will be to allow the appeal and direct a new trial, the case being remitted, in accordance with usual practice, to some judge other than the judge from whom the appeal has been brought. The appeal will be allowed with costs in this court and below on the same scale as the costs were awarded in the court below.

New trial ordered.

Solicitors: *Duthie, Hart & Duthie* (for the landlord); *Kingsford, Dorman & Co.*, agents for *Hatten, Asplin, Jewers & Glenney*, Barking (for the tenant).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

HARTE AND ANOTHER v. FRAMPTON.

[COURT OF APPEAL (Scott, Asquith and Evershed, L.JJ.), October 16, 17, 28, 1947.]

Landlord and Tenant—Rent restriction—Possession—Hardship—Hardship to persons affected other than landlord or tenant—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I (h), proviso.

In assessing "greater hardship" for the purposes of the proviso to sched. I (h), of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, it is proper to take into account hardship to all who may be affected by the grant or refusal of an order for possession—relatives of the landlord or tenant, their dependants, lodgers and guests, and the stranger within the gates, but that hardship should be weighed with due regard to the status of the persons affected, their "proximity" to the landlord or the tenant, and the extent to which, consequently, hardship to them would be hardship to him.

A county court judge, in assessing hardship, took into account hardship to the tenant's daughter, son-in-law and grandchild who resided with him, but who were not financially dependent on him.

HELD: it was proper to take such hardship into consideration.

[AS TO POSSESSION REQUIRED BY LANDLORD FOR OWN OCCUPATION, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 396; and FOR CASES, see DIGEST, Vol. 31, pp. 580-581, Nos. 7283-7297.]

A Cases referred to:

(1) *Cooley v. Walsh and Cooney*, [1926] I.R. 239; Digest Supp.

(2) *Baker v. Lewis*, [1946] 2 All E.R. 592; [1947] K.B. 157; 175 L.T. 490; Digest Supp.

(3) *Cumming v. Danson*, [1942] 2 All E.R. 653; 112 L.J.K.B. 145; *sub nom.*, *Cumming v. Dawson*, 168 L.T. 35; Digest Supp.

B APPEAL by the landlords from a judgment of His Honour JUDGE ARMSTRONG, at Poole County Court, dated Dec. 4, 1946, refusing an order for possession of a dwelling-house claimed under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I (h).

C The county court judge held that greater hardship would be caused to the tenant by granting the order than would be caused to the landlords by refusing it, taking into account the hardship which would be caused to persons residing with, but not dependent on, the tenant. The Court of Appeal now upheld the county court judge. The facts appear in the judgment of the court.

Fay for the landlords.

A. W. Roskill for the tenant.

Cur. adv. vult.

Oct. 28. ASQUITH, L.J., read the following judgment of the court. This case raises an important point of construction under the Rent Restrictions Acts. The ground on which possession was sought was that which is set out in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I (h). The material facts were not in dispute. The plaintiffs, or one of them, let to the tenant a bungalow, the subject-matter of these proceedings. The tenant's wife having died, he took to live with him in the bungalow his married daughter, her husband, and their child. Meanwhile, the plaintiffs were living on the first floor of 19, Cranbrook Road, a house which they or one of them owned, the ground floor being let. The female plaintiff suffered from colitis, anæmia and heart trouble, and a doctor certified that she ought to "avoid stairs for the rest of her life." This ambition could clearly be achieved if the plaintiffs could resume possession of the bungalow let to the tenant. Accordingly, notice to quit was given and the female plaintiff brought proceedings (the husband being added later) for possession, relying on para. (h) of sched. I to the Act of 1933, and alleging that "the landlord requires possession of the premises for occupation by herself and her husband." At the trial it also appeared that the daughter, son-in-law and grandchild residing with the tenant were not financially dependent on him. The main question debated was whether the tenant had established that greater hardship would be caused by granting an order for possession than by refusing to grant it within the concluding words of the proviso to para. (h), and, more particularly, *whose* hardship, in making the comparative computation prescribed by the proviso, it was relevant or permissible for the judge to consider—whether hardship to the tenant or landlord personally and that alone, or hardship to third persons as well, and, if so, what third persons. The county court judge took the view that hardship to third persons was relevant and admissible and in the shorter of the two notes of his judgment expressed himself as follows:

H In this case I considered the hardship which would be involved if an order were made against the tenant, not only to him personally, but also to his daughter, son-in-law and grandchild who are residing with him, though not financially dependent on him. I took the view that "hardship" is not by the Act limited to hardship to any class such as relatives dependent on the party.

He, accordingly, gave judgment for the tenant.

Counsel for the landlord maintained that the only "hardship" contemplated by the proviso or competent to be taken into account under it was that suffered by the tenant or the landlord, but that the hardship to *dependants* of either party who were interested in the premises might be indirectly relevant since they might be regarded as constituent elements in the hardship suffered by the

party himself, who must be assumed to be a person of average sensibility and human feeling. It will be observed that the class of third persons whose reflected hardship, so to speak, may be taken into account is, according to this contention, limited to dependants, whether relatives or not. Lodgers, counsel argued, should be excluded, and so should relatives if not dependant. He cited an Irish authority, *Cooley v. Walsh* (1), which lays down without qualification the proposition that it is only hardship to the parties to the lease which can be considered at all, a proposition more severe than that for which counsel for the plaintiffs himself contended. This authority, which we treat with proper respect, is not binding on this court, nor can we accept counsel's milder and more qualified proposition that hardship to persons other than the parties (whether as an independent element or as one contributory to the parties' own hardship) can be considered only if those persons are dependants. Such a limitation seems wholly arbitrary. Why should a hardship to a close relation who does not happen to be a dependant be excluded from consideration? No such limitation is suggested by the express words of the proviso which, indeed, speaks simply of "greater hardship." Nor is any such limitation suggested in two cases decided by this court in which the point has been approached without being definitively dealt with. In *Baker v. Lewis* (2) (which, it is true, is mainly devoted to another point) the headnote, para. (3), reads ([1947] K.B. 187):

In considering the question of "greater hardship" the court can take into account that the landlord desires to have living in his house persons who have been previously living with him outside his sons or daughters or parents.

In that case counsel argued (*ibid.*, p. 188):

Lastly, the county court judge in considering the question of "greater hardship" ought not to have taken into account the plaintiff Mrs. Joubert's desire to have living in the house persons outside her own family who had been living with her hitherto.

MORTON, L.J., said, dealing with this argument (*ibid.*, p. 190):

It is true that the plaintiffs could not, for example, come within para. (h) if they "required" the dwelling-house for occupation as a residence for, for instance, a nephew or niece, but I think that, if they require the house as a residence for themselves, in deciding the other points which arise in the case the learned judge ought to take into consideration the fact (if it be a fact) that there are other persons residing with them in their present premises whom they do not wish to turn into the street.

It is true that it does not appear whether these persons, who were not relatives, were dependants or not, but no one seems to have thought that that was the test. *Cumming v. Danson* (3) again, though inconclusive because it deals mainly with the question of the reasonableness of making an order for possession, and not with the construction of para. (h) as such, certainly does not attach any crucial importance to dependence in this connection.

To attempt to define classes, hardship to whom and to whom alone (apart from the parties) can be taken into account (whether as an element entering into the party's hardship, or on its own account) appears to us an unhelpful line of approach to the construction of the proviso. The true view, we think, is that the county court judge should take into account hardship to all who may be affected by the grant or refusal of an order for possession—relatives, dependants, lodgers, guests, and the stranger within the gates—but should weigh such hardship with due regard to the status of the persons affected and their "proximity" to the tenant or landlord, and the extent to which, consequently, hardship to them would be hardship to him. The inability to take in a guest for the week-end would no doubt be assessed by the judge at *nil*. The extrusion of a loved and trusted relation, whether dependent or not, would weigh heavily in the scales. We are of opinion that the county court judge did not misconstrue the proviso, that he directed himself rightly as to its meaning, that there was evidence on which he could find that the tenant had proved that greater hardship would result from making than from withholding an order for possession, and that the appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors: *Barnes & Butler*, agents for *J. W. Miller & Son*, Poole (for the landlords); *Peacock & Goddard*, agents for *Trevanion & Curtis*, Poole (for the tenant).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

Re STRAKOSCH (deceased), TEMPERLEY v.
H.M. ATTORNEY-GENERAL.

[CHANCERY DIVISION (Roxburgh, J.), October 16, 29, 1947.]

Charities—Charitable purposes—“To strengthen bonds between Union of South Africa and Mother Country and incidentally conduce to appeasement of racial feeling in South Africa.”

A All modes of the application of a fund which are beneficial to the community are not necessarily charitable. Accordingly, although a testator has declared purposes which are, undoubtedly, beneficial to more than one community, it does not follow that they are charitable. On the contrary, while a testator can safely declare a trust for the benefit of a community without giving any further indication of the manner in which the benefit is to be conferred, if he departs from this safe path, his trust will fail unless it can be predicated of every possible mode of application which would fall within the ambit of the trust that it is not only beneficial to the community, but also charitable.

B A testator by his will directed his trustees to apply part of his estate “to a ‘fund’ for any purpose which in their opinion is designed to strengthen the bonds of unity between the Union of South Africa and the Mother Country and which incidentally will conduce to the appeasement of racial feeling between the Dutch and English speaking section of the South African community.” It was conceded that, unless the trust was charitable, it failed for uncertainty.

C HELD: on a true interpretation of the direction, the trustees were to apply the fund to any purpose which, in their opinion, answered both requirements, but, as it was possible to envisage some non-charitable modes of application conforming with the first requirement, the trust was not charitable, for no mode of application outside the range of charity could be brought within it merely because “incidentally” it was expected to achieve a charitable result.

D [AS TO GIFTS FOR PUBLIC PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 122-127, paras. 161-168; and FOR CASES, see DIGEST, Vol. 8, pp. 255-260, Nos. 161-217.]

E Cases referred to:

- (1) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cases 53; 8 Digest 241, 1.
- (2) *Re Smith, Public Trustee v. Smith*, [1932] 1 Ch. 153; 100 L.J.Ch. 409; 146 L.T. 145; Digest Supp.
- (3) *A.-G. v. National Provincial & Union Bank of England*, [1924] A.C. 262; *sub nom., Re Tetley, A.-G. v. National Provincial & Union Bank of England*, 93 L.J.Ch. 231; 131 L.T. 34; Digest Supp.
- F (4) *Houston v. Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 8 Digest 297, 739.
- (5) *Farley v. Westminster Bank, Ltd., Re Ashton's Estate, Westminster Bank, Ltd. v. Farley*, [1939] 3 All E.R. 491; [1939] A.C. 430; 108 L.J.Ch. 307; 161 L.T. 103; Digest Supp.
- (6) *Williams' Trustees v. Inland Revenue Comrs.*, [1947] 1 All E.R. 513; 176 L.T. 462.
- G (7) *National Anti-Vivisection Society v. Inland Revenue Comrs.*, [1947] 2 All E.R. 217; [1947] L.J.R. 1112; 177 L.T. 226.

ADJOURNED SUMMONS to determine whether a direction to trustees to apply a “fund” for any purpose which in their opinion was designed to strengthen the bonds of unity between the Union of South Africa and the Mother Country and which incidentally conduced to the appeasement of racial feeling between the Dutch and English speaking section of the South African community constituted a valid charitable trust. ROXBURGH, J., held that the trust was not charitable, and that it failed for uncertainty. The relevant facts appear in the judgment.

H D. A. Ziegler for the plaintiff.

Danckwerts for the Attorney-General.

Winterbotham for executor of testator.

J. A. Wolfe for parties interested in the residue.

Cur. adv. vult.

Oct. 29. ROXBURGH, J., read the following judgment. By his will dated Aug. 27, 1941, Sir Henry Strakosch, who died on Oct. 30, 1943, directed

much of his large estate to be held on trust to be applied by his trustees :

... to a "fund" for any purpose which in their opinion is designed to strengthen the bonds of unity between the Union of South Africa and the Mother Country and which incidentally will conduce to the appeasement of racial feeling between the Dutch and English speaking section of the South African community.

First, I must construe the gift. I do not think that the "fund" which the trustees are to constitute is to be a fund which has a single purpose only. I think that the "fund" is to be applied for any purpose which answers the prescribed requirements. Counsel for the defendant has submitted that the words "in their opinion" qualify the first requirement only, and that the second is absolute, but the use of the word "incidentally" shows that the first is the more important, and there seems no reason why the testator should have been content to trust the judgment of his trustees in connection with the first but not the second. On the contrary, the second requirement is hardly appropriate for submission to the judgment of an English court because it relates to the effect of certain practical steps on sentiment among peoples living in South Africa. In my judgment, the words "in their opinion" apply to both requirements. Accordingly, I hold that the trustees are directed to apply the fund to any purpose which in their opinion answers both requirements.

The next question is whether such a trust fails for uncertainty. Counsel for the defendant conceded that it must unless it is charitable, but he contended that its purposes fell within the fourth of the classes of charitable trusts enumerated by LORD MACNAGHTEN in *Pemsel's Case* (1), namely, trusts for other purposes beneficial to the community which do not fall within the first three classes. It is well settled that not all modes of application of a fund which are beneficial to the community are charitable, and, accordingly, although this testator has declared purposes which are, undoubtedly, beneficial to more than one community, it does not follow that they are charitable. On the contrary, although a testator can safely declare a trust for the benefit of a community without giving any further indication of the manner in which the benefit is to be conferred, if he departs from this safe path, his trust will fail unless it can be predicated of every mode of application which would fall within the ambit of the trust that it is not only beneficial to the community, but also charitable. Thus, a direction to apply a fund for the benefit of England would be valid: compare *Re Smith, Public Trustee v. Smith* (2), but a direction to apply it for patriotic purposes in England would not: compare *A.-G. v. National Provincial Bank* (3) and *Houston v. Burns* (4). A trust for the benefit of the inhabitants of a parish would be good, but a trust for "parish work" would be bad: *Farley v. Westminster Bank, Ltd.* (5). The explanation seems to be that where no purpose is defined, a charitable purpose is implicit in the context: *Williams' Trustees v. Inland Rev. Comrs.* (6), and the court will intervene to direct the fund into charitable channels, but if purposes are defined in language which would sanction an application which is not in law charitable, no such implication can be made and the court will not aid the gift.

I conceive these propositions to have been laid down by cases of the highest authority, and, therefore, it is not for me to discuss the questions of principle and policy underlying them. Many testators fail to accomplish the task which the cases set for them, and therein charitable intentions are often defeated. Has this happened again? I fear so. It is easy to think of many modes of application which would fulfil the first requirement and yet not be charitable. One mode of application which might, in the opinion of the trustees, be designed to strengthen the bonds of unity between the Union of South Africa and the Mother Country would be financial aid to a movement to consolidate the British Commonwealth of Nations by alterations in its constitution, but this would not, I think, be a charitable purpose. Greater harmony in certain branches of English and South African law might be designed to strengthen the bonds of unity, but it would not be a charitable purpose to promote changes in the law of England: *National Anti-Vivisection Society v. Inland Rev. Comrs.* (7). Improvements in transport or communications, or programmes of trade agreements, tariffs or preferences might be designed to strengthen the bonds of unity, but expenditure on such objects would not be charitable. Nor would expenditure on the organisation of tripartite contests in the athletic field between South Africa, England and Holland. Indeed, it is possible to think of many examples.

In this trust, however, there is a further requirement. Counsel for the defendant has submitted that, whatever the position might be if the first requirement stood alone, any mode of application which fulfils both requirements must of necessity be charitable. The second requirement relates to the reaction to measures taken in South Africa of people living in that country. I have a limited extra-judicial knowledge of the problem to which the testator is referring, but no judicial knowledge of it at all. I have no information about steps which could usefully be taken to assist in its solution. No evidence has been filed on these matters. Counsel has asked me to hold, without any evidence and as a proposition of law, that any mode of application which fulfils both requirements must necessarily be charitable on the ground that its purpose must be the prevention of strife and the removal of causes of discord and strife and that such a purpose is charitable, but, unless I could hold that every mode of application which fulfilled the first requirement was necessarily charitable, I could not accede to this argument, because no mode of application outside the range of charity could be brought within it merely because "incidentally" (and that is the testator's own word) it was expected to achieve a charitable result. Moreover, it is, in my judgment, in dealing with LORD MACNAGHTEN'S fourth class, impossible to cure defects in the language in which a testator has expressed his purposes by extracting from it a purpose or object which he has not in terms expressed, and then holding that, if he had expressed that purpose or object, it would have been charitable. Otherwise *Re Smith* (2) and *A.-G. v. National Provincial Bank* (3) could not stand together, and *Farley v. Westminster Bank, Ltd.* (5) would have been decided differently. I must, accordingly, reject this method of approach.

It is, in my judgment, necessary, in all cases where modes of application are indicated, for the court to be satisfied that every possible mode of application which falls within the ambit of the testator's language is in law charitable. In the absence of any evidence I must recoil from speculation, but it seems to me that, having regard to the prevalence of Roman-Dutch law in South Africa and to geographical considerations, some of the non-charitable modes of application which I have already envisaged in discussing the first requirements could be so arranged as incidentally to comply with the second. I reach this conclusion with great regret because it means that the testator's intention has foundered in a chartered but dangerous sea, when a single timely word would have saved it from disaster.

Order accordingly.

Solicitors: *Herbert Smith & Co.* (for the plaintiff, and others); *Treasury Solicitor* (for the Attorney-General).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

GOTT v. MEASURES.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Croom-Johnson, JJ.), October 27, 28, 1947.]

Animals—"Unlawful and malicious killing"—Defence of property—Dog chasing game—Rights of owner of sporting rights—Malicious Damage Act, 1861 (c. 97), s. 41.

The appellant's dog was killed by the respondent while it was chasing game on land over which the respondent had full sporting rights. On an information against the respondent under the Malicious Damage Act, 1861, s. 41, for unlawfully and maliciously killing the dog, the justices found that the respondent had acted in defence of his property and without malice, and they dismissed the information:—

HELD: the respondent had no property in the land or in the game until it was reduced into possession, and, therefore, he was not entitled to shoot the dog in protection of his property. The case must be remitted to the justices with an intimation that the offence was proved.

[AS TO MALICIOUS INJURY TO DOGS, see HALSBURY, Hailsham Edn., Vol. 1, p. 567, para. 973; and FOR CASES, see DIGEST, Vol. 2, pp. 216, 217, Nos. 116, 117, 124.]

Cases referred to :

- (1) *Daniel v. Janes*, (1877), 2 C.P.D. 351 ; 41 J.P. 712 ; 2 Digest 217, 124.
- (2) *Miles v. Hutchings*, [1903] 2 K.B. 714 ; 72 L.J.K.B. 775 ; 89 L.T. 420 ; 2 Digest 216, 116.
- (3) *Bromage v. Prosser*, (1825), 4 B. & C. 247 ; 1 C. & P. 673 ; 6 Dow. & Ry. K.B. 296 ; 3 L.J.O.S.K.B. 203 ; 15 Digest 1020, 11461.
- (4) *Smith v. Williams*, (1892), 56 J.P. 840 ; 2 Digest 216, 117.

CASE STATED by justices for the Parts of Lindsey, Lincolnshire.

The appellant's dog was shot at and killed by the respondent while it was chasing game on land over which the respondent had full sporting rights. On an information under the Malicious Damage Act, 1861, s. 41, the justices were of the opinion that they were bound by *Daniel v. Janes* (1) to decide in favour of the respondent as he had acted in defence of his own property and without malice, and they dismissed the information. The court now remitted the case to the justices with an intimation that the offence was proved.

Serjeant Sullivan, K.C., and *Van Oss* for the appellant.

James Stirling for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the Parts of Lindsey on an information which was preferred against the respondent under the Malicious Damage Act, 1861, s. 41, charging him with having unlawfully and maliciously killed a certain dog, the property of the appellant. The facts, which were admitted, were that a black Labrador bitch, belonging to the appellant was shot dead by the respondent on land over which the respondent had full sporting rights. Shortly before it was killed, the dog was seen by the respondent tearing a hen pheasant to pieces, and later chasing a hare. The respondent went at once for his gun, and, on returning, saw the dog chasing another hare, which was heavy in young, into a spinney. Thereupon, he shot and killed the dog. He knew it was the appellant's dog and the appellant had been warned on several occasions about the dog's trespassing. The question is whether or not in law the respondent was justified in shooting the dog.

The justices were of opinion that they were bound to decide the matter in favour of the defendant by the decision in *Daniel v. Janes* (1), as the respondent, in their opinion, shot the dog on land over which he had the full sporting rights, in defence of his property, and without malice. In giving judgment in *Daniel v. Janes* (1), LORD COLERIDGE, C.J., said (2 C.P.D. 353) :

I agree with *Mr. Buszard* that the 41st section of the Act upon which the conviction proceeded points to a wicked crime, the unlawfully and maliciously killing or maiming the animals referred to simply for the purpose of indulging a cruel disposition, and not to an act done under an impression, right or wrong, that the party is justified in protecting his premises from a trespass by such means, especially after notice given.

LINDLEY, J., who was the other member of the court, did not go so far, and it has been said by WILLS, J., in *Miles v. Hutchings* (2) ([1903] 2 K.B. 716) that that statement of LORD COLERIDGE, is too wide.

The offence that is charged is killing a dog "unlawfully and maliciously." If an unlawful act is done wilfully, the law implies malice, although, as was said in the well-known leading case of *Bromage v. Prosser* (3), malice may be rebutted. The law, in my opinion, is clear. A person may be justified in shooting a dog if he honestly believes that it is necessary as being the only way in which he can protect his property. For example, if a farmer finds a dog chasing his sheep, which may result in incalculable damage, and the only way in which he can protect his flock is by shooting the dog, he would be justified in doing so. In the present case, however, the respondent had no property in anything. He merely had the sporting rights. Either by leave or licence of a grant, he was entitled to go on the land to hunt game, but he had no property in the land, nor had he any property in the game until he had reduced it into possession. Neither a person owning the sporting rights nor the landowner has any property in wild game. He has no property in a covey of partridges or in wild pheasants. If he has pheasants in breeding pens, that is another matter, because they are in the same position as domestic fowls, but he has no property in a hare unless and until he has shot and taken it.

In my opinion, therefore, it cannot be said that the respondent could have reasonably believed that he was entitled to shoot the dog in protection of his property, because that would be a belief in something which the law does not recognise. Just as one cannot have a *bona fide* claim of right if the right is one which the law does not recognise, one cannot, in my opinion, honestly believe that it is necessary to shoot a dog to protect one's property when one has no property to protect. The justices were in error, but I can well understand their coming to a mistaken view of the law after they had had the judgment of LORD COLERIDGE in *Daniel v. Janes* (1), cited to them. In the circumstances, the case must go back to the justices, with an intimation that the offence is proved.

HUMPHREYS, J. : I agree.

CROOM-JOHNSON, J. : Two cases were cited to the justices on which they apparently acted : *Daniel v. Janes* (1), and *Smith v. Williams* (4). In HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 1, p. 567, the learned author states that those two cases are of doubtful authority since the decision in *Miles v. Hutchings* (2). I concur in the motion proposed by my Lord that this case should go back to the justices, with a direction that the offence is proved.

Appeal allowed with costs.

Solicitors : *Richard Brooks & Son* (for the appellant) ; *Clifford-Turner & Co.*, agents for *Raymond E. Frearson*, Skegness (for the respondent).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. COMMISSIONER OF POLICE AND ANOTHER.

Ex parte NALDER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Croom-Johnson, JJ.), October 28, 1947.]

Crown Practice—Habeas corpus—Arrest—Irish warrant endorsed and executed in England—Indictable Offences Act, 1848 (c. 42), s. 12—Petty Sessions (Ireland) Act, 1851 (c. 93), s. 27 (3).

On Aug. 27, 1947, a warrant which satisfied the provisions of the Petty Sessions (Ireland) Act, 1851, was issued by a justice of a district court in Eire for the arrest of one Nalder for an indictable misdemeanour. On Sept. 5, 1947, the warrant was brought before a metropolitan police magistrate at Bow Street, who endorsed it for execution in England under the Indictable Offences Act, 1848, s. 12. Nalder was arrested and his counsel obtained leave to move for a writ of *habeas corpus* on the grounds that Nalder's detention so that he might be brought before justices in Eire was illegal, and that the proceedings, if any, should have been under the Fugitive Offenders Act, 1881.

HELD : the Act of 1851 and s. 12 of the Act of 1848 were continued in force by the Irish Free State Constitution Act, 1922, sched. I, art. 73, and s. 12 was applied to the Irish Free State by the Irish Free State (Consequential Provisions) Order, 1923, art. 8 (1); the requirements of those enactments had properly been complied with; and Nalder was, therefore, in lawful custody.

[AS TO PURPOSES FOR WHICH HABEAS CORPUS GRANTED, see HALSBURY, Hailsham Edn., Vol. 9, pp. 713-719, paras. 1214-1223; and FOR CASES, see DIGEST, Vol. 16, pp. 250-252, 253, Nos. 501-524, 542-545.]

Case referred to :

(1) *The State, at the prosecution of Michael Kennedy v. Edward J. Little*, District Justice, [1931] I.R. 39.

APPLICATION for a writ of *habeas corpus* on the ground that the endorsement and execution in England of an Irish warrant had led to the illegal detention of the applicant, John Fielding Nalder. The court dismissed the application. The facts appear in the headnote and the judgment of LORD GODDARD, C.J.

R. O'Sullivan, K.C., Maude, K.C., and Seaton for the applicant.
Sir Valentine Holmes, K.C., and Geoffrey Howard for the respondents.

LORD GODDARD, C.J. : On Aug. 27, 1947, a warrant was issued by a justice of a district court in Eire for the arrest of the applicant, John Fielding Nalder, for what we should call in this country an indictable misdemeanour. That warrant, which was in the form provided by the Petty Sessions (Ireland) Act, 1851, an Act which applied to Ireland when Ireland was part of the United Kingdom and which it is not suggested has ever been repealed, was brought before a metropolitan police magistrate sitting at Bow Street Magistrate's Court on Sept. 5, and he backed it, or endorsed it for execution in this country. The applicant was arrested, and his counsel obtained leave to move for a writ of *habeas corpus* because he suggested that it is illegal to hold a person in custody for the purpose of being brought before the justices in Ireland, and that proceedings, if any, should have been taken under the Fugitive Offenders Act, 1881.

In our opinion, with all due respect to counsel's argument, the matter is really beyond question that the applicant is in lawful custody.

The Irish Free State Constitution Act, 1922, sched. I, art. 73, provides :

Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.

Among the laws that were in force in the Irish Free State at the date of the coming into operation of the Constitution was the Indictable Offences Act, 1848, s. 12. That Act did not apply to Ireland except s. 12 and the consequential sections. Also in force in 1922 was the Petty Sessions (Ireland) Act, 1851, which is a statute applicable only to Ireland except that s. 27 and the consequential provisions with regard to backing of warrants are effective in England in the same way as the provisions of s. 12 of the Indictable Offences Act, 1848, were effective in Ireland. Under s. 12 of the Act of 1848 it was provided that, if a warrant was issued in Ireland, it could, on the appropriate steps being taken and the endorsement of a justice in England obtained, be executed, among other places, in England. Under the same section a warrant issued in England could be executed in Ireland, and the Petty Sessions (Ireland) Act, 1851, except as to provisions of machinery, did not in any way whittle that down. It made similar provisions, by ss. 27 to 31, and substituted certain other machinery, and I daresay the practice has been to proceed under the Petty Sessions (Ireland) Act, 1851, rather than the Indictable Offences Act, 1848. That, however, seems immaterial.

In 1922, following on the Irish Free State Constitution Act, there was passed the Irish Free State (Consequential Provisions) Act, 1922, of which s. 6 provides :

(1) His Majesty may, by Order in Council—(a) make such adaptations of any enactments so far as they relate to any of His Majesty's Dominions other than the Irish Free State as may appear to him necessary or proper as a consequence of the establishment of the Irish Free State.

Accordingly, in pursuance of the last-mentioned section, on Mar. 27, 1923, the Irish Free State (Consequential Adaptation of Enactments) Order, 1923, was promulgated. Article 8 provides :

(1) The provisions of any enactments which are applicable to—(a) the endorsement and execution in England, Scotland, the Channel Islands, or the Isle of Man of warrants issued by justices' courts or judges of courts in Ireland . . . shall apply respectively to—(i) warrants issued by justices, courts or judges of courts in the Irish Free State.

It was considered necessary to make that provision because, for one reason, by whatever name the courts in Ireland were to be known in future, there would no longer be in Ireland a King's Bench Division, or quarter sessions.

The only question is whether this warrant can be executed in England. Article 8 clearly contemplates that it can be if the provisions of any enactments applicable for backing and executing warrants are valid. There is no question but that the provisions of the Petty Sessions (Ireland) Act, 1851, which is still in force in Ireland, have been complied with, and, therefore, I can find no ground whatever for saying that the applicant is not in lawful custody. The main point, as I understand, of counsel's argument is that the proceedings which were taken should have been taken under the Fugitive Offenders Act, 1881.

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

FOR THE FOOD AND DRUGS ACT, 1938, ss. 3 (1) and 83 (3), see HALSBURY'S STATUTES, Vol. 31, pp. 254, 306.]

CASE STATED by Sherborne (Dorset) justices.

Informations were preferred before the justices by the appellant, the chief inspector of food and drugs and an officer duly authorised by the Dorset County Council under the Food and Drugs Act, 1938, charging the respondents with selling to the prejudice of a purchaser pills of sodium thiocyanate not of the nature, substance or quality demanded, contrary to s. 3 (1) and 83 (3) of the Food and Drugs Act, 1938. The justices, being of opinion that the respondents had adopted the usual trade practice in the manufacture of the pills and were not aware at the time the pills were made and sold that the deficiency proved could occur in making pills by hand, dismissed the informations. The appellant appealed. The appeal was allowed.

Roberts, K.C. and *Alastair Morton* for the appellant.

Thomas Dewar for the respondents.

LORD GODDARD, C.J.: This is a Case stated by justices of Dorset, who dismissed an information preferred by the appellant, the Chief Inspector of Food and Drugs of the county, against the respondents who are manufacturing chemists. The circumstances are extremely simple and on the findings of the chemist, there can be no doubt that this appeal must be allowed. A doctor, living in the county, ordered from a firm of pharmaceutical chemists in London a quantity of one grain and a quantity of three grain pills containing a drug known as sodium thiocyanate. Those pills were, apparently, not stocked by that firm, and they obtained them from the respondents, who, being the persons ultimately responsible, were made defendants in the information. The doctor found that the patient to whom the pills were administered was not responding to treatment and came to the conclusion that there might be something wrong with the pills. He, therefore, sent an adequate quantity for analysis, and the pills were found to be on an average 23 per cent. and 28 per cent. respectively short of the one-grain or three-grains which had been ordered. Accordingly, the respondents were charged with supplying an article not of the nature and quality demanded by the purchaser, and, consequently, to his prejudice. The justices found that the pills were deficient. The explanation given by the respondents was: "We made these pills in the ordinary way in which we make pills when we have to make them by hand. A certain amount of material sticks to the hand or to the mortar or implement used in the mixing, and, therefore, we cannot guarantee that every pill that is sent out contains one grain or three grains, as the case may be. The pills go out as we make them, and without any guarantee on our part, because it would not pay us financially to test them." That certainly cannot be used as an excuse. If they know, through their experience of manufacture, that these pills will be or may be deficient in the quantity of the drug ordered, they should inform the doctor or the customer of that fact. There cannot be any doubt that, if a person orders pills of one grain and gets a pill 75 per cent. of that quantity, he is not getting an article of the nature and quality he has demanded, but is getting an article which is sold to his prejudice.

The only real point taken in support of the justices' finding is the contention of counsel for the respondents that these were pills which, in the ordinary walks of commerce, were known as one-grain and three-grains pills. The first answer to that is that there is no finding of that fact at all. There is the finding that the pills were made in the ordinary way the respondents make up their pills when they are manufactured by hand, but there is not a trace to be found in the case that doctors and the public know that when they are ordering a pill containing a particular quantity of the drug, they must expect to get a pill which contains much less of the drug. An attempt was made to support this argument by references to certain cases where an article is sold which, in ordinary every day commercial dealing, is known by a particular name, such as Demerara sugar. If the evidence is that the general public and the people who deal in the article know that the description "Demerara" is not necessarily a description of the place of origin, but is a description of a particular form of sugar, wherever it is made, then, of course, the purchaser does not sustain any prejudice. Everybody knows what Demerara sugar is in the ordinary acceptation of the term. It does not necessarily mean sugar shipped from British Guiana. It may be shipped from the West Indies, or anywhere else, but it is ground crystal

sugar. That argument can have no application to the case where a doctor is ordering a pill containing a definite quantity which he has specified to fulfil his order. There must be in making up pills a minute difference here and there in the quantity of the particular drug, but s. 4 of the Food and Drugs Act, 1938, protects the manufacturer if this occurs in good faith or accidentally by providing that where some constituent has been abstracted from the food or drug in question, it is a defence that the abstraction has not rendered the food injurious to health, or, as the case may be, affected injuriously the quality or potency of the drug, and was not made fraudulently to conceal the inferior quality of the food or drug. There is no question here of fraudulent concealment of the nature of the drug, but the respondents sold pills which were deficient in quality and potency, and, therefore, they have no defence.

The justices, apparently, thought it would be impossible in practice to ensure that the exact dosage of the drug was contained in each individual pill, but they have to look at the whole facts of the case. It may be difficult for the manufacturing chemists to supply the exact quantity, but they should make it clear to the purchaser that they cannot say that the particular pill contains substantially the precise amount of the drug which is ordered. The respondents did not give notice to that effect, and, therefore, on the facts found by the justices, in my opinion, there was clearly a sale to the prejudice of the purchaser. With all respect to the argument to which we have listened on behalf of the respondents, this case is unarguable, and it must go back to the justices with an intimation that it is proved.

HUMPHREYS, J. : I agree.

SINGLETON, J. : I agree.

Appeal allowed with costs.

Solicitors : Booth & Blackwell, agents for C. P. Bruton, Dorchester (for the appellant) ; William Charles Crocker (for the respondents).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

STEFANI v. JOHN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Croom-Johnson, JJ.), October 27, 1947.]

Magistrates—Summary jurisdiction—Right to trial by jury—Omission to inform defendant—Election by defendant, after hearing of charge begun, to be tried summarily—Summary Jurisdiction Act, 1879 (c. 49), s. 17 (1).

On the hearing of an information for an offence on conviction of which the appellant was liable to be sentenced to imprisonment for a term exceeding three months it was discovered, after some formal evidence had been given, that the appellant had not been informed of his right to be tried by a jury before the charge had been gone into, as required by s. 17 (1) of the Summary Jurisdiction Act, 1879. Counsel for the appellant, on his behalf, informed the justices that the appellant elected to be tried summarily and that no question would be raised on the matter, whereupon the justices proceeded to hear the remainder of the evidence and to adjudicate on the case :—

HELD : the provisions of s. 17 (1) and (2) not having been complied with, the justices had no jurisdiction to hear and determine the case and the conviction must be quashed.

[AS TO CLAIM TO TRIAL BY JURY, see HALSBURY, Hailsham Edn., Vol. 21, p. 592, para. 1037 ; and FOR CASES, see DIGEST, Vol. 33, pp. 318, 319, Nos. 332-345, p. 331, No. 441.]

Cases referred to :

(1) *R. v. Cockshott*, [1898] 1 Q.B. 582 ; *sub nom. R. v. Cockshott, etc., Southport J.J., Ex p. Rickerby*, 67 L.J.Q.B. 467 ; 78 L.T. 168 ; 62 J.P. 325 ; 33 Digest 319, 345.

(2) *Davis v. Morton*, [1913] 2 K.B. 479 ; 82 L.J.K.B. 665 ; 108 L.T. 677 ; 77 J.P. 223 ; 33 Digest 331, 441.

CASE STATED by Swindon justices. The appellant was convicted of an offence under the Defence Regulations, 1939, reg. 56A (2) of carrying out certain work for the alteration and repair of a house without having in respect thereof a licence. The facts appear in the judgment of LORD GODDARD, C.J. The appeal was allowed.

Ogilvie Jones for the appellant.

The respondent did not appear.

LORD GODDARD, C.J. : This is a Case stated by justices for the borough of Swindon, who adjudicated on a charge brought against the appellant under reg. 56A (2) of the Defence Regulations, 1939, of carrying out certain work in the alteration and repair of a house without having in force a licence in respect thereof. The case says :

Upon the hearing of the said information the appellant, being asked to plead to the charge, pleaded through his counsel: "Not Guilty," whereupon the hearing proceeded by the solicitor for the respondent opening his case and calling his witnesses. When two witnesses as to formal matters, who were not cross-examined, had been heard and the examination of a third witness had commenced, the clerk called the attention of appellant's counsel to the fact that the appellant had not been put on his election and it might be a case where this should have been done. The appellant's counsel, in reply, stated he was not aware whether or not his client should have been put on his election, but, in any case, his client did elect to be tried summarily, and the clerk could take it that no question would be raised on this matter. The third witness was cross-examined and re-examined, and two further witnesses for the respondent were heard. The appellant was then called, cross-examined and re-examined, and his counsel addressed the court.

The justices then proceeded to adjudicate, and they state :

We were of the opinion that the appellant's counsel's election to be tried summarily (made in the presence of the appellant) and his statement to the clerk that no question would be raised on the matter, was genuine, and, accordingly, convicted the appellant as hereinbefore stated.

The appellant should have been informed of his right to be tried by a jury since, under the Defence Regulations, he could have received a sentence of more than three months' imprisonment: see Summary Jurisdiction Act, 1879, s. 17.

No blame attaches to the justices in the circumstances, but the case raises a point of a highly technical character, *viz.*, whether the justices had power to act as a court of summary jurisdiction. The Summary Jurisdiction Act, 1879, s. 17 (1) provides :

A person when charged before a court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may, on appearing before the court and before the charge is gone into, but not afterwards, claim to be tried by a jury, and thereupon the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence . . .

The court has been referred to certain authorities. Perhaps, the leading case is *R. v. Cockshott* (1). In that case the defendant was not informed that he could elect to be tried by jury, and R. S. WRIGHT, J., giving the judgment of the court, said ([1898] 1 Q.B. 586) :

The words mentioned in sub-s. 2 [of s. 17 of the Summary Jurisdiction Act, 1879] or words to the same effect, are to be addressed "for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section." I think it would be wrong to fritter away the protection which the section intends to give to accused persons. It intends to give them protection in the broadest and most generous way by providing that the option of trial by jury shall be put before any accused person before the charge is gone into. I think the option ought to be put before him before he is asked whether he pleads guilty or not guilty. The protection is possibly even more necessary where he intends to plead guilty . . . there cannot be a waiver of a right which the defendant does not know that he has. I doubt whether he could waive the right to be informed of his option to be tried by a jury if he knew that he had the option. I am inclined to think that, the duty to inform having been imposed upon the court for the protection of all accused persons, the right to be informed could not be waived. I am of opinion that, the provisions of sub-s. 2 having not been complied with, this rule ought to be made absolute and the conviction quashed.

Some years later *Davis v. Morton* (2) came before this court. In that case it was discovered that through inadvertence the defendant had not been given the option of his right to be tried by a jury, and thereupon the solicitor for the informant withdrew the summons with the consent of the justices, although the solicitor for the defendant contended that there was no power to withdraw it. Another summons for the same offence was issued, and on that summons the defendant was informed of his right to be tried by a jury. He did not elect

A so to be tried and he was convicted. The matter was brought before this court on the ground that the withdrawal of the previous summons amounted to a dismissal of the case which could be pleaded in bar of the subsequent proceedings. Exactly the same state of facts occurred in that case as in the present, except that in this case the matter was raised soon after the case had started, whereas in *Davis v. Morton* (2), the case had been gone into to some extent. Reading the judgments of PICKFORD, J., AVORY, J., and RIDLEY, J.,

B I think it is clear that in that case the court were of opinion that there was a lack of jurisdiction in the magistrates.

Summary jurisdiction is entirely a matter of statute. The justices have power to deal with cases summarily only if they are given power by statute to do so, and if some provision in the statute is not complied with it follows that they have no jurisdiction to hear and determine. Accordingly, we are

C bound to hold that in the circumstances of this case, for purely technical reasons, the justices have no jurisdiction, and the conviction must be quashed.

HUMPHREYS, J. : I agree.

CROOM-JOHNSON, J. : I also agree. I have considered whether, the words of s. 17 (2) of the Act of 1879 being that the accused person is to be addressed "to the following effect," in substance that was not done in the

D present case, but I have come to the conclusion that it is impossible to take that view.

Appeal allowed.

Solicitors : *Alwyn Williams & Co.* (for the appellant).

[Reported by F. A. AMIES, Esq., *Barrister-at-Law.*]

E GOSS v. GOSS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Wallington, J.), June 18, 1946, October 13, 1947.]

Divorce—Evidence—Non-access—Bastardization of issue—Evidence directed solely to issue of condonation.

F *Per curiam* : Although the rule in *Russell v. Russell* ([1924] A.C. 687) prevents proof of a charge of adultery by either spouse giving evidence of non-access if the effect of such evidence is to bastardise a child born in wedlock, evidence denying intercourse during the relevant period is admissible if directed solely to the rebuttal of an allegation of condonation or to the bringing or refuting of a charge of contracting a venereal disease on an issue of cruelty.

G *Observations of WILLMER, J., on this point in Morris v. Morris, Morris and Manning (King's Proctor Showing Cause)* ([1947] 2 All E.R. 377) *disagreed with.* *Observations in Glenister v. Glenister* ([1945] 1 All E.R. 513) *approved.*

[AS TO THE RULE IN *Russell v. Russell*, see HALSBURY, Hailsham Edn., Vol. 10, p. 663, para. 976 ; and FOR CASES, see DIGEST, Vol. 27, pp. 297, 298, Nos. 2743-2753.]

H Cases referred to :

- (1) *Morris v. Morris, Morris and Manning (King's Proctor Showing Cause)*, [1947] 2 All E.R. 377.
- (2) *Glenister v. Glenister*, [1945] 1 All E.R. 513 ; [1945] P. 30 ; 114 L.J.P. 69 ; 172 L.T. 250 ; 109 J.P. 194 ; Digest Supp.
- (3) *Russell v. Russell*, [1924] A.C. 687 ; 93 L.J.P. 97 ; 131 L.T. 482 ; 27 Digest 297, 2743.

APPEAL by the husband from an order made against him by the Bedford City Justices on the ground of his desertion. The facts appear in the judgment of LORD MERRIMAN, P. The appeal was allowed.

H. E. Park for the husband.

The wife did not appear.

LORD MERRIMAN, P. : This is an appeal against an order made by the Bedford City justices against the husband on Mar. 22, 1946, on the ground of his desertion as from a date in Oct., 1945. The appeal came before this court first on June 18, 1946, and it was then adjourned on the court being informed that the husband had recently presented a petition for divorce on the ground of adultery. The charge of adultery was then based on the birth of a child to the wife in Dec., 1943, when the husband had been a prisoner of war for two years. The petition was subsequently amended, first, to bring in a reference to the proceedings before the justices, and, secondly, to refer to a child born to the wife on May, 13, 1946, the parentage of which was not admitted by the husband. The case came on as an undefended suit before His Honour JUDGE ENGELBACH sitting as a commissioner of the High Court. He pronounced a decree *nisi*, and that decree has been made absolute.

That is enough to dispose of this appeal, but I feel impelled to add another word, because of a doubt which has been introduced by the judgment of WILLMER, J., in *Morris v. Morris, Morris and Manning* (1). In that case the learned judge criticised and dissented from the view expressed by this court in *Glenister v. Glenister* (2) that, although *Russell v. Russell* (3) prevents proof of a charge of adultery by either spouse giving evidence of non-access, a spouse rebutting an allegation of condonation or refuting a charge of communicating a venereal disease on the issue of cruelty must necessarily be entitled to say that he or she did not have sexual intercourse at the time alleged. In *Glenister v. Glenister* (2) we followed the well-known passage in LORD DUNEDIN's opinion in *Russell v. Russell* (3) ([1924] A.C. 728, 729). WILLMER, J., has held, first, that our decision was *obiter*, and, secondly, that it was wrong. On reading *Morris v. Morris, Morris and Manning* (1) I cannot help observing that WILLMER, J.'s criticism of our observations in *Glenister v. Glenister* (2) is itself *obiter*, because he decided on the facts that the evidence was admissible as it could not possibly tend to bastardise the child, and, therefore, it was not necessary for him to consider the matter. It may very well be (having regard to the ground on which *Glenister v. Glenister* (2) was ultimately decided), that, although it was certainly necessary to go into the issues connected with the venereal disease, any observations directed to that issue were *obiter dicta* so far as the final result was concerned. But I feel impelled to go further. This question did not arise for the first time in *Glenister v. Glenister* (2). I am speaking now with an experience of 14 years in this court, and I say without the slightest hesitation that it has arisen over and over again, and I myself have given, and I am certain that other judges have given, on many occasions decisions based on the admissibility of evidence to rebut an allegation of condonation or in relation to a charge of cruelty which, if directed solely to the question of adultery, would have been inadmissible under the rule in *Russell v. Russell* (3). I cannot believe that the law is such that a wife is permitted to say, on a charge of adultery : " True, I have committed adultery, but you condoned it by having intercourse with me on such and such a date," which happens to coincide with the conception of a child she is expecting, and yet the husband is not entitled to say that he did not have intercourse on that date and, by the exclusion of such evidence, must be held to have condoned the wife's adultery. That seems to me, with all respect, to make nonsense of the law, and whether or not we, sitting here today, are bound by *Glenister v. Glenister* (2), I propose to follow, at any rate, that part of the judgment which is based on the observations of LORD DUNEDIN in *Russell v. Russell* (3). I do not ignore the awkwardness of the circumstance that in the present case there was a charge of adultery which bore on the same question whether the husband had intercourse with the wife in Aug., 1945. It is impossible in nature to dissociate the two issues, but in law, in my opinion, they are quite distinct, and I accept counsel's assurance that that issue was not pursued before the learned commissioner, for the very reason that, founding himself on our observations in *Glenister v. Glenister* (2), counsel very properly indicated to the learned commissioner that the evidence of the husband was not admissible to prove the charge of adultery, though it was admissible to rebut the allegation of condonation. In my opinion, that was right, and I think the learned commissioner was correct in accepting the evidence. This appeal, in my opinion, should be allowed.

WALLINGTON, J.: I agree. Looking at the circumstances, I have a strong feeling that the decision of the justices was wrong. I do not desire to discuss the interesting question whether evidence of non-access by a spouse may be given to refute an allegation of condonation. After what my Lord has said I have no doubt that the view of this court is clear, that such evidence is admissible in some circumstances, and I incline to the opinion that it was admissible in this case. If, in the future, this point of law should be raised, I confess that I should approach it with a strong bias in favour of the view that there is no doubt about the admissibility of the evidence, even if it fell to be determined on the law as it stood before the *Glenister* (2) and *Morris* (1) cases were decided.

Appeal allowed.

Solicitors: *Ernest W. Long & Co.*, agents for *C. M. P. Burgess*, Bedford (for the husband).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

R. v. HIGGINS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Singleton, JJ.), October 22, November 3, 1947.]

Inns and Innkeepers—Duty of innkeeper to supply refreshment to traveller—Reasonableness of refusal—Question of fact for jury—Extent of duty at common law—Right to reserve tables.

An innkeeper cannot refuse to supply food and lodging to a traveller without reasonable excuse, but what is a reasonable excuse is a question for the jury. An innkeeper is not bound, as a matter of law, to send out to procure food if he has none in the house, nor is he obliged to allow the whole of his provisions to be consumed during the day, but he is entitled to keep food for an evening meal or breakfast next morning if he reasonably expects other travellers to be arriving later. It is not illegal for an innkeeper to book tables for prospective guests, to serve only those who have booked tables, and to refuse to serve anyone else, even if he has food in the house unless, on a full consideration of all the facts, the jury thinks such a refusal unreasonable.

Browne v. Brandt ([1902] 1 K.B. 696) considered.

[AS TO LIABILITY OF INNKEEPER TO RECEIVE AND ENTERTAIN GUESTS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 141-147, paras. 198-203; and FOR CASES, see DIGEST, Vol. 29, pp. 5-8, Nos. 45-86.]

Case referred to:

(1) *Browne v. Brandt*, [1902] 1 K.B. 696; 71 L.J.K.B. 367; 86 L.T. 625; 29 Digest 7, 75.

APPEAL against conviction.

The appellant, an innkeeper, was charged at Essex Quarter Sessions with having refused to supply refreshment to a traveller without lawful excuse, contrary to the common law. He appealed on the ground of misdirection of the jury. The Court of Criminal Appeal quashed the conviction.

Slade, K.C., and *C. E. Rochford* for the appellant.

Buckee for the Crown.

Cur. adv. vult.

Nov. 3. **LORD GODDARD, C.J.**, read the following judgment of the court. The appellant was convicted at Essex Quarter Sessions of a common law misdemeanour. The indictment charged that he, being an innkeeper, refused to supply refreshment to a traveller contrary to the common law, and the particulars of the offence given were that on a certain date in Apr., 1947, he, being the keeper of an inn known as the Cock Hotel, Epping, without lawful excuse refused to supply the prosecutor with refreshment for which he was willing to pay. The appellant now appeals to this court on the ground of misdirection.

Except on one point the facts were not in dispute before us. The defendant was admittedly an innkeeper and it is not disputed that the prosecutor, one Robert Sidney Roach, was a traveller. On a Sunday last April, Mr. and Mrs

Reach went to the defendant's inn and asked for lunch. The waiter whom they saw asked them if they had booked, and, on being told that they had not, he said that his orders were not to serve anybody who had not previously booked. At this time luncheon was in progress of being served. The dining room was not full and there were vacant places at tables. The manageress, who is the wife of the appellant, was called and she confirmed the refusal to supply Mr. and Mrs. Reach with lunch in the dining room as they had not already booked a table. The matter which was in conflict between the prosecution and the defence was that, whereas the prosecutor said that he and his wife asked if they could have some sandwiches and Mrs. Higgins refused to supply them, Mrs. Higgins, supported by another witness, said that she offered sandwiches and they were refused. There was no question but that there was food at the time in the inn and more than enough for luncheon. The appellant was reserving some of the food he had in his house for the evening meal and for the next morning's breakfast. Those are all the facts that appear to the court to be material.

Now, there is no doubt as to the obligation of an innkeeper. He is bound to supply a traveller with food and lodging, which he cannot refuse without reasonable excuse. A reasonable excuse is a lawful excuse. What is a reasonable excuse is eminently a question for the jury, and, had this case merely left these facts to the jury with the direction that it was for them to find whether the excuse put forward by the defendant was one which in all the circumstances was reasonable, there would have been no ground for interfering with the conviction if the jury had seen fit to convict. Unfortunately, a great many other matters were introduced in this case with regard to the right of an innkeeper to accept bookings for meals and also with regard to his right to run his inn as a restaurant, as it was called, and the main argument of counsel for the appellant was that the directions which were given to the jury on these points were not only inaccurate in law but also tended to confuse the simple issue which the jury had to try.

We say at once that in some parts of his summing-up the chairman gave quite accurate directions to the jury, but there are other passages to which we think exception can properly be taken. The first matter to which counsel for the appellant called attention was that, during the course of the opening speech for the defence, several interlocutory observations were made by the chairman which, counsel contends, would give the jury a wrong impression of the law on the subject and of the case which they had to try. When counsel for the appellant, in his address to the jury, said: "All that an innkeeper has to do is to act reasonably. He is not under an absolute obligation to provide a traveller with food," the chairman said:

I shall tell the jury that he is. If he [*i.e.*, the innkeeper] has no food in the house and is unable to procure food, the maxim *lex non cogit ad impossibilia* would apply, but, given that the man is a traveller, given that the innkeeper has not an absolutely full house, given that the innkeeper has food or is able to procure food, then the obligation is absolute.

No doubt, the jury would pay a great deal of attention to an observation of that sort which was made by the chairman in the course of counsel's opening speech for the defence, and, in our opinion, that is not an accurate statement of the law. In the first place, an innkeeper is not, in our opinion, bound as a matter of law, if he has no food in the house, to send out and procure it, a somewhat difficult task on a Sunday. No doubt, if a jury thought that an innkeeper was not making provision for such guests as he might reasonably expect, they might say that he had acted unreasonably, but we think it is far too wide a statement to say that he is bound to supply food if he can procure it. Again, we are unable to agree with the chairman that the obligation is absolute if the innkeeper has food in the house. A jury might well think that it would be reasonable for an innkeeper to say at any particular time: "I cannot give you food now. True, I have food in the house, but I have to consider the travellers who may come later in the day, the people who are staying in the hotel, the requirements of my own family and servants, and, more particularly, on a Sunday, the provision of breakfast on Monday morning." Those are matters which the jury can fairly take into consideration on the question whether a refusal is reasonable or not.

A little later the chairman emphasised this matter by saying :

They [i.e., travellers] can say to the innkeeper : " I am a traveller. You must supply me with food." The innkeeper then says : " I have not got any food," and the innkeeper is committing no offence, but, if the innkeeper has any food and he will not supply them, and if they are prepared to pay for it, he is committing an offence.

From what we have already said, it will be seen that the court cannot agree with so wide a statement as to the innkeeper's obligation, yet the jury would have to consider the defendant's evidence in the light of that observation by the chairman.

It is, perhaps, a matter to remember that the people who had booked tables for lunch at the defendant's inn on the day in question were coming from a distance and were not living in the immediate neighbourhood of the inn. The latter would, of course, not be travellers, and it may well be that an innkeeper is not entitled so to arrange his affairs that he can supply residents in his town or village, who may find it more convenient to lunch or dine at an inn than in their own homes, with the result that he is not able to supply legitimate travellers who require refreshment on their journey. In the days when the liability of innkeepers was first laid down, such conveniences as telephones and such restrictions as are imposed by rationing orders did not exist, and, while we agree that an innkeeper is not allowed, in the words of LORD ALVERSTONE, C.J. ([1902] 1 K.B. 698), in *Broune v. Brandt* (1) to " pick and choose his guests," we cannot think that that phrase applies to the case where a number of travellers give notice to an innkeeper by telephone or letter that they will be calling at his inn for a meal and he has provided for them. If in such a case an innkeeper were to say to a casual traveller who arrives : " Such food as I have I am keeping for other travellers who have already intimated that they are on their way and I am afraid I have none left for you," a jury might well find the refusal to be reasonable.

Then, when the appellant was giving evidence, many questions were put and discussions arose whether it was legitimate for an innkeeper to book tables for people who had intimated their intention of coming for a meal. It was said that, by so doing, the appellant was running a restaurant and not an inn, and, in the opinion of the court, during the cross-examination the chairman obviously intimated to the jury that there was something improper or illegal in an innkeeper booking tables. We are unable to agree with this view. We see no reason whatever why an innkeeper should not book tables, or why it should be said that, as a matter of law, he is, by so doing, failing to conduct his inn according to his common law obligations. He is not bound to supply—as, indeed, the chairman pointed out—any particular sort or class of meal, or a meal in any particular room. The whole question is whether or not a refusal, if it were made, was in all the circumstances of the case reasonable.

When we come to the summing up, many passages in it are quite unexceptionable and, indeed, correctly stated the issue for the jury. At an early stage the chairman, having told the jury that the first questions, which were really not in dispute, were whether the defendant was an innkeeper and the prosecutor a traveller, said :

The third question is : Did Mr. Higgins refuse to supply some reasonable refreshment to Mr. and Mrs. Reach ? And the fourth question is : Was that refusal an unreasonable refusal ?

If those simple questions had been left to the jury without the complications in regard to the booking of tables and allocating food for one meal or another, and the jury had taken the view that the refusal in this case was unreasonable, this court would have seen no reason to interfere. The difficulty is that so much was said in the course of the case with regard to other matters that we think the issue which was left to the jury was far from clear. It appears to us that the real objection to the directions given by the chairman is that many matters were treated as if they were matters of law while, in truth, they were nothing more than questions of fact. More particularly, the matter referred to constantly by the chairman is the allocation of food to particular meals. We repeat that it cannot be said as a matter of law that an innkeeper is not entitled to refuse to allow the whole of his provisions in the inn to be consumed at what is usually called luncheon time, or that he is doing anything wrong if he keeps

provisions for those he may reasonably expect in the evening or for the requirements of himself and his family.

In the course of his summing up, the chairman dealt fully and satisfactorily with the question whether or not sandwiches had been offered and refused or demanded and refused. Indeed, he went so far as to say in the course of his summing up that, if sandwiches were offered and refused, that was an end of the case. That, really, was putting the matter too favourably for the appellant, for it would be for the jury to say whether, if the sandwiches were offered, that amounted to an offer of reasonable refreshment. Such refreshment might, in some cases, be considered reasonable and, in others, totally inadequate.

Towards the close of the summing up the chairman said :

Now, members of the jury, Mr. Higgins was called, and it is quite clear that he has got the wrong idea about his obligations as an innkeeper. He is under the impression that he can pick and choose his guests. He cannot. He is under the impression that he can say : " I will serve people who have booked my tables, but, having booked up all my tables, I will not serve anybody else, even if I have food in the house." He cannot do that, because that would be picking and choosing.

In our opinion, that is again stating the matter far too broadly. There cannot, as a matter of law, be anything wrong in an innkeeper saying that he will serve people who have booked tables and will not serve anybody else, even if he has food in the house, unless, on a full consideration of all the facts, the jury thinks such a refusal is unreasonable. He can book tables—at least, there is nothing illegal in his doing so—and, in our opinion, he is not obliged, as a matter of law, to serve the last crumb of food in his house to any traveller who may arrive at any moment. If he knows or reasonably expects that in the evening other travellers will be arriving, he surely is entitled to keep food for an evening meal.

The summing up concluded in this way :

The third question is : Did the defendant refuse reasonable refreshment to Mr. and Mrs. Reach ?

A perfectly proper direction. Unfortunately, the chairman added :

And the fourth question is : In all the circumstances, taking into consideration the rationing difficulties, taking into consideration that he could buy fish and poultry, was such refusal reasonable ?

That, we think, was introducing an irrelevant consideration. To put it in that way, and at the same time to hand the jury the menu (as was done), might, we think, well lead the jury to say that, even if an offer of food was made, it could not have been reasonable, because it was said that the appellant could go out and buy fish and poultry, which he certainly was under no obligation to do.

In our opinion, so many extraneous circumstances were imported into this case, and so many matters were treated as questions of law which were nothing but questions of fact, that we think the only safe course is to quash the conviction. In truth, this case raises no new question, nor do we desire to lay down any new or particular doctrines of law with regard to the liability of innkeepers in regard to the supplying of food or refreshment to travellers. We think that the case may have given the impression that an innkeeper is doing something wrong if he books tables for prospective guests. There is nothing wrong in his so doing. It may also have given the impression that an innkeeper is bound to use up the whole of the food in his house at any particular time that a traveller arrives and asks for refreshment. Again, we cannot agree that that can be laid down as a matter of law. All these are mere matters which go to the reasonableness or unreasonableness of the innkeeper's conduct if he refuses to supply a particular traveller, and are questions solely for the jury. What is reasonable depends on all the circumstances of the case, and while we think that in many passages the chairman gave correct direction to the jury, we think that a wrong impression may have been given to them and they may have understood that such matters as we have just referred to must be regarded as unreasonable conduct on the part of the innkeeper, and it is for that reason that we quash the conviction.

Conviction quashed.

Solicitors : J. E. Lickfold & Sons (for the appellant) ; Director of Public Prosecutions (for the Crown).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

FORSYTH v. FORSYTH.

[COURT OF APPEAL (Tucker, Bucknill and Cohen, L.JJ.), October 16, 17, November 1, 1947.]

Husband and Wife—Maintenance—Jurisdiction—Husband ordinarily resident in Scotland—Wife residing in England at wish of husband—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4.

By s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, which does not extend to Scotland, any married woman whose husband shall have deserted her may apply to any court of summary jurisdiction acting within the petty sessional district in which the cause of complaint shall have wholly or partially arisen for an order or orders under the Act.

At the time of the marriage in 1943 the husband was in the army and the wife went to live with his family in Scotland, where she remained until Christmas, 1945, when trouble arose between the parties. The husband, who was on leave, told the wife that, owing to shortage of room in his parents' house, he had decided that she should return to London until he was demobilised and that he would follow her in a few days. In this belief the wife returned to her parents' home in London, but the husband did not follow her, and from that date she did not see him again nor did she receive any money from him. In July, 1946, the wife took out a summons before the justices in the petty sessional division in which she was resident, alleging that the husband had deserted her. The summons was directed to the husband at his address in Scotland and was served on him under the provisions of the Summary Jurisdiction (Process) Act, 1881. At the hearing the solicitor representing the husband objected to the jurisdiction on the ground that the husband was a domiciled Scotsman, but he called no evidence in support of this submission, nor did the wife call any evidence that the husband was a domiciled Englishman. The justices overruled the objection to the jurisdiction, found that the complaint of desertion was proved, and made an order for the wife's maintenance, but they did not make a separation order. For the purposes of the appeal it was assumed that at the material time the husband was ordinarily resident in Scotland and the wife was, at the express wish of the husband, resident in England:—

HELD: (i) the general words of s. 4 of the Act of 1895 did not constitute special legislation and an exception to the general principle laid down by LORD SELBORNE, L.C., in *Berkley v. Thompson* (1884) 10 App. Cas. 49) that a person resident abroad, still more, ordinarily resident and domiciled abroad, was *prima facie* not subject to the process of the court, but must be found within the jurisdiction to be bound by it.

M'Queen v. M'Queen (1920 2 Sc. L.T. 405), approved.

(ii) if a court of inferior jurisdiction, which derives its jurisdiction from statute, lacks jurisdiction, parties cannot by agreement or otherwise confer jurisdiction on it, and, consequently, the objection to the jurisdiction was not waived by the presence of the husband's solicitor before the justices.

Semble: mere presence, as distinct from the ordinary residence, of the offending spouse in the jurisdiction at the time the summons was issued would be sufficient to confer jurisdiction on the justices.

Decision of the Divisional Court ([1947] 1 All E.R. 406), reversed.

[AS TO SUMMARY JURISDICTION OF JUSTICES IN MATRIMONIAL CAUSES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 834-848, paras. 1336-1354; and FOR CASES, see DIGEST, Vol. 27, pp. 554-568, Nos. 6081-6264.]

Cases referred to:

- (1) *Harris v. Taylor*, [1915] 2 K.B. 580; 84 L.J.K.B. 1839; 113 L.T. 221; 11 Digest 449, 1072.
- (2) *Foster v. Usherwood*, (1877), 3 Ex.D. 1; 47 L.J.Q.B. 30; 37 L.T. 389; 16 Digest 118, 167.
- (3) *R. v. Shropshire County Court Judge*, (1887), 20 Q.B.D. 242; *sub nom.*, *R. v. Rogers*, 57 L.J.Q.B. 143; 58 L.T. 86; 16 Digest 122, 203.
- (4) *Berkley v. Thompson*, (1884), 10 App. Cas. 45; 54 L.J.M.C. 57; 52 L.T. 1; 49 J.P. 276; 3 Digest 393, 312.
- (5) *Carrick v. Hancock*, (1895), 12 T.L.R. 59; 11 Digest 448, 1065.
- (6) *M'Queen v. M'Queen*, 1920 2 S.L.T. 405.

APPEAL by the husband from a decision of the Divisional Court (LORD MERRIMAN, P., and JONES, J.), dated Feb. 13, 1947, and reported [1947] 1 All E.R. 406, affirming a decision of the justices of Edmonton (Middlesex) that they had jurisdiction to hear and determine a complaint by the wife, who was, at the express wish of the husband, resident in England, against the husband who was ordinarily resident and domiciled in Scotland. The appeal was allowed. The facts appear in the headnote.

Ewen Montague, K.C., and *James MacMillan* for the husband.

Rewcastle, K.C., *Bernard Lewis* and *Gavin Simonds* for the wife.

Cur. adv. vult.

Nov. 10. The following judgments were read.

TUCKER, L.J. : I have had the advantage of reading the judgment which **BUCKNILL, L.J.**, is about to deliver on the main question in this appeal, *viz.*, the jurisdiction of the justices to make an order against the husband under the Summary Jurisdiction (Married Women) Act, 1895, on the ground of desertion, he having, at all material times, been resident and domiciled in Scotland, having been served with the summons in Scotland and not having been personally present within the jurisdiction when the summons was issued or when the order was made. I entirely agree with the conclusion which he has reached and the reasoning whereby he has arrived at that conclusion and do not desire to add anything to his judgment on this point. I will content myself, therefore, with dealing with two subsidiary matters.

Counsel for the wife, before dealing with the main issues, submitted that the question of jurisdiction did not really arise, and that, accordingly, even if he was wrong as to jurisdiction, the judgment of the Divisional Court should be upheld on other grounds. First, he contended that on the evidence before the justices there was nothing to show that the husband was resident or domiciled in Scotland. I think this submission clearly fails. The evidence showed a marriage in Scotland; that the husband's parents, with whom the parties lived after their marriage during the husband's periods of leave from the forces, had their home in Scotland; and that on the occasion of his last leave the husband was seeing his old employers with reference to his employment, which I understand to mean with reference to his returning to his old employment on demobilisation. On the summons his address is given as 13, Torry Road, Huntly, in the county of Aberdeen, and he was, in fact, served in Scotland. There was no evidence that he had ever resided in England, and the only inference that could properly be drawn from the evidence is that he was at all times domiciled and resident in Scotland.

Secondly, it was contended that, even if the husband was, in fact, domiciled and resident in Scotland, he had submitted to the jurisdiction of the justices by reason of the fact that his solicitor had appeared before the justices and cross-examined the wife, and that, accordingly, he could not now be heard to complain of lack of jurisdiction. For this proposition counsel relied on the well-known authorities which have decided that the courts of this country will enforce the judgments of foreign courts of competent jurisdiction where the defendant was at the commencement of the action resident in a foreign country, or where at the time of judgment he is a subject of the sovereign of that country, or where he has by voluntarily appearing in the action submitted to the jurisdiction of its courts: see *Harris v. Taylor* (1). In that and other similar cases the courts have had to consider on the facts of each case whether the defendant had voluntarily submitted to the jurisdiction of a competent foreign court. Such cases have no application to courts of inferior jurisdiction in this country which derive their jurisdiction from statute. If such an inferior court lacks jurisdiction, parties cannot by agreement or otherwise confer jurisdiction on it. An instance of this principle is to be found in *Foster v. Usherwood* (2), where, dealing with the jurisdiction of the county court, **BRAMWELL, L.J.**, used this language (3 Ex.D. 3):

It is urged that consent has waived the objection. I do not understand what is meant by waiving the objection. In this case the registrar had no jurisdiction to make the order to try the action in the county court. The parties cannot by consent confer a jurisdiction which does not exist.

- Again in *R. v. Shropshire County Court Judge* (3) a writ of prohibition was granted against a county court judge who had acted without jurisdiction in awarding compensation to a plaintiff against a bailiff of another county court who had been guilty of neglect, connivance or omission in levying an execution, notwithstanding that the bailiff had appeared before the county court judge and had thereby, as was contended, submitted to the jurisdiction. It is true that in some circumstances the court may refuse to allow prohibition to issue
- A where the applicant has by his conduct waived or acquiesced in some irregularity of procedure or has not taken objection at the proper time, but the reason for this is that the issue of a writ of prohibition is discretionary and the court may refuse this relief, not on the ground that the applicant has by his conduct conferred on an inferior tribunal jurisdiction which it does not possess, but in the exercise of its discretion in the grant of this particular remedy. We are not here concerned with prohibition. Appeal lies to a Divisional Court of the Probate,
- B Divorce and Admiralty Division from a decision of justices under the Summary Jurisdiction (Married Women) Act, 1895, and, in my view, a respondent to an application under that Act over whom justices have no jurisdiction is not precluded from appealing on the ground of lack of jurisdiction from an order made against him by reason of the fact that he has been represented by a solicitor who, as in the present case, while protesting against the jurisdiction
- C at every stage, has asked some questions of the applicant which do not appear to be exclusively relevant to the question of jurisdiction. In my view, this point, which was not taken in the court below, fails. For these reasons and for those contained in the judgment of BUCKNILL, L.J., I am of opinion that this appeal should be allowed.

- BUCKNILL, L.J.:** This is an appeal from a decision of the Divisional
- D Court of the Probate, Divorce and Admiralty Division who had dismissed the appeal of the husband from an order made against him by the justices of the petty sessional district of Edmonton. The order was for payment of 20s. a week by the husband to his wife on the ground of his desertion.

- The facts of the case are clearly set out in the judgment of LORD MERRIMAN, P. The cardinal facts are that at the time when the justices summoned the husband to appear before them to answer the wife's complaint of desertion, the wife
- E was living in Tottenham, and the husband was living in Huntly in Scotland. There is no evidence that he was ever in England either before or after the issue of the summons. During the marriage the parties lived together in Scotland at his parents' house while the husband was on leave from the army. I agree with the conclusion drawn by the learned President that for the purpose of the case the husband was shown to be ordinarily resident in Scotland, and also that
- F on the evidence before the justices the wife at the material time was, with the full consent of the husband, and, indeed, at his express wish, resident in England.

- The only point taken on behalf of the husband before the Divisional Court, and the main point argued before this court, was that the residence in England of the husband as well as the wife was a condition precedent to the exercise by the justices of their jurisdiction in this case. There is no reported case decided in England precisely in point, and the decision of the question seems
- G to me to turn on whether s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, must be qualified by the general principle stated by LORD SELBORNE, L.C., in *Berkley v. Thompson* (4). The summons is based on s. 4 of the Act of 1895, and s. 2 of the Act states that the Act shall not extend to Scotland or Ireland. For the purposes of the present case the material words of s. 4 of the Act of 1895 are that any married woman whose husband shall have deserted her may apply to any court of summary jurisdiction acting within the petty
- H sessional district in which the case of complaint shall have wholly or partially arisen for an order or orders under the Act. In *Berkley v. Thompson* (4) the material facts were that a woman who resided in Sunderland applied to the justices at Sunderland for an affiliation summons in respect of her child, of whom she alleged one Duncan was the father. At the hearing of the summons before the justices, Duncan did not appear, but his solicitor objected that the justices had no jurisdiction on the ground that he was domiciled and resident in Scotland. The justices declined to adjudicate, and a rule was obtained calling on the justices to show cause why they should not proceed to hear and determine

the matter. The Queen's Bench Division, after argument, discharged the rule, and this order was affirmed in the Court of Appeal and then in the House of Lords. The principle stated by LORD SELBORNE, L.C., in *Berkley v. Thompson* (4) was as follows (10 App. Cas. 49) :

... the general principle of law is *actor sequitur forum rei* ; not only must there be a cause of action of which the tribunal can take cognizance, but there must be a defendant subject to the jurisdiction of that tribunal ; and a person resident abroad, still more, ordinarily resident and domiciled abroad, and not brought by any special statute or legislation within the jurisdiction, is *prima facie* not subject to the process of a foreign court—he must be found within the jurisdiction to be bound by it.

This general principle finds its place in DICEY'S CONFLICT OF LAWS, 5th ed., p. 398. Rule 95 states :

In an action *in personam* in respect of any cause of action, the courts of a foreign country have jurisdiction in the following cases :—*First case*—Where at the time of the commencement of the action, the defendant was resident or present in such country so as to have the benefit, and be under the protection of the laws thereof.

At p. 403 the text states :

... presence is enough, or in other words ... residence means for the present purpose nothing more than such presence of the defendant as makes it possible to serve him with a writ or other process by which the action is commenced.

The authority for this statement is *Carrick v. Hancock* (5). In that case LORD RUSSELL OF KILLOWEN, C.J., observed (12 T.L.R. 60) that the jurisdiction of a court was based on the principle of territorial dominion, and that all persons within any territorial dominion owed their allegiance to its sovereign power and obedience to all its laws and to the jurisdiction of its courts. In his opinion, that duty was correlative to the protection given by a State to any person within its territory. This relationship and its inherent rights depended on the fact of the person being within its territory. It seemed to him that the question of the time the person was actually in the territory was wholly immaterial. In *Carrick v. Hancock* (5) the writ was served on the defendant during a short visit he was paying to Sweden. This passage in LORD RUSSELL'S judgment was cited with approval by BANKES, L.J., in *Harris v. Taylor* (1) ([1915] 2 K.B. 592).

Is there any reason why the general principle stated by LORD SELBORNE should not be applied when interpreting s. 4 of the Summary Jurisdiction (Married Women) Act, 1895 ? The learned President in his judgment, as I understand it, said that, in his view, the combined effects of s. 4 of the Summary Jurisdiction Act, 1848, s. 4 of the Act of 1895 and s. 4 of the Summary Jurisdiction (Process) Act, 1881, comprised "special legislation" which brought the husband, although resident in Scotland, within the jurisdiction. With the greatest respect to the learned President, I do not agree that the Acts in question have this result. It is true that s. 4 of the Summary Jurisdiction Act, 1848, is quite general in its terms, but I do not think that this fact takes it out of the general principle to which I have referred. LORD WATSON in *Berkley's case* (4) (10 App. Cas. 56) pointed out that the Summary Jurisdiction Acts before 1881 gave no jurisdiction as against the respondent when domiciled and resident in Scotland. Section 4 of the Act of 1881 is procedural only, and as LORD SELBORNE pointed out in *Berkley v. Thompson* (4) that section proceeds on the assumption of jurisdiction under the Summary Jurisdiction Acts. LORD SELBORNE said (*ibid.*, 50) :

How can the process be issued under the Summary Jurisdiction Acts if the Summary Jurisdiction Acts give no power to issue such process ? This point is not peculiar to bastardy cases ; the argument goes to the extent, that any process whatever which a court of summary jurisdiction can be induced to issue, though in a case manifestly altogether beyond its jurisdiction, and as to which the Summary Jurisdiction Acts give it no jurisdiction, is nevertheless to be served and executed in the manner provided for in Scotland. To me the natural meaning of the words "process issued under the Summary Jurisdiction Acts" is process issued under the jurisdiction given by those Acts, and in the manner which those Acts authorise and require. It is begging the whole question to say that those Acts give jurisdiction to issue a summons in this case.

The question whether the general words of s. 4 of the Act of 1895 constitute special legislation and an exception to the general principle is the question which has to be decided in this case. I doubt whether in a case like the present it is

- necessary to prove that the husband was ordinarily resident in the jurisdiction at the time when the summons was issued and am disposed to think that mere presence therein is sufficient, but it is unnecessary to decide the point because in this case not only was the husband ordinarily resident in Scotland, but there is no evidence that he was ever in England. Although there is no reported English case in point, there is a case decided in Scotland directly in point. This is the case of *M'Queen v. M'Queen* (6), decided by the LORD ORDINARY, LORD
- A ASHMORE, from which I take the following summary of the facts and judgment. The complainer was a domiciled Scotsman residing in Scotland until, on the outbreak of war, he joined His Majesty's Forces. In 1915 he met the respondent, then a domiciled Englishwoman, in London, and married her there. On his discharge from the Army in February, 1920, the spouses did not live together. The husband alleged that the wife refused to live with him in Scotland, the wife alleged that her husband deserted her in England and refused to provide for her support. The wife then took out a summons against her husband at the
- B West Ham Police Court on the ground of her husband's desertion under the Summary Jurisdiction (Married Women) Act, 1895, and the magistrate issued a summons calling on the husband to appear at the police court to answer the complaint. The summons, having been duly endorsed by a justice of the peace for Kirkcudbrightshire, was served on the husband's most usual place of address in Maxwelltown. The husband did not appear at the police court and the magistrate made an order against him for maintenance. This order
- C was served in the same house as the summons was served. As the husband paid nothing under the order, the wife got a warrant for his arrest from the English magistrates. The warrant, after being endorsed in Scotland as before, was executed by the arrest of the husband in Scotland, with a view to his being taken to the police court at West Ham. The husband then presented a note
- D of suspension and liberation before the Court of Session on the ground that he had been wrongfully charged at his wife's instance to pay a sum of money for maintenance in virtue of a judgment of an English court of summary jurisdiction. The wife appeared before the court and pleaded that the order was a valid warrant for her husband's arrest and that his note of suspension and liberation should be refused. LORD ASHMORE decided in the husband's favour on the ground that the case was covered by the rule laid down in the House of Lords
- E in *Berkley v. Thompson* (4), which I have set out. LORD ASHMORE in the course of his judgment said (1920, 2 S.L.T. 407) :

- The Lord Chancellor's opinion seems to me to be applicable to the present case and to be conclusively adverse to the regularity of the procedure which has culminated in the apprehension of the complainer under the warrant issued by the court of summary jurisdiction in England. Under the reasoning to which effect was given in the House
- F of Lords case the whole substratum of the jurisdiction asserted by the English court in this case necessarily collapses. There being no initial jurisdiction over the complainer, the English court had no power to cite him to that court ; and, on that assumption, the subsequent procedure, including both the granting of the order to pay alimony and the warrant to apprehend—all this is inept.

- The decision was confirmed on appeal by the Second Division of the Inner House on July 14, 1921, but there is no published report of the reasons for the
- G decision : see 85 Justice of the Peace (Notes), p. 335. In my opinion, the decision in *M'Queen v. M'Queen* (6) was rightly decided, and a decision to the same effect should be given in this case. I agree with the judgment of TUCKER, L.J., that the objection to the jurisdiction was not waived by the presence of the husband's solicitor at the police court in order to object to the jurisdiction.

- COHEN, L.J. : I have had the advantage of reading the judgments which
- H have been delivered by my brethren and I agree so entirely with the reasons they have given for allowing this appeal that I do not desire to add any reasons of my own.

Appeal allowed.

Solicitors : *H. H. Wells & Co.*, agents for *Andrew Duncan*, Huntley, Aberdeenshire (for the husband) ; *Alfred Slater & Co.* (for the wife).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

HALE v. HANTS & DORSET MOTOR SERVICES, LTD. AND ANOTHER.

[COURT OF APPEAL (Lord Greene, M.R., Somervell, L.J., and Singleton, J.),
October 28, 29, 1947.]

Highways—Planting of trees—Branches allowed to overhang carriage way—Injury to passenger in passing omnibus—Liability of highway authority—"Reasonable use" of highway—Roads Improvement Act, 1925 (c. 68), s. 1 (1), (2). A

Where a highway authority has caused trees to be planted in a highway under the powers given by the Roads Improvement Act, 1925, s. 1 (1), it has a duty under s. 1 (2) of the Act not to allow the branches of a tree in their natural growth to stretch out over the roadway so as "to hinder the reasonable use of the highway by any person entitled to the use thereof," and, if an accident occurs as a result of a collision between the overhanging branches and a vehicle making a reasonable use of the highway, the highway authority is liable. In the absence of any reason to suspect danger from an overhanging tree or some similar obstruction, a driver who is driving close to the kerb when his vehicle is struck by a branch of the tree is not making an unreasonable use of the highway within the meaning of the Act. B

[AS TO PLANTING TREES ON HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 16, p. 500, para. 738. C

FOR THE ROADS IMPROVEMENT ACT, 1925, s. 1 (1), see HALSBURY'S STATUTES, Vol. 9, pp. 219, 220.]

APPEALS by the defendants, Poole Corporation and Hants and Dorset Motor Services, Ltd., from an order of CROOM-JOHNSON, J., at the Hampshire Winter Assizes, dated Mar. 14, 1947.

The plaintiff was riding as a passenger on the top of an omnibus belonging to the omnibus company when the branches of a tree struck the windows of the omnibus and a piece of glass struck the plaintiff in the eye, which had to be removed. The tree had been planted on the side of the highway by the Poole Corporation under the powers given by the Roads Improvement Act, 1925, s. 1 (1). In an action brought by the plaintiff against the omnibus company for damages for personal injuries suffered by him through their negligence, the company, in their defence, denied negligence and stated that the accident was due to the omnibus colliding with the branches of a tree which obstructed the carriage way and were a nuisance to the highway, and that the nuisance, which was created and maintained by the corporation, was the cause of the accident. The corporation were then joined as defendants in the action. CROOM-JOHNSON, J., held that both the corporation and the omnibus company were liable and he apportioned the damages under the Law Reform (Married Women and Tortfeasors) Act, 1935. The defendants appealed, the appeals being dismissed by the Court of Appeal. D

Beney, K.C., and *Laskey* for the corporation (the highway authority).

McGougan for the omnibus company.

J. T. Molony for the plaintiff. E

LORD GREENE, M.R.: These are appeals by the two defendants who were held jointly responsible for the accident by the judge. He apportioned the liability two-thirds to the Poole Corporation and one-third to Hants and Dorset Motor Services, Ltd. F

The appeal by the Poole Corporation was based on the view that, in allowing the branches of this tree in their natural growth to stretch out over the roadway to a small extent, the corporation were not liable and had committed no breach of the Roads Improvement Act, 1925, s. 1, under the powers of which they had planted the tree. It was suggested that this was a case of non-feasance and that the Poole Corporation could not on any view be held liable because they are the highway authority, but that argument appears to me to be without substance in a case of this kind where the obligation of the authority which plants trees are clearly laid down in the statute itself. It does not appear to me to matter very much whether the action is regarded as an action based on breach of statutory duty or merely on nuisance or negligence at common law, because G

H

it is common ground that, if the provisions of the statute governing the conduct of the local authority, on their true interpretation, make it a breach of that statute for the authority to allow a branch to grow out in the way these branches grew out, the authority must be regarded as being in breach of its obligations to the plaintiff.

A Under the Roads Improvement Act, 1925, s. 1 (1), the county council or other highway authority is given power to cause trees to be planted in any highway maintainable by them. Section 1 (2) is as follows :

No such tree . . . shall be placed, laid out or allowed to remain in such a situation as to hinder the reasonable use of the highway by any person entitled to the use thereof, or so as to be a nuisance or injurious to the owner or occupier of any land or premises adjacent to the highway.

B The first reading of that sub-section led me to think that the corporation were in breach of the obligations imposed on them. It appeared to me that the passengers on the omnibus were persons entitled to the use of the highway, that the omnibus in which they were travelling was making a reasonable use of the highway, that the situation of the tree hindered the reasonable use of the highway, and that the local authority had allowed the tree to remain in that situation. Counsel for the corporation, however, argued that that is not the real construction of the sub-section. He maintained that the sub-section had nothing to do with the normal growth of a tree which was lawfully planted in compliance with the section, and that a local authority whose tree grew in such a way that the branches impinged on the carriage way could not be said to be allowing that tree to remain in such a situation as to hinder the reasonable use of the highway. I am unable to accept that construction. It appears to me to place a limitation on the clear words of the sub-section which they will not bear, and it would result in the curious consequence that the legislature, while concerning itself with the original siting and planting of the tree, had, through some extraordinary lapse, omitted to deal with what one would have thought was in its mind, namely, that trees grow and throw out their branches. C D It would absolve the authority from any obligation to see that the tree in its natural growth was curbed in such a way as not to hinder the reasonable use of the highway.

E Counsel for the corporation then maintained that the omnibus on this occasion was not making reasonable use of the highway because, when the window was struck by the projecting branch, the driver must have been driving very close to the kerb. The projection of the branches in question was $7\frac{1}{2}$ and $6\frac{1}{2}$ inches respectively and, therefore, he must obviously have been quite close to the kerb, but I am unable to see any ground for holding that a driver who chooses to drive close to the kerb is making an unreasonable use of the highway. He is entitled to use the whole of the highway unless there is some special reason to prevent him doing so. F Apart from the existence of the tree, there was nothing at all unreasonable in the omnibus driver driving as close to the kerb as he liked. It was only the existence of the tree that made that course a dangerous one.

G The consequence of this rather remarkable submission would be that a local authority who chose to plant trees beside a carriage way could, by allowing the branches of those trees to grow in the natural way over the carriage way, sterilise part of the carriage way, because the local authority would be entitled to say to drivers : " Now you must not drive so close to the kerb." I cannot accept that argument. It appears to me that in the circumstances the local authority committed a clear breach of their statutory obligations, and the result is that I cannot see how, on any view, they can be acquitted of negligence or breach of their duty towards the plaintiff. The attempt, therefore, to attribute to the omnibus company the whole of the blame, in my opinion, fails.

H The next question is : Ought any of the blame to be ascribed to the driver ? On that I must admit I have felt more doubt. [LORD GREENE, M.R., then dealt with the question whether any of the blame should be ascribed to the driver of the bus. After reviewing the evidence he continued :] I am not myself disposed to blame the driver for not having observed that the tree was overhanging. The overhang was very slight. It was at night. There was a brilliant street lamp between him and the tree as he came round the roundabout, and I do not think that in those circumstances a driver, with his duty to observe the road, could be blamed for not casting his eye up to the upper part of this

tree and forming a sufficiently accurate estimate on the question of the slight overhang. His evidence, however, seems to be that he had formed the opinion that these trees were potential sources of danger. With that knowledge and without having any accurate knowledge whether this particular tree did or did not overhang, it appears to me that his duty was to act on the footing that it might overhang and to give it a wide berth accordingly. The judge did not absolve the driver, and, although I think there is a great deal to be said on his behalf, I do not feel justified in dissenting from his opinion. I can find nothing in the apportionment he made which would justify this court in changing it. In the result, both appeals, in my opinion, must be dismissed.

SOMERVELL, L.J. : I agree.

SINGLETON, J. : I agree.

Appeals dismissed with costs, the plaintiff's costs to be apportioned between the two appellants.

Solicitors : *Kenneth Brown, Baker, Baker*, agents for *Trevanion, Curtis & Ridley*, Bournemouth (for the highway authority); *Stanley & Co.*, agents for *D'Angibau & Malin*, Bournemouth (for the omnibus company); *Walmsley & Stansbury*, agents for *E. W. Marshall Harvey & Dalton*, Bournemouth (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

THORNTON HALL AND PARTNERS v. WEMBLEY ELECTRICAL APPLIANCES, LTD.

[COURT OF APPEAL (Scott, Asquith and Evershed, L.JJ.), October 14, 15, 29, 1947.]

Contract—Severability—Contract by quantity surveyor to prepare, for submission to War Damage Commission, schedule of work done by builders on bomb-damaged factory and to supervise work as agent of factory owners—Breach of contract—Surveyor becoming managing director of building company after preparation of schedule—Waiver of breach—Factory owners informed of facts.

The owners of a factory damaged by enemy action engaged a quantity surveyor (a) to prepare a specification of the repairs to be done to the factory for submission to the War Damage Commission, and (b) subsequently to supervise the work of repair done by the building company and to check their accounts. After the specification had been prepared, but before the repairs had been begun, the surveyor became managing director of the building company. He informed the factory owners of that fact, but they allowed him to continue as their agent. On a claim by the surveyor for his fees, the factory owners contended that they were not liable for payment of the fees, on the ground that the surveyor's acceptance of the managing directorship of the building company conflicted with his duty to them as his principals and that he had, accordingly, forfeited his rights against them:—

HELD : although the functions which the surveyor undertook to perform were distinct and separate in time, the contract of engagement was not severable so as to entitle either party to treat it as consisting of separate contracts; it was an essential part of the surveyor's duty to supervise on behalf of the factory owners the work done by the building company and its accounts, and his acceptance of the post of managing director of the building company was inconsistent with his contractual obligations and a breach going to the root of the whole contract (observations of LORD BLACKBURN in *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (9 App. Cas. 434) considered); but that the factory owners had acquiesced in his continuing to act as their agent, notwithstanding the conflict between his duty and interest and so had waived his breach of duty, and, since there was no evidence that the contract was vicious or unlawful, the surveyor was not precluded from enforcing his claim for his fees against the factory owners.

[AS TO ENTIRE AND DIVISIBLE CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 334, 335, para. 463; and FOR CASES, see DIGEST, Vol. 12, pp. 115-117, Nos. 755-763.]

Case referred to :

- (1) *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.*, (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 12 Digest 339, 2835.

A APPEAL by the defendants from an order of His Honour JUDGE NEAL made at Willesden County Court on Dec. 3, 1946, in an action for the recovery of £94 9s. for fees alleged to have been earned by the plaintiff as quantity surveyor. The defendants, who were factory owners, denied liability for the fees on the ground that the plaintiff had forfeited his rights against them, as his principals, by a breach of duty to them, in that, after being engaged by them as their agent to prepare a specification for the War Damage Commission of repairs to be done to their factory by a building company and to supervise the work and accounts of the building company, he had become a managing director of the building company. B The county court judge held (a) that the contract of employment was severable and that the plaintiff was entitled to sue in respect of the preparation of the specification which had been completed before he became managing director of the building company; (b) that, although the plaintiff had committed a breach of duty to the factory owners, it did not go to the root of the entire C contract, but only affected the part to be performed after he became managing director; and (c) that, in regard to the latter period, there was no waiver of their rights by the factory owners, notwithstanding that they had been informed by the plaintiff of his dual relationship. In the result, the plaintiff obtained judgment for the sum of £62 19s. 4d., representing the fees for the preparation of the specification and its submission to the War Damage Commission, and costs. The factory owners appealed, but the Court of Appeal now dismissed D their appeal on the ground that, while the contract was not severable, but was a single contract, and the plaintiff's breach of contract went to the root of the contract, the factory owners were, nevertheless, liable for payment of his fees because they had, by their conduct, waived his breach of duty. The facts appear in the judgment of the court read by SCOTT, L.J.

C. P. Harvey for the factory owners.

E Lloyd-Davies for the plaintiff.

Cur. adv. vult.

Oct. 29. SCOTT, L.J., read the following judgment of the court. This was an action, tried before His Honour JUDGE NEAL in the Willesden County Court on Dec. 3, 1946, for the recovery of the sum of £94 9s. for fees earned by the plaintiffs as quantity surveyors. There is, in fact, but one member of the plaintiff firm, Mr. Charles Thornton Hall, and in this judgment we shall refer F to the individual, Mr. Thornton Hall, instead of to "the plaintiffs" or the "plaintiff firm."

The circumstances from which the claim arose were these. About the end of July, 1944, the factory of the defendants (hereafter referred to as "the Wembley Co.") was damaged by enemy action. Inasmuch as the Wembley Co. was engaged in making aircraft parts for the Ministry of Aircraft Production, it was entitled to immediate reparation of the damage and it was also entitled G to have the proper costs of such repair paid by the War Damage Commission out of public funds. The Wembley Co., accordingly, placed matters in the hands of a building company, Raglan Building Co., Ltd. (hereafter referred to as "the Raglan Co."). That company, on Aug. 3, 1944, wrote a letter to the Wembley Co. in the following terms :

H It will be necessary for a schedule to be prepared of work required to be executed for submission to the War Damage Commission. We think it advisable, therefore, that you contact Messrs. Thornton Hall and Partners, Incorporated Quantity Surveyors, 68A, St. Johns Wood, High Street, N.W.8. to act for you. Their scale fee charges can be added to the account rendered to the Commission. It will be necessary for you to obtain a building licence for the work to be executed. We suggest that you contact Mr. Harding of B.T.H., Ltd., Neasden Lane, N.W.10, and ask for a provisional licence of £1,000. The work will be executed according to the Ministry scale . . . It will be essential for you to give us an undertaking to meet the cost of any item which may be disallowed by the War Damage Commission and we shall be glad of same when you acknowledge this letter.

The Wembley Co. took the advice proffered by the Raglan Co. and engaged Mr. Thornton Hall to act for it as quantity surveyor for the purposes in hand. The terms of the engagement are evidenced by two letters dated Aug. 5 and 9, 1944. The letter of Aug. 5 [from the Wembley Co. to Mr. Hall's firm] says:

With reference to war damage caused to the above premises, we have been in touch with Messrs. Raglan Building Co., Ltd., and we should be obliged if you would take this letter as authority to act for us in preparing the necessary schedule for submission to the War Damage Commission, and also act for us in such other matters as may be required.

The letter [in reply] of Aug. 9 is:

We are obliged by your letter of the 5th instant asking us to act for you in connection with war damage works at your factory. We will do all possible to protect your interests in negotiation with the War Damage Commission and also in expediting the progress of the reinstatement work.

As will be observed from the terms of the two letters just read, Mr. Thornton Hall's engagement did not involve the preparation by him of bills of quantities in accordance with more usual practice. His functions were (i) to prepare a "schedule" of the work to be done for submission to the War Damage Commission, *i.e.*, in effect, a specification of the work, and (ii) to supervise the work as it was done by the Raglan Co., and to check the accounts for labour and materials. It appears from the evidence that Mr. Thornton Hall had been acting as "consultant" to the Raglan Co. since 1941, and it seems reasonably clear that the Wembley Co. was, from the start, aware of this fact. There is no evidence that the Wembley Co. was aware of the further fact that, at the time when it engaged the services of Mr. Thornton Hall, Mr. Thornton Hall was advising the Raglan Co. in regard to a proposed re-organisation. Nor does it appear from the evidence that, before Oct., 1944, Mr. Thornton Hall had any closer interest in or connection with the Raglan Co.

The first part of Mr. Thornton Hall's duties, namely, the preparation of a schedule of the work to be done and its submission to the War Damage Commission, had been completed by the end of Sept., 1944. On Oct. 1 Mr. Thornton Hall accepted the position of managing director of the Raglan Co., and he thereafter continued as such managing director at all material times. It is clear that Mr. Thornton Hall informed the Wembley Co. of his appointment at the date of its taking effect. Thenceforward, the Wembley Co. was fully aware of Mr. Thornton Hall's position in the Raglan Co. Notwithstanding the position he had assumed and the interest he had in the Raglan Co., Mr. Thornton Hall continued, with the full knowledge and authority of the Wembley Co., to perform or purport to perform his duties to that company in supervising the Raglan Co.'s work and checking the Raglan Co.'s accounts.

The work of repair to the Wembley Co.'s factory was duly completed, and about Nov., 1945, the War Damage Commission, on the recommendation of the Ministry of Aircraft Production, paid to the Raglan Co. the sum (somewhat over £2,000) which that company was willing to accept for the work, but, having discovered the fact of Mr. Thornton Hall's appointment as managing director of the Raglan Co. during the progress of the work, it is not surprising that the Ministry of Aircraft Production did not recommend to the War Damage Commission that the latter should pay Mr. Thornton Hall's fees—at least, it is not surprising to this court—for it is, as it seems to us, not the least shocking feature of this case that the view taken by the Ministry of Aircraft Production greatly surprised Mr. Thornton Hall, the Wembley Co., and (apparently) the Raglan Co., too. So great, indeed, was the dismay occasioned in the breasts of the officers of the Wembley Co., and their vexation at the possible liability of the Wembley Co. to pay to Mr. Thornton Hall the sum of £94 9s. that in Jan., 1946, for the first time, it occurred to the Wembley Co. that Mr. Thornton Hall's acceptance of the office of managing director of the Raglan Co. conflicted with his duty to his principal. On that ground, the Wembley Co. refused to pay any part of Mr. Thornton Hall's fees, and in the county court and this court relied on this conflict as involving for Mr. Thornton Hall a forfeiture of all his rights.

In the county court Mr. Thornton Hall obtained judgment for £62 19s. 4d., equivalent to two-thirds of the total sum claimed of £94 9s., and representing

that part of the total account for fees which was referable to the first part of Mr. Thornton Hall's duties, namely, the preparation of a schedule of work and its submission to the War Damage Commission. As I have said, Mr. Thornton Hall had completed this part of his functions before Oct. 1, 1944, when he became managing director of the Raglan Co. In arriving at his decision, the county court judge came to the conclusion (i) that the contract between Mr. Thornton Hall and the Wembley Co. was severable so as to entitle him

A to sue in respect of the work performed by him in preparing and submitting the schedule of work as on a separate contract distinct from the later work of supervision; (ii) that, although the acceptance by Mr. Thornton Hall of his office on the board of the Raglan Co. involved a breach of his duty to and contractual relationship with the Wembley Co., that breach did not go to the root of his entire contract so as to entitle the Wembley Co. to repudiate all their obligations to Mr. Thornton Hall, but was a breach affecting only that part

B of the contract (held by the judge, as above appears, to be severable from the rest) which fell to be performed after Oct. 1; and (iii) that, as regards the functions performed by Mr. Thornton Hall after Oct. 1, the conduct of the Wembley Co. in continuing to employ Mr. Thornton Hall after knowledge of his dual relationship did not amount, in law, to such acquiescence in or affirmation of the contract as disentitled it to rely on Mr. Thornton Hall's

C breach. On the Wembley Co.'s alternative claim for damages (which would be equivalent in amount to the fees which it would otherwise have to pay) the county court judge decided adversely to the Wembley Co. In the result, Mr. Thornton Hall, by leave of the county court judge, amended his claim so as to confine it to the figure of £62 19s. 4d., and on the claim, so amended, he obtained judgment with costs. Against this judgment the Wembley Co. appeals. There is no cross-appeal by Mr. Thornton Hall, who has not before

D us sought to make good his claim to anything beyond the sum awarded him by the county court judge.

Although the absence of any cross-appeal might, at first sight, be thought to rob the point of practical significance, it is, in our judgment, necessary, first, to reach a conclusion on the matter which, as we read his judgment, was fundamental to the decision of the county court judge, namely, the severability of the contract. On this matter we are unable to agree with his conclusion.

E It is, no doubt, true that the functions which Mr. Thornton Hall undertook to perform were distinct and necessarily separate in point of time, but, in our judgment, it does not follow that the contract of engagement was severable so as to entitle either party to treat it as consisting of separate contracts. The work he was engaged to do consisted of the several functions appropriate to a quantity surveyor in reference to the repair for a building owner, entitled to claim against the War Damage Commission, of bomb damage which had been

F suffered. It is true that the final words of the Wembley Co.'s letter of Aug. 3 appear, on one interpretation of them, to treat the work of preparing and submitting a schedule of the work as distinct from the other duties Mr. Thornton Hall performed and to suggest that in respect of those other duties there would be some re-engagement or series of re-engagements, but it is, in our view, clear that no such re-engagement was, in truth, ever contemplated and equally

G clear that none ever occurred. In our judgment, it was, from the start, an essential part of the function of Mr. Thornton Hall as quantity surveyor acting on behalf of the Wembley Co. to supervise the work which he had specified and check the accounts presented by the Raglan Co. in respect of it.

It is next necessary to determine what, so far as relevant to the present claim, was the nature of the duties owed by Mr. Thornton Hall in carrying out his work. On this question counsel for Mr. Thornton Hall conceded (and, in our

H judgment, rightly conceded) that Mr. Thornton Hall owed a duty by virtue of his engagement as quantity surveyor to the Wembley Co. (and also to the War Damage Commission) to see that the work specified in the schedule was not more extensive than the occasion required and also to see, in the course of supervising the work and checking the accounts, that the charges of the Raglan Co. were in no way inflated. If this formulation is correct, then it seems to us too plain for argument that acceptance by Mr. Thornton Hall of the post of managing director of the Raglan Co. was as wholly inconsistent with his contractual obligations as it was with professional propriety, and if either Mr.

Thornton Hall or the Wembley Co., or both, were oblivious of this circumstance, then their lack of appreciation was without excuse. As the county court judge himself observed :

In the present case it seems to me that in supervising the work of his own small company the plaintiff not only could not exercise disinterested skill and zeal but could not properly do anything more for the defendant than he was already bound to do by virtue of his position in the company and his company's contract with the defendants, namely, see to it that the work was properly done with due priority and speed.

As regards Mr. Thornton Hall's relationship with the War Damage Commission, it should have been plain to the Wembley Co., as one making a claim on the public funds under the scheme of war damage insurance, that the duty of its agent was to put forward a claim for such amount only as the company itself, in the absence of insurance, would have been properly bound to pay.

Did Mr. Thornton Hall's breach of contract and of his fiduciary obligations go to the root of the whole of the contract ? The county court judge gave a negative answer to the question, basing himself, as it appears, on the general observations of LORD BLACKBURN (9 App. Cas. 443, 444), in *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1). At the same time, treating the contract as severable (as he did), the judge concluded that from Oct. 1, 1944, onwards Mr. Thornton Hall had forfeited all right to further fees on the ground that, in virtue of his managing directorship of the Raglan Co., he was incapable of doing any work as quantity surveyor or performing any functions other than such functions as were appropriate to him as the managing director of the company employed to do the building work. With all respect to the county court judge, we entertain no doubt whatever that Mr. Thornton Hall's breach of contract and duty went to the root of the contract. Such a result seems to us necessarily involved in the judge's reasoning as regards the assumed contract or contracts performed after Oct. 1, 1944. No authority is required to establish or emphasise the strictness with which these courts insist that a man must not put himself in a position where his interest and his duty conflict. If the duty is, as it was here, one that pervades the whole contractual relationship, then to acquire an interest which is in conflict with the duty is to strike at the root of the contractual relationship. In our judgment, nothing in LORD BLACKBURN's language (to which the county court judge alluded) in any way qualifies this conclusion.

It is, however, equally well established that breach of fiduciary obligations such as the present contract imports may be waived by the other party to the contract who has full knowledge of the circumstances. If at the time of Mr. Thornton Hall's appointment as agent for the Wembley Co. at the beginning of Aug., 1944, Mr. Thornton Hall had been managing director of the Raglan Co., and that fact had been known to the Wembley Co., the latter company could not thereafter have complained of the conflict of Mr. Thornton Hall's duty with his interest. On the footing that the contract of agency was one and indivisible, is the position different where the agent assumed his equivocal position, with the knowledge of, and without any objection from, the principal, in the middle and not at the beginning of the engagement ? The county court judge held "with some doubt" that there was no waiver by the Wembley Co. of its rights in regard to the contract or contracts (regarded by him as separate from the earlier contractual relation) which came into being after Oct. 1, 1944, and on the view he took it was unnecessary for him to apply his mind to the question of waiver in respect of Aug. and Sept., 1944. It is, we think, clearly open to us to draw our own inferences from the facts proved on the basis that (according to the view which we take) (i) the contract was a single contract, and (ii) the action of Mr. Thornton Hall involved a breach of the contract going to its root. In our judgment, the correct inference is that the Wembley Co. must be taken to have acquiesced in his continuing as its quantity surveyor, notwithstanding the conflict of his duty and his interest. It is, indeed, impossible, in our judgment, to resist the conclusion that the Wembley Co. cared not at all whether Mr. Thornton Hall performed his functions with propriety or impropriety so long as his bill was paid by the War Damage Commission. The ethics which underlie the Wembley Co.'s defence were evoked, and evoked only, when damage to its own finances was apprehended. For, if the action of Mr. Thornton

Hall amounted to a breach of his contract or to a repudiation by him of that contract which the Wembley Co. was entitled to accept for the purpose of determining the contract and claiming damages for its breach, what did the Wembley Co. do? So far as the evidence shows, the Wembley Co., making no protest or demur of any kind, continued to press Mr. Thornton Hall to pursue his contractual labours to a conclusion—which he did. Moreover, the Wembley Co. took the benefit of those labours, for the work was done and, save as regards

A Mr. Thornton Hall's own fees, done without cost to the Wembley Co. True it is that Mr. Thornton Hall did not see fit to draw his principal's attention to the consequences of his own breach of contract or to make any offer to withdraw in favour of an independent man. On the other hand, it is equally plain that there was no attempt at concealment on his part. It was said by counsel for the Wembley Co. that in existing war-time circumstances it would have been practically difficult for it to change horses, as it were, in mid-stream. We
B are not satisfied that it would have been. No representative of the Wembley Co. (though offered an opportunity by the judge) gave evidence to prove the difficulty or otherwise explain the company's passivity.

C Counsel for Mr. Thornton Hall made the point that, in any case, it was not shown that the War Damage Commission were not liable to pay, or would not pay, the sum of £62 19s. 4d. awarded by the judgment, and the judge expressed the view that "there would be every probability that they would pay." On this matter, since the War Damage Commission are not before the court, it is plainly undesirable that we should express any opinion. Whether or not the War Damage Commission are liable to pay any part of Mr. Thornton Hall's fees, it is, at least, in no way surprising that payment was not recommended by the Ministry of Aircraft Production. In any case, the point is, in our view, immaterial to the present question.

D Counsel for the Wembley Co. sought to put his case alternatively—namely, that the Wembley Co. was entitled by way of damages to a sum equivalent to the amount of any fees for which it was liable. We have found some difficulty in following his formulation of this case. If the contractual term, the breach of which entitles the Wembley Co. to claim damages, is Mr. Thornton Hall's obligation not so to act as to allow his interest to conflict with his duty, we have already given our reasons for holding that any breach of such obligation was
E waived by the Wembley Co. If it be contended that it was a term of the contract that Mr. Thornton Hall would not so act as to jeopardise the Wembley Co.'s right to recover his fees from the War Damage Commission—if, in effect, Mr. Thornton Hall warranted that his fees would be payable by the War Damage Commission—and if, in the events which have happened, his fees are not so recoverable, then, in our judgment, there is no evidence sufficient to support such conclusions. At an early stage in the hearing before us, it seemed to the

F court that in the events which had happened the relations between the Wembley Co., Mr. Thornton Hall, and the Raglan Co. had, from the beginning of Oct., 1944, so far degenerated as to raise the question whether the court ought to entertain any action on the contract. As we have already indicated, the conduct of all three parties, building owner, builder and surveyor, was such as to give rise at least to the suspicion that they acted in the belief that the employment
G by the building owner of a quantity surveyor (*i.e.*, of a professional man) would ensure payment by the War Damage Commission of the entire bill for the work, including the surveyor's own fees, and that, as payment would be made out of public funds, there was no need to do anything to keep down the builders' charges, or, to put it more bluntly, the conduct of the parties was such as to give rise to the suspicion that it was all arranged with the intention, tacit or expressed, that Mr. Thornton Hall could and would exploit his position to inflate

H the costs for the work and extract the maximum sum possible from the public funds for the benefit of the builders and himself. If there were evidence to justify such suspicion, the legal result might well be to disentitle either party to the contract of employment to the help of the court to enforce it, though there were no proof of overcharges in fact. In our judgment, however, the evidence is not sufficient to justify that conclusion. The tripartite arrangement itself, when made, was not vicious or unlawful, nor is there evidence that the War Damage Commission, in fact, relied on the independence of quantity surveyors employed in such cases, or of the Commission's own methods of

checking the accounts rendered to it. The point not having been taken by the Wembley Co. in its defence and the court below not having raised the point, there was no occasion for such evidence to be called. Finally, there was no evidence of any abuse in fact of Mr. Thornton Hall's position as regards the War Damage Commission. However disquieting, therefore, on the face of it, was the relationship created between the three parties to the arrangement, building owner, builder and surveyor, and however shocking their apparent lack of appreciation of their duties to the public, we do not think that the taint of illegality in the relationship of the parties is sufficient to justify the court in holding that the plaintiff is precluded from enforcing his present claim by the maxim *in pari delicto potior est conditio defendentis*.

The result is that the judgment of the county court judge must, in our judgment, be upheld, though on somewhat different grounds from those which found favour with him. Although we cannot hold that the Wembley Co. and Mr. Thornton Hall acted dishonestly towards the War Damage Commission, we feel no doubt that they acted improperly by putting themselves in a relationship which might easily have caused the improper use of public money and they cannot escape moral blame for creating a position which was *peccata minime*. In order to mark our disapproval of their conduct we dismiss the appeal without any order as to costs.

Appeal dismissed. No order as to costs.

Solicitors: J. A. Ramsey (for the appellants); Edward Mackie (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

DUFFIELD v. GREAT WESTERN RAILWAY CO.

[COURT OF APPEAL (Somervell, L.J., and Atkinson, J.), October 24, 1947.]

Emergency Legislation—Essential work—Railway fireman—Transfer to lower grade in accordance with contract of employment—Claim to wages at original rate—Essential Work (General Provisions) (No. 2) Order, 1942 (S.R. & O., 1942, No. 1594), art. 4 (1).

The plaintiff was employed by the defendant company as a fireman from 1922 to 1943. It was a term of his contract of employment that a fireman, before being promoted to the grade of engine-driver, should pass an examination, and that, if he failed three times to pass it, he should be transferred to a different grade of employment. The plaintiff, having failed in the examination three times, was transferred to the grade of shed-labourer, being promoted later to that of steam raiser. He brought this action, claiming the balance of wages at the higher rate applicable to a fireman, and in support of his claim he relied on the Essential Work (General Provisions) (No. 2) Order, 1942.

By art. 4 (1) of that Order a person carrying on a scheduled undertaking [the railway company were such an undertaking] "shall . . . pay to every specified person" [the plaintiff was such a person] ". . . not less than the normal wage . . . if that person is during the normal working hours (i) capable of and available for work; and (ii) willing to perform any services outside his usual occupation which . . . he can reasonably be asked to perform . . . when work is not available for him in his usual occupation in the undertaking."

HELD: the change in the plaintiff's occupation having taken place in accordance with the terms of his contract of employment, the Order of 1942 was not applicable, and the claim failed.

Decision of WROTTESELEY, J. ([1946] 2 All E.R. 586), affirmed.

[AS TO THE ESSENTIAL WORK (GENERAL PROVISIONS) (NO. 2) ORDER, 1942, ART. 4 (1), see BUTTERWORTH'S EMERGENCY LEGISLATION [14].]

APPEAL by the workman from a decision of WROTTESELEY, J., dated Oct. 23, 1946, and reported [1946] 2 All E.R. 586. The facts appear in the headnote. The appeal was dismissed.

Beney, K.C., and M. R. Nicholas for the workman.

Sir Valentine Holmes, K.C., and J. P. Ashworth for the employers.

SOMERVELL, L.J. [having recited the facts and the relevant articles of the Order, continued]: The workman says that from Mar. 10, 1943, which was the day after he finally failed in his examination, until the issue of the writ his "normal wage" was his wage as a fireman, and he claims the difference between what he was actually paid and the sum which he says he ought to have been paid. I do not think that that is a maintainable submission. The practice, even if one regards it as limited, is that in certain events an employee of the company is no longer employed as a fireman. A man who becomes a fireman does so with his eyes open, knowing that it is not a permanent employment. One either goes up by qualifying as an engine-driver or one goes down, making way for someone else who can be trained as an engine-driver. The event having happened which led to the workman being taken off the foot-plate, which means his ceasing to be a fireman, it seems to me impossible to say that during the period covered by his claim a fireman's wage remained his normal wage, and that, therefore, this claim falls within the provision of the Order.

Counsel for the workman pointed out that in normal times, if a man was "down-graded" as a result of his failing to pass the examination, he could leave the employment of the company and seek work elsewhere. That is, no doubt, true, although, according to the witness called by the employers, none of the persons so down-graded had, in his recollection, ever done so. But, of course, that could not alter the construction of the words of the Order. No doubt, there are many cases covered by this Order in which in peace-time men might have left one employment and gone to another and got better wages. Obviously, one of the purposes of the Order was to prevent men leaving one employment and seeking another when they wished to do so. A man who failed to become an engine-driver might say: "In peace-time, if I had failed to become an engine-driver, I would have gone off and tried to start a small shop or something like that," but that clearly would not be any reason why under the Order he should be paid the wages of a fireman.

The other matter that was debated, and which I think it difficult to determine with precision, is what was the position in law when this event happened? Counsel for the workman argued that the learned judge was wrong when he said that under the contract the workman, when he failed to pass on the final occasion, could be sent to work in the shed. I would myself incline to the view on the evidence that the failure to pass the final examination did not terminate the contract of service, and, provided the employers offered, according to their usual practice, what I may call a reasonable alternative job, the workman, if he wanted to go, was bound to give a week's notice. For the reasons which I have given, however, I do not think that this appeal depends on a final decision on that point. In my opinion, therefore, this appeal fails. The grounds which I have stated are, I think, the same as those on which the learned judge proceeded. He said ([1946] 2 All E.R. 588):

As it appears to me, the fallacy in the case put forward by the plaintiff lies in attempting to apply these provisions to the case of a man, the nature of whose job was changed in accordance with the terms of his contract of employment.

That may be going a little further than I think it necessary to go in that that wording may be based on the assumption that the contract of service continues. In my opinion, this appeal fails even if the contract of service is terminated.

ATKINSON, J.: I agree. I read this Order, precisely as the learned judge read it, as applying to a totally different class of case. If, when the workman had come down ready to work as a fireman, for some reason, such as the removal of a number of engines to another part of the country for military reasons, there were no engines on which he could be employed and he was asked to do some other work, he would not cease to be a fireman. He would still be graded as a fireman. In the ordinary way in peace-time I suppose the employers could have said: "We are very sorry, but there is no work to be done," and his pay might have been affected, but the Order provides that, so long as the workman is graded as a fireman, he is to be paid as a fireman, whether the employers have work for him or not. They cannot dismiss him. On the other hand, he has to be ready to do any work which they can reasonably ask him to do. It seems to me that that is in vivid contrast with a case where the

man ceases to be a fireman altogether, not because there is no work for him, but because, by the terms of his original contract of service, he has ceased to have any right to be a fireman. In my judgment, this Order has nothing to do with the case, and I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Pattinson & Brewer* (for the workman); *H. B. Gilmour* (for the employers).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*] A

Re FRANKS, FRANKS v. FRANKS.

[CHANCERY DIVISION (Wynn-Parry, J.), October 30, November 4, 1947.]

Wills—Family provision—Infant child of second marriage—Testatrix dying at child birth—Provision made for child of first marriage—Form of order—Inheritance (Family Provision) Act, 1938 (c. 45) s. 1 (1). B

By her will dated Mar. 21, 1940, the testatrix, who was twice married, left the residue of her estate on trust for R., the infant child of her first marriage, on his attaining the age of 21, with power of advancement. On Aug. 5, 1946, the testatrix died as a result of giving birth, on Aug. 3, 1946, to P., a child of the second marriage, without having altered her will. C

HELD: having regard to the fact that the testatrix had no opportunity to alter her will after the birth of P., the court would order that provision be made for P. under the Inheritance (Family Provision) Act, 1938, s. 1 (1).

In the circumstances of the case the court declared that provision ought to be made for P. and then, under s. 3 (2) of the Act, gave the consequential direction that the further hearing of the summons would be adjourned until R. came of age when the quantum of the provision payable to P. and the date when it was to begin could be considered, all parties being given liberty to apply in the meantime and to file further evidence at the adjourned hearing. D

[AS TO PROTECTION OF TESTATOR'S FAMILY, see HALSBURY, 3 Hailsham Edn., Vol. 34, pp. 439-445, paras. 486-505; and FOR CASES, see DIGEST Supp.] E

Cases referred to:

- (1) *Re Pugh, Pugh v. Pugh*, [1943] 2 All E.R. 361; [1943] Ch. 387; 112 L.J.Ch. 311; 169 L.T. 284; Digest Supp.
- (2) *Re Styler, Styler v. Griffith*, [1942] 2 All E.R. 201; [1942] Ch. 387; 111 L.J.Ch. 263; 167 L.T. 295; Digest Supp.
- (3) *Re Brownbridge, Brownbridge v. Brownbridge*, (1942), 193 L.T.Jo. 185.

ADJOURNED SUMMONS, under the Inheritance (Family Provision) Act, 1938, on behalf of the plaintiff, Peter Franks, infant child of a second marriage of his mother for whom the mother, the testatrix, had made no provision in her will, though she had provided for a child of the first marriage. The testatrix having died immediately after the birth of the child of the second marriage without opportunity to alter her will, an order under the Act was made that provision should be made for the plaintiff. F

J. L. Arnold for the plaintiff.

G. D. Johnston for the child of the first marriage.

B. A. Bicknell for the trustees of the will. G

Cur. adv. vult.

Nov. 4. WYNN-PARRY, J., read the following judgment. The testatrix, Mary Josephine Franks, was first married to Fritz Emil Brandt, and there was one child of this marriage, the defendant, Richard Emil Brandt, born on Feb. 5, 1929. He is, therefore, upwards of 18 years of age and will attain 21 in Feb., 1950. As a defendant under the Inheritance (Family Provision) Act, 1938, his interests have to be taken into consideration. The first marriage was dissolved in 1939 and in the early part of 1940 the testatrix married the defendant, John Arthur Franks. The testatrix made her will on Mar. 21, 1940, and appointed her second husband and the defendant, Tyler, to be her executors and trustees. She gave her second husband a legacy of £1,000 and directed her trustees to hold the residue of her estate on trust for Richard, the child of the first marriage, on his H

attaining the age of 21 years, with the proviso that, if he should predecease her or die under that age, her residuary estate should be held in trust for her second husband. By cl. 4 the trustees were given a power of advancement, uncontrolled as to amount, for the maintenance, education and benefit of Richard. There was one child of the second marriage, the plaintiff, Peter Franks, who was born on Aug. 3, 1946. His birth was artificially accelerated in the hope of saving the life of his mother, the testatrix, who, however, died on Aug. 5, 1946.

- A According to the evidence the first husband is not, and never has been, a man of substantial means. He made no contribution to the maintenance of Richard, the child of the first marriage, who was maintained and educated by the testatrix until her death. The value of the net estate of the testatrix amounts to £17,460 and it produces a gross income of £525 per annum. Under the will, dated Feb. 4, 1937, of the testatrix's mother, Mrs. Such, the two children, Richard Brandt and Peter Franks, are entitled contingently on attaining 21 years to share equally
- B in her residuary estate. The value of that residuary estate is £1,979 10s. 7d. and it produces a gross income of £57 per annum. Apart from his interest in those two estates, Richard Brandt has no property. The second husband is a government meteorological officer and his salary is approximately £550 per annum. Apart from his salary and the legacy of £1,000 under the will of the testatrix he has no financial means. Apart from his interest under the will of
- C Mrs. Such and such rights as he may have to be maintained by his father, the infant, Peter Franks, has no financial means or expectations. There is no suggestion that the second marriage of the testatrix was not a perfectly normal and happy marriage.

- Richard Brandt has recently left Bloxham School near Banbury. While he was there the total cost of educating and maintaining him was £225 per annum. He has begun his period of military service after which it is proposed that, with
- D or without the aid of a scholarship, he shall go to Oxford University to read for an arts degree. During the period to be spent there the cost of his maintenance and education will be somewhat higher than at school. The infant, Peter Franks, on the other hand, does not, and will not for some time, require much provision, and, indeed, it was stated that for the time being his father did not ask that any provision should be made. Nevertheless, having regard to the provisions of s. 2 (1) of the Inheritance (Family Provision) Act, 1938, it was essential that this
- E originating summons should be taken out on his behalf at the present time.

- The first question which arises is whether this is a case in which any provision should be made for the infant, Peter Franks, out of his mother's estate. I think it is such a case. The fact that his father, the second husband, has a present income of £550 per annum out of which he can maintain him is a factor to be taken into consideration, but it is not by any means decisive. Nor can I treat
- F as decisive the fact that the will of the testatrix disposes of her residuary estate wholly in favour of the child of the first marriage. It is true that by a proper formula she could have provided also for the child or children of the second marriage. On the other hand, the circumstance that she chose to deal solely with the position as it stood at the date of the will does not of itself indicate that, if she had had an opportunity of providing for the child of her second marriage, she would not have done so. No reason can be put forward why she should not,
- G and there is every reason why she should. In contrast to her husband's position, which must to some extent be regarded as precarious, depending entirely on the continued receipt of a salary, she would have been able to ensure a contribution at least to the maintenance and education of her younger child. Not to do so would appear to me to be unnatural and unreasonable.

In *Re Pugh* (1), MORTON, J. said ([1943] Ch. 395) :

- H If I had been sitting in the testator's armchair I should have made slightly more provision for the widow than the testator made, but I cannot conclude that the will did not make reasonable provision for the maintenance of the widow within the meaning of s. 1, sub-s. (1), of the Act. As I pointed out in *Re Styler* (2), quoting the judgment of BENNETT, J., in *Re Brownbridge* (3), the Act gives the court the right to interfere only if it concludes that the dispositions which were made were unwarranted, and I proceeded to say : " I do not think that a judge should interfere with a testator's dispositions merely because he thinks that he would have been inclined, if he had been in the position of the testator, to make provision for some particular person. I think that the court has to find that it was unreasonable on the part of the testator to make

no provision for the person in question or that it was unreasonable not to make a larger provision."

In the present case the testatrix had no opportunity to alter her will after the birth of the infant, Peter. It may be said that she did not act unreasonably, and, therefore, that, on the reasoning in the passage from *Re Pugh* (1) which I have read, I should not be warranted in interfering. When the facts in that case and in the cases cited in that passage are referred to it will be seen that the reasoning is applied to cases where the testator or testatrix had it in his or her power to make or not to make provision. The relevant words of the Act in s. 1 (1) are "if the court... is of opinion that the will does not make reasonable provision" not "that the testator has acted unreasonably." In my judgment, the words of this Act enable one to take into account a case like the present where it could not be said, before the birth of the infant, Peter Franks, that the will did not make reasonable provision for him, and where, after his birth, but before her death, the testatrix had no opportunity to alter her testamentary disposition. In my view, the effect of the birth of the infant, Peter Franks, was immediate in that thereafter it must be said of the will that it did not make reasonable provision for his maintenance as a dependant. I conclude, therefore, that this is a case in which I can and ought to direct that provision be made for the infant, Peter Franks.

The question then arises what provision should be made. From what I have already said, it is clear that Richard Brandt, the son of the first marriage, requires, and will for some time require, a substantial part of the income of the estate for his maintenance and education, while, on the other hand, the infant, Peter Franks, requires nothing now, but will require something later. The method of dealing with that situation which immediately springs to the mind is to direct that some nominal sum be paid weekly or monthly on behalf of the infant, Peter Franks, liberty being given to apply when circumstances require a larger sum to be provided. Unfortunately, on the wording of this Act this cannot be done. I think this necessarily follows from s. 3 (2) which reads as follows:—

The court may give such consequential directions as it thinks fit for the purpose of giving effect to an order made under this Act, but no larger part of the net estate shall be set aside or appropriated to answer by the income thereof the provision for maintenance thereby made than such a part as, at the date of the order, is sufficient to produce by the income thereof the amount of the said provision.

I think, however, the object which I have in view can be obtained in another way. The effect of s. 1 (5) is that I can order provision to be made as from a future date, and I can find nothing in the Act which would prevent me from declaring that provision should be made for the infant, Peter Franks, but ordering that the summons should stand over to a given date with a view to considering then, first, the quantum of the provision, and, secondly, the date in the future as from which it is to run, giving all parties liberty to apply in the meantime if circumstances should require. This order and any further order will, of course, under s. 1 (1) operate to alter the will as from the testator's death, but they will, in effect, only introduce a legacy consisting of an annuity payable out of future income, the amount of which when determined will run from a future date. This course will protect the interests of the infant, Peter Franks, and it will not prejudice the interests of Richard Brandt, for the trustees will not be prevented from dealing with income accruing in the meantime in accordance with the provisions of the will. The only fetter on the trustees will be on the power to advance capital. As to this I observe that, in the first place, the evidence does not indicate that it is likely that the trustees will require to exercise this power during the next few years, and, in the second place, that, if circumstances should arise which in the opinion of the trustees make it desirable to exercise this power, they can in that case bring the matter before the court under the liberty to apply. The position of Richard Brandt as a dependant will cease on his attaining the age of 21 years on Feb. 5, 1950. I think, therefore, the convenient course will be to declare that provision ought to be made for the infant, Peter Franks, under the Act and to adjourn the further hearing of this summons until the last Friday in Jan., 1950, for the purpose which I have indicated, giving all parties liberty to apply in the meantime and to file such further evidence on the adjourned hearing as may be necessary to bring the position up to date.

It may be that, on attaining his majority, Richard Brandt will be prepared to agree to an arrangement which will dispose of the whole matter. Failing that, the court can decide in the light of the circumstances then obtaining whether to deal with the matter finally then and, if so, how, or to adjourn the summons for a further period.

Declaration accordingly.

Solicitors : *Routh, Stacey, Hancock & Willis* (for the plaintiff and the trustees) ;

A *Clifford-Turner & Co.* (for Richard Brandt).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Affirmed. C.A. [1948] 1 All E.R. 803.

HUTTON v. WATLING.

B

[CHANCERY DIVISION (Jenkins, J.), October 29, November 3, 1947.]

Perpetuities—Rule against perpetuities—Vendor and purchaser—Option to purchase land—No time limit for exercise—Specific performance against original grantee of option—Foundation of jurisdiction to grant decree.

C

An option to purchase land without any time limit for its exercise is enforceable by a decree of specific performance as a matter of personal contract against the original grantor of the option, and the rule against perpetuities has no relevance to such a case as distinct from one in which such an option is sought to be enforced against some successor in title of the original grantor, not by virtue of any contractual obligation on the part of the successor in title, but by virtue of the equitable interest in the land conferred on the grantee by the option agreement.

D

In a document, dated Sept. 6, 1937, signed by the defendants, setting out the terms of an agreement between themselves and the plaintiff for the sale by them to her of the goodwill, stock and fixtures of a business carried on by them on certain premises, it was stated that "in the event of purchaser wishing at any future date to purchase property in which the business is situated, she has the option of purchase at a price not exceeding £450." By letter dated Dec. 8, 1944, the plaintiff purported to exercise the option to purchase, and it was conceded that, if the option were valid, the letter was an effective exercise of it.

E

HELD : the plaintiff was entitled to specific performance of the option, and the rule against perpetuities afforded no bar to the relief.

South Eastern Ry. Co. v. Associated Portland Cement Manufacturers (1900), Ltd. ([1910] 1 Ch. 12), followed.

F

Rider v. Ford ([1923] 1 Ch. 541), not followed.

Per cur. : The jurisdiction to grant specific performance of a contract for the sale of land is founded, not on the equitable interest in land which the contract is regarded as conferring on the purchaser, but on the simple ground that damages will not afford an adequate remedy. In other words, specific performance is merely an equitable mode of enforcing a personal obligation with which the rule against perpetuities has nothing to do.

G

[AS TO INTERESTS TO WHICH THE RULE AGAINST PERPETUITIES DOES NOT APPLY, see HALSBURY, Hailsham Edn., Vol. 25, pp. 111-123, paras. 206-221; and FOR CASES, see DIGEST, Vol. 37, pp. 79-82, Nos. 195-212.]

Cases referred to :

H

- (1) *London & South Western Ry. Co. v. Gomm*, (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620, C.A.; 37 Digest 79, 80, 195.
- (2) *Birmingham Canal Co. v. Cartwright*, (1879), 11 Ch.D. 421; 48 L.J.Ch. 552; 40 L.T. 784; 27 W.R. 597; 37 Digest 88, 89, 258.
- (3) *Woodall v. Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 92 L.T. 292; 53 W.R. 203; *offd.*, [1905] 2 Ch. 266, C.A.; 37 Digest 81, 211.
- (4) *Worthing Corpn. v. Heather*, [1906] 2 Ch. 532; 75 L.J.Ch. 761; 95 L.T. 718; 50 Sol. Jo. 668; 4 L.G.R. 1179; 37 Digest 81, 82, 212.
- (5) *South Eastern Ry. Co. v. Associated Portland Cement Manufacturers*, (1900), *Ltd.*, [1910] 1 Ch. 12; 79 L.J.Ch. 150; 101 L.T. 865; 74 J.P. 21; 54 Sol. Jo. 80, C.A.; 37 Digest 80, 200.
- (6) *Rider v. Ford*, [1923] 1 Ch. 541; 92 L.J.Ch. 565; 129 L.T. 347; 67 Sol. Jo. 484; 30 Digest 473, 1359.

WITNESS ACTION to claim specific enforcement of an option to purchase land. The defendants claimed (*inter alia*) that the option provision, which contained no limit of time as to exercise, was void under the rule against perpetuities. JENKINS, J., held that the matter was merely the enforcement of a personal covenant, to which the rule against perpetuities had no relevance. The facts appear in the judgment.

Jopling for plaintiff.

J. F. Bowyer for defendants.

Cur. adv. vult.

Nov. 3. JENKINS, J., read the following judgment. In this case the plaintiff, Mrs. Mabel Hutton, claims against the defendants, Mr. and Mrs. Watling, specific performance of an agreement for the sale by the defendants to the plaintiff of the property known as No. 10, Market Street, King's Lynn, in the county of Norfolk for the sum of £450. The agreement sued on is claimed to be constituted by (a) an option conferred by an agreement in writing between the parties dated Sept. 6, 1937, and (b) a letter dated Dec. 8, 1944, from the plaintiff's solicitors to the defendants whereby notice was given to the defendants of the plaintiff's exercise of the option thus conferred.

The agreement of Sept. 6, 1937, on which the plaintiff relies as conferring the option is, to be strictly accurate, a document signed by the defendants which sets out the terms of an agreement between themselves and the plaintiff for the sale by them to her of the goodwill, stock and fixtures of a business carried on by them on the property now in question. It is a home-made document and is endorsed "Agreement between Mr. and Mrs. A. Watling *re* purchase of business trading as A. Watling, Market Street, King's Lynn, in the county of Norfolk." That endorsement is inaccurate to the extent that the agreement was not an agreement between Mr. and Mrs. Watling, but was an agreement by them. At all events, it does show that Mr. and Mrs. Watling regarded this document as containing the terms of an agreement for the purchase of the business. The agreement itself consists of seven unnumbered paragraphs. The first of them is in these terms: "To sale of business between Mr. and Mrs. A. Watling, on the one part, hereinafter called the vendors, and Mrs. M. Hutton, on the other part, hereinafter called the purchaser." Then follow six paragraphs as it seems to me all qualified by the preceding words. They are these:

The purchase price of the goodwill of the business to be £22 10s. 0d. (Twenty two pounds, ten shillings), plus stock and fixtures at valuation at time of entry. Our signatures as appended hereon being proof of acceptance of monies in complete payment of same. We, the vendors, our heirs and assigns agree not to in any circumstances open or purchase any existing business to do business therefrom round or in the area of the present business known as A. Watling of Market Street, King's Lynn, in the county of Norfolk, whilst the present purchaser or her heirs and assigns does business there. We also agree that whilst the purchaser does pay her rent weekly, *i.e.*, 16s. 6d (sixteen shillings and sixpence) per week, this sum including town rates, she shall enjoy her business without any interruption whatsoever from the landlord. Furthermore, we agree to keep her premises in good living order. In the event of better business being obtained, we shall not make demands for increased rent. In the event of purchaser wishing at any future date to purchase property in which the business is situated, she has the option of purchase at a price not exceeding £450 (four hundred and fifty pounds). In the event of the property being sold without agreement of the purchaser, we, the vendors agree, in the event of eviction by the said purchaser of property, to make compensation of not less than £50 (fifty pounds), this amount not including stock and fixtures. In the event of purchaser wishing to, at a future date, through any set of circumstances unforeseen, sell the business, we, the vendors, providing a suitable tenant is found, agree not to incommode the purchaser.

The document is signed over a 6d. stamp by Mr. and Mrs. Watling and the signatures are witnessed. It will be observed that the provision conferring the option on the plaintiff imposed no limit as to the time within which it was to be exercised. I need not refer to the letter exercising the option, as there is no dispute that, if the option was valid and enforceable, the letter was an effective exercise of it.

The defendants resist the claim on three grounds. [HIS LORDSHIP said that, first, the defendants invited him to admit oral evidence to contradict and nullify the document which they had signed as containing the terms of their agreement. Secondly, the defendants contended that the provision conferring

the option was an independent stipulation which formed no part of the agreement and was unenforceable for want of consideration. His LORDSHIP rejected both these contentions, and continued:] Thirdly, and finally, it is alleged in the defence that the option provision is void as infringing the rule against perpetuity. Counsel for the defendants contended before me that the option provision was wholly void on this ground even as between the plaintiff and the defendants, although themselves the actual parties to the agreement by which the option was conferred.

- A The state of the authorities on this point is not wholly satisfactory. The earliest of the cases to which I was referred was *London and South Western Ry. Co. v. Gomm* (1), in which the plaintiff company, having sold certain surplus land to a purchaser with an option to re-purchase unlimited in point of time, purported to exercise that option by notice to a successor in title of the original purchaser and brought the action against such successor in title for specific performance of the contract thus constituted. KAY, J., granted the relief claimed, saying (20 Ch.D. 575):

C A contract not creating any estate or interest properly so called in property, at law or equity, is not, in my opinion, obnoxious to the rule [*i.e.*, the rule against perpetuity]. For instance, a covenant to pay £1,000 when demanded, with interest meanwhile, if not barred by the Statute of Limitations, might be enforced by an action of covenant at any time. A contract to buy or sell land and covenants restricting the use of land, though unlimited, are not void for perpetuity. In these latter cases the contracts do not run with the land, and are not binding upon an assign, unless he takes with notice. They are not properly speaking, estates or interests in land, and are therefore not within the rule. I think that this is the true test to apply to this case, and am of opinion that this covenant does not create any interest in land.

- D On appeal to the Court of Appeal the decision of KAY, J., was reversed, and on the question of perpetuity SIR GEORGE JESSEL, M.R., after holding that the option provision did create an interest in land and was subject to the rule against perpetuities, said (*ibid.*, p. 582):

E That appears to me to dispose of the case, unless we agree with the conclusion of KAY, J., on the last point considered by him. Down to that point I agree with him. I consider that he is quite right in the view he takes of the doctrine of remoteness and of the authorities cited before him, not forgetting the case of the *Birmingham Canal Co. v. Cartwright* (2), which must be treated as overruled. But KAY, J., having, as I think he has, most correctly and accurately defined the law, thinks that this case is not within it, because he comes to the conclusion that "this covenant does not create any interest in the land." But he had forgotten that if that were so he could not make a decree against Mr. Gomm. If it were a mere contract it was not Gomm's contract, and if it did not in equity run with the land so as to give an interest in the land, it could not have been enforced against him. It is clear from his Lordship's judgment that if he had been of opinion that this covenant gave the company an interest in the land (which, I think, is the correct view) he would have decided the case the other way.

F LINDLEY, L.J., said (*ibid.*, p. 587):

G I am of the same opinion. This is an action for specific performance of a contract entered into not by the defendant but by somebody else. The first thing, therefore, the plaintiffs must show is, upon what legal principle the defendant is bound by a contract into which he did not enter. It is not contended that he is bound by it on the ground that the covenant entered into by Powell runs with the land and binds him at law, but it is said that though it does not bind him at law it binds him in equity. Then upon what principle is it that he is bound in equity . . . [The Lord Justice then considered on what principle he could be held bound, and said (*ibid.*, p. 588):] I agree with the observations made by the other members of the court, that this covenant creates an interest in land and is void for remoteness.

- H *Gomm's* case (1) was followed by WARRINGTON, J., in *Woodall v. Clifton* (3), and *Worthing Corp'n. v. Heather* (4), both cases in which an option to purchase land was sought to be enforced against the assigns or successors in title of the original grantor. It may be noted that in the latter case WARRINGTON, J., held that, while the rule against perpetuities was a fatal objection to the claim for specific performance against the successors in title of the original grantor of the option, damages for breach of covenant were recoverable at law against the original grantor's estate, because there was nothing illegal in the contract as such.

In *South Eastern Railway Co. v. Associated Portland Cement Manufacturers* (5) the right in question was a right to make a tunnel through land of the plaintiff company at a point to be selected by the grantee of the right, and was thus capable of being regarded as conferring an easement as opposed to a future interest in the land, which was the view taken by SWINFEN EADY, J., but having regard to the reasoning on which the judgment proceeded, I do not think this distinction is material for the present purpose. SWINFEN EADY, J. said ([1910] 1 Ch. 24):

The second point was that the provision was void for perpetuity according to *London and South Western Ry. Co. v. Gomm* (1). But the conveyance reserves an immediate right or easement of tunnelling. It is not a right to arise at some future time, it is an immediate right. The conveyance was made subject to a legal reservation of the easement. That is not like *Gomm's* case (1) where the covenant was to re-convey on the happening of a future event which might not arise within the period of time allowed by the rule against perpetuities. Moreover, in *Gomm's* case (1), as the covenant had not been entered into by Gomm, who was only an assignee of the covenantor, it was essential for the railway company to maintain that the covenant bound and therefore created an interest in the land. JESSEL, M.R., pointed this out and said that if it was a mere personal contract it would not be obnoxious to the rule against perpetuities, but, as Gomm had not himself entered into the covenant, it was essential for the plaintiff to prove that it ran with the land in order to succeed against the assignee. In the present case the plaintiffs themselves entered into the contract to grant and granted the easement of tunnelling, and they are the very parties who now wish to restrain the defendants from exercising that easement. There is no question here as to the validity of the grant of an easement *in futuro*. There was an immediate right to make the tunnel directly the conveyance was executed, and the plaintiffs accepted the conveyance subject to that right. Again I wholly fail to appreciate why the plaintiffs are not bound by their own personal contract, which has nothing whatever to do with the rule against perpetuities.

In the Court of Appeal, LORD COZENS-HARDY, M.R., said (*ibid.* p. 28):

It is a case in which the only point that has been argued before us seems to me to be reasonably clear . . . [He continued after stating the nature of the agreement:] That was an agreement entered into by the railway company—if I may use such a phrase of a corporation, a living covenantor, a covenantor now alive. Let me suppose that Mr. Calcraft [the original covenantee] was alive. What possible objection would there have been to an action by Mr. Calcraft against the actual covenantor? What would the rule against perpetuities have to say to the matter? I have listened with some amazement to the contention that the rule of perpetuities applies where the action is brought, not against an assign of the covenantor, but against the covenantor himself, and I have listened with still more amazement when I heard the case of *London and South Western Ry. Co. v. Gomm* (1) cited as an authority for that purpose . . . But so far from that being an authority in favour of the proposition which has been argued, it is, as I read it, as clear and distinct an authority as could be desired to the contrary. KAY, J., from whom the appeal was brought, says . . . [his Lordship read the passage (20 Ch.D. 576) already quoted from the judgment of KAY, J., and continued:] That means as between the contracting parties, and SIR GEORGE JESSEL expressly draws the distinction in these words (20 Ch.D. 580): "If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell, who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land." And LINDLEY, L.J., says (20 Ch.D. 580): "How is Gomm to be held bound by this covenant? He did not enter into it, he is not bound at law." So far from that being an authority that Powell would not have been bound by the covenant, and that the London and South Western Railway Co. could not have enforced the covenant against Powell, I think the observations of all the members of the court plainly indicate that in that case there would have been a perfectly enforceable covenant by Powell at the instance of the London and South Western Railway Co., and the whole doctrine of the rule against perpetuities would have had absolutely nothing to do with it. So that, if Mr. Calcraft were now alive, I think there could be no answer to an action by him against his living covenantor claiming to enforce the rights under the covenant in the agreement of 1847 . . . It seems to me when one gets to the bottom of this case it is a very plain one. A living covenantor has covenanted with A.B. and his assigns, and the defendants are the assignees of that covenant, and they simply ask that they may be entitled to claim the benefit and to enforce the benefit of that covenant for the purpose of connecting the two portions of the demised chalk which are separated by the railway and which they desire to join by means of a tunnel . . . In that demised property they desire to make

the tunnel, and I can see no reason why as against the covenantors, with whom alone we are concerned, they should not enforce their rights.

FLETCHER MOULTON, L.J. said (*ibid.* p. 32) :

The company made a personal agreement that they would allow something to be done. They are bound by that agreement because, as the Master of the Rolls said, personal covenants do not fall within any rule of perpetuities, and they are the actual covenantors. Therefore I cannot see a shadow of justification for the claim they set up.

A FARWELL, L.J. said (*ibid.* p. 33) :

I am of the same opinion. It is settled beyond argument that an agreement merely personal not creating any interest in land is not within the rule against perpetuities . . . But the fact that there is some connection with or reference to land does not make a personal contract by A less a personal contract binding on him, with all the remedies arising thereout, unless the court can by construction turn it from a personal contract into a limitation of land, and a limitation of land only. As regards the original covenantor it may be both ; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant. The real answer to the argument founded on the inconvenience of tying up land is that the action upon the covenant sounds in damages only unless the defendant has still got the land to which the covenant relates. If he has still that land, then in an action on the covenant the plaintiff may claim specific performance, and it is for the court to see whether in such circumstances it is inequitable to grant specific performance, or whether the covenantor ought to pay damages in lieu of it. There is no defence to such an action in the present case. So far as I see I should have no hesitation whatever in decreeing specific performance.

South Eastern Ry. Co. v. Associated Portland Cement Manufacturers (5), therefore, appears to me to provide clear authority, which is, of course, binding on me, to the effect that an option to purchase land without limit as regards time is specifically enforceable as a matter of personal contract against the original grantor of the option and that the rule against perpetuities has no relevance to such a case as distinct from a case in which such an option is sought to be enforced against some successor in title of the original grantor, not by virtue of any contractual obligation on the part of the successor in title, but by virtue of the equitable interest in the land conferred on the grantee by the option agreement.

I was referred to passages in certain well known text books from which it appeared that the authors had doubts as to the correctness of the exposition of the law on this topic contained in the *Associated Portland Cement Manufacturers* case (5) so far as it involves the conclusion that an option agreement unlimited in point of time is specifically enforceable against the original grantor notwithstanding the rule against perpetuities : see WILLIAMS ON VENDOR AND PURCHASER, 4th ed., vol. 1, p. 424, note (1) ; GRAY ON PERPETUITIES, 4th ed., pp. 366 and 367. These doubts appear to me to be ill-founded as I understand the jurisdiction to grant specific performance of a contract for the sale of land to be founded not on the equitable interest in the land which the contract is regarded as conferring on the purchaser, but on the simple ground that damages will not afford an adequate remedy. In other words, specific performance is merely an equitable mode of enforcing a personal obligation with which the rule against perpetuities has nothing to do. Be this as it may, it is, at all events, clear that the doubts expressed by the authors of the works to which I have referred can in no way detract from the efficacy of the judgments in the *Associated Portland Cement Manufacturers* case (5), an authority binding on me.

Finally, I was referred to *Rider v. Ford* (6) an action between the original parties to an agreement for a lease containing an option unlimited in point of time to purchase the freehold, in which (according to the headnote) it was held that the option in question was void as infringing the rule against perpetuities, but perusal of the report shows, first, that the *Associated Portland Cement Manufacturers* case (5) was not cited, and, second, that counsel for the defendant (the grantee of the option) admitted that the rule against perpetuities rendered the option invalid. The relevant passage from the judgment of RUSSELL, J., ([1923] 1 Ch. 546) is :

Defendant's counsel admits that the rule against perpetuities must render invalid the option to purchase the freehold unless the agreement is read as giving only an

option to the defendant personally, or to an assignee of the defendant, but only exercisable during the defendant's life. In my opinion the agreement cannot be read in that way and therefore I hold that the option to purchase the freehold is inoperative and invalid because of the rule against perpetuities.

The decision in *Rider v. Ford* (6) on the point now in question, having thus been founded entirely on an admission by counsel made without reference to the *Associated Portland Cement Manufacturers* case (5), I am able, without the slightest disrespect to a very eminent judge, to hold that it cannot be regarded as providing any authority in support of the defendants' third and final contention in the present case. I, therefore, regard myself as bound by the authority of the *Associated Portland Cement Manufacturers* case (5) to hold that the rule against perpetuities affords no bar to the relief by way of specific performance here claimed, and I so decide.

This makes it unnecessary for me to express any opinion on the question whether, as a matter of construction of the document of Sept. 6, 1937, it might be possible to regard the option as confined to the plaintiff personally, which would, of course, in itself provide a complete answer to the objection founded upon the rule against perpetuities. It follows that, in my judgment, the defendants fail in all their grounds of defence, and the plaintiff is entitled to an order for specific performance of the agreement sued on with costs.

Order for specific performance.

Solicitors: *Metcalfe, Copeman & Pettefar* (for the plaintiff); *Pritchard, Sons, Partington & Holland*, agents for *Alan G. Hawkins & Co.*, Kings Lynn (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Observation of ROXBURGH, J., at p. 647, not applied. Re HAYNES' WILL TRUSTS. [1948] 2 All E.R. 423.

FRAENKEL v. WHITTY.

[CHANCERY DIVISION (Roxburgh, J.), October 17, 22, 30, 1947.]

Settlement—Monthly sum payable to beneficiary until vested in some other person—Beneficiary becoming enemy—Payment of further sums to Custodian of Enemy Property—Trading with the Enemy Act, 1939 (c. 89), s. 7 (1) (a) (b)—Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198), art. 1 (i), (ii) (e).

By a deed dated Aug. 31, 1939, the settlor covenanted to pay a sum of money to the beneficiary on the first day of each month from May 1, 1939, until Sept. 1, 1946, "or until some act or event shall sooner be done or happen whereby the monthly sums hereby covenanted to be paid or some part thereof if belonging absolutely to the beneficiary would become vested in or charged in favour of some other person or persons or some corporation." The beneficiary, an Austrian national, was then residing in Switzerland, but in May, 1940, she went to reside in Austria and thereupon she became an "enemy" within the meaning of the Trading with the Enemy Act, 1939:—

HELD: when the beneficiary became an enemy each instalment payable to the beneficiary would have "vested" in the Custodian of Enemy Property within the meaning of the deed, and, therefore, the settlor was absolved from making any further payments under the deed and nothing became payable to the Custodian under the Act of 1939, or the Trading with the Enemy (Custodian) Order, 1939.

[FOR THE TRADING WITH THE ENEMY ACT, 1939, s. 7, see HALSBURY'S STATUTES, Vol. 32, p. 1098.

FOR THE TRADING WITH THE ENEMY (CUSTODIAN) ORDER, 1939, see BUTTERWORTH'S EMERGENCY LEGISLATION [40].]

Case referred to:

(1) *Re Wightman, Bradbury and another v. Cambridge University and others*, unreported (Apr. 17, 1945).

ADJOURNED SUMMONS to determine whether, on the true construction of a deed and in the events which happened, the monthly sums thereby covenanted to be paid to the beneficiary ceased to be payable when the beneficiary became an "enemy" within the meaning of the Trading with the Enemy Act, 1939.

His Lordship held that, on the happening of that event, the settlor was absolved from making any further payments, and that, therefore, nothing ever became payable to the Custodian of Enemy Property.

Upjohn, K.C., and *W. F. Waite* for the plaintiff.

Danckwerts for the defendant.

Cur. adv. vult.

Oct. 30. **ROXBURGH, J.**, read the following judgment. By a deed A dated Aug. 31, 1939, between the plaintiff, of the one part, and Hilde Raaber, an Austrian national then residing in Switzerland, of the other part, the plaintiff covenanted :

... for himself his executors and administrators ... with the beneficiary [*i.e.*, Miss Raaber] that he or they as the case may be will until Sept. 1, 1946, or until the termination of a period of three months following the sooner death of the settlor [*i.e.*, the plaintiff] or until the death of the beneficiary or until some act or event shall B sooner be done or happen whereby the monthly sums hereby covenanted to be paid or some part thereof if belonging absolutely to the beneficiary would become vested in or charged in favour of some other person or persons or some corporation pay to the beneficiary on the first day of each and every month commencing on May 1, 1939, such a sum as after deduction of income tax at the standard rate for the time being in force shall amount to £41 13s. 4d.

C During May, 1940, Miss Raaber went to reside in Austria and thereupon became an "enemy" within the meaning of the Trading with the Enemy Act, 1939. The question which I have to determine is whether that event absolved the plaintiff from making any further payments under the deed.

Before I consider the consequences which ensued under that Act from the event which I have described, I must make two observations about the deed. The first is that at the date when it was executed the Act had not been passed. D It would, therefore, be wrong to assume that in using the word "vest" the draftsman of the deed had in mind the meaning which that word bears in the Act. The second is that the deed refers to the vesting of the monthly sums of money or some part thereof. If the words "or some part thereof" had been omitted, it would have been as impossible to argue in this case that all the sums of money vested in the Custodian as it was to argue that the income of a trust fund vested in him in *Re Wightman* (1).*

E It is whether an event happened in May, 1940, whereby some part of the monthly sums, *e.g.*, the June, 1940, instalment, if belonging absolutely to Miss Raaber, would become vested in some other person or some corporation.

I turn now to the Act to see, and only to see, what would have happened to that June instalment, if it had belonged absolutely to Miss Raaber. Section 7 of the Act provides :

F (1) With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint custodians of enemy property for England,

*In *Re Wightman* (1) the testator directed his trustees to hold the trust fund and the income thereof to pay the income to his wife during her widowhood, and, in the event of her re-marrying, to pay her an annuity out of the income of the trust fund. By the G will : "If any act or event shall be done or happen whereby the interest during widowhood or the annuity given to my wife respectively if belonging absolutely to her would become vested in or charged in favour of some other person persons or a company then such interest or annuity shall cease to be payable to her . . ." The testator died on Nov. 20, 1937, leaving his wife him surviving. She was living in France in July, 1940, when the Trading with the Enemy (Specified Areas) Order, 1940, brought the provisions of the Trading with the Enemy Act, 1939, into operation with regard H to metropolitan France. Thereupon, the widow became technically an enemy, it would have been an offence for the trustees to have paid her any income to which she would otherwise have been entitled under the will, and that income became payable to the Custodian of Enemy Property. *ROMER, J.*, held that the widow's interest had not "become vested in or charged in favour of" the Custodian or the Board of Trade within the provision in the will, and he also expressed the opinion that, even if the provision had also included the words "become payable to" some other person, it could not be said that the whole interest during widowhood had become payable to the Custodian since all the Custodian was entitled to was income arising until the end of the war.

Scotland and Northern Ireland respectively, and may by order—(a) require the payment to the prescribed custodian of money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, or which would, but for the provisions of s. 4 or s. 5 of this Act, be payable to any other person . . . (3) Where, in pursuance of an order made under this section, (a) any money is paid to a custodian, (b) any property, or the right to transfer any property, is vested in a custodian, or (c) a direction is given to any person by a custodian in relation to any property which appears to the custodian to be property to which the order applies, neither the payment, vesting or direction nor any proceedings in consequence thereof shall be invalidated or affected by reason only that at a material time—(i) some person who was or might have been interested in the money or property, and who was an enemy or an enemy subject, had died or had ceased to be an enemy or an enemy subject, or (ii) some person who was so interested, and who was believed by the custodian to be an enemy or an enemy subject, was not an enemy or an enemy subject . . . (5) If any person pays any debt, or deals with any property, to which any order under this section applies, otherwise than in accordance with the provisions of the order, he shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding one hundred pounds or to both such imprisonment and such fine; and the payment or dealing shall be void.

The Trading with the Enemy (Custodian) Order, 1939, provides :

1 (i) Any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, and any money which is to be deemed for the purposes of the Act to be money which would, but for the existence of a state of war, be so payable, shall be paid to the Custodian. (ii) Without prejudice to the generality of the foregoing paragraph, there shall be paid to the Custodian in particular any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, by way of : . . . (e) debt . . . (iv) Any money required to be paid under the foregoing paragraphs of this article to the Custodian, shall be paid : (a) within fourteen days after the coming into force of this order, if the money has become payable or would, but for the existence of a state of war, have become payable before the coming into force of this order; or (b) within fourteen days after the day on which a person becomes an enemy, if the money is required to be paid to the Custodian by reason of that person being an enemy and the money has become payable or would, but for the existence of a state of war, have become payable before the day on which that person becomes an enemy; or (c) in any other case, within fourteen days after the day on which the money becomes payable or would, but for the existence of a state of war, become payable . . . (vii) The Custodian shall have power to sue for and recover any moneys payable to him under this order . . . 3 . . . (iv) The receipt of the Custodian or any person duly authorised by him to sign receipts on his behalf for any money paid to him under this order shall be a good discharge to the person paying the same. 4 No person shall, without the consent of the Board of Trade, save as directed by this order transfer, part with or otherwise deal with the property of any enemy.

Accordingly, the event which happened would have caused the June instalment to be payable to the Custodian within 14 days of its due date, and, if not paid, would have rendered the settlor liable to a penalty. It would have vested in the Custodian the right to sue for it and to give a good discharge for it. It would have put him in a position as strong as, or, indeed, stronger than, that of a legal assignee. It is difficult to see what more could have been done to "vest" that instalment in him, short of actual payment, and the context shows that in the deed "vest" cannot refer to actual payment. No vesting order under the Act could have given the Custodian more than he got. In my judgment, the word "vest" in this deed is used to indicate just such a situation as the Act would have brought into being in relation to the June instalment, and there would have been a vesting of it in the Custodian.

In reaching this conclusion, I have assumed that the phrase "would be payable," when used in art. 1 (i) of the Order, means "would be payable at the date of the Order or would thereafter become payable," and that, once money has become payable, its character is fixed, and it must be paid to the Custodian, whatever may be the subsequent history of the person to whom it became payable. Counsel for the defendant, however, submitted that this is not the true construction. He referred to the preamble to s. 7 of the Act and contended that, in the light of that preamble, the phrase "would be payable" in s. 7 (1) (a) ought to be construed as meaning "would be payable at the date of the Order or would thereafter become payable and would continue to be payable," with the result that no Order could be made which would require payment to the

Custodian of money which became payable to an enemy who after that date and before actual payment ceased to be an enemy. The next step in the argument is that art. 1 (i) of the Order must be construed likewise, and that, accordingly, if an enemy ceased to be such after the date when a sum of money became due, but before actual payment, the same words in art. 1 (i) which had transferred the right to receive payment to the Custodian must operate to divest him of that right. The final step is that a right to receive payment which might be divested in certain events could not be a "vesting" within the deed. I feel unable to accept this chain of arguments. I can find nothing in the preamble to the Act to warrant what I regard as a strained construction of the phrase "would be payable to . . . an enemy" in s. 7 (1) (a). In my judgment, it is used to describe the characteristics of sums of money which may be required to be paid to the Custodian and nothing else. If a sum of money has those characteristics, it may be ordered to be paid to the Custodian. Such an order is final, and the work of the sub-section is finished, and it cannot go into action again to undo the deed which it has done. I think that the same construction is to be applied to art. 1 (i) of the Order. Any other construction would have most strange results. Article 1 (vii) states without qualification that the Custodian shall have power to sue for and recover any moneys payable to him under this Order, but according to counsel's argument, if the enemy ceased to be an enemy before judgment, that right would be divested by art. 1 (i) coming into operation a second time. Again art. 3 (iv) provides that the Custodian's receipt shall be a good discharge for any money paid to him under this Order, but the person paying would get no discharge if the person otherwise entitled to the money ceased to be an enemy between due date and actual payment. Accordingly, before making any payment, the person liable to pay would have to make enquiries about the whereabouts of the enemy. Section 7 (3) of the Act would not avail him. In my judgment, once a particular sum is caught in the net, there is no way of escape, and a vesting order under the Act could confer, in relation to that particular sum, no advantage on the Custodian which the Order has not already given to him. Accordingly, in my judgment, nothing has ever become payable to the Custodian.

There will, therefore, be a declaration that upon the true construction of the deed when the said Hilde Raaber became an enemy within the meaning of the Trading with the Enemy Act, 1939, and the Orders made thereunder, no further sum became payable under the deed.

Declaration accordingly.

Solicitors: *Withers & Co.* (for the plaintiff); *Solicitor, Board of Trade* (for the defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

F

DE POIX AND ANOTHER v. CHAPMAN (H.M. INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Atkinson, J.), October 28, 29, 1947.]

G *Income Tax—Assessment*—"Land wholly or mainly occupied for the purposes of husbandry"—*Holding comprising 80 per cent. farm land—Finance Act, 1941 (c. 30), ss. 10, 11.*

H The Finance Act, 1941, s. 11, as amended by the Finance Act, 1942, s. 28, provides in effect that, if the total annual value of farm land does not exceed £100, it shall be assessed in accordance with the Income Tax Act, 1918, sched. B. By s. 10 of the Act of 1941, "farm land" is "land wholly or mainly occupied for the purposes of husbandry, not being market garden land, and includes the farm house and farm buildings, if any . . ." The taxpayers occupied land with an area, including the farm house, of some 108 acres at a rent of £105 per annum. The land comprised some 86 acres of farm land, 19 acres of woodland, and 2 acres of kitchen garden. It was found as a fact that neither the woodland nor the garden was occupied for the purpose of husbandry, but the Special Commissioners held that they were bound to treat the whole 108 acres as being "mainly occupied for the purposes of husbandry" since more than half of those 108 acres was

used as farm land. The annual value of the farm land alone was less than £100, but the annual value of the whole holding exceeded that figure.

Held: there being a definite separation of the portions in respect of which a separate assessment was claimed and a permanence of purpose and use to which those portions were put, the taxpayers were entitled to have the farm land separately assessed.

Bomford v. Osborne ([1941] 2 All E.R. 426), *applied*.

[As to the Finance Act, 1941, ss. 10 and 11, see HALSBURY'S STATUTES, Vol. 34, pp. 107-110.] A

Cases referred to:

- (1) *Bomford v. Osborne*, [1941] 2 All E.R. 426; [1942] A.C. 14; 110 L.J.K.B. 432; 165 L.T. 205; 23 Tax Cas. 642; Digest Supp.
- (2) *Dennis v. Hick*, (1935), 19 Tax Cas. 219.
- (3) *Lowe & Sons, Ltd. v. Inland Revenue Comrs.*, (1938), 21 Tax Cas. 597.

CASE STATED by the Special Commissioners of Income Tax.

The Special Commissioners found that, of the total land held by the taxpayers, 19.287 acres constituted woodland and 1.805 acres were kitchen garden, and that neither of those areas was occupied for the purposes of husbandry. They held, however, that they were bound to treat the whole holding as farm land because it was "wholly or mainly occupied for the purposes of husbandry" within s. 10 of the Finance Act, 1941, and, therefore, in view of the annual value of the whole, it was not assessable under sched. B. The appeal by the taxpayers was allowed by ATKINSON, J., in whose judgment the facts appear. B

B. J. M. MacKenna for the taxpayers.

The Solicitor-General (Sir Frank Soskice, K.C.) and *R. P. Hills* for the Crown.

ATKINSON, J.: The taxpayers here are appealing against an assessment in the sum of £1,060, less £53 for wear and tear, for the year ending Apr. 5, 1943, in respect of the profits of their trade as farmers carried on at Bream Fruit Farm in the county of Norfolk. C

The Finance Act, 1941, s. 10, provides that farming shall be treated as a trade for the purpose of income tax and the profits or gains shall be charged under case I of sched. D, and "farm land" is defined as meaning:

... land wholly or mainly occupied for the purposes of husbandry, not being market garden land, and includes the farm house and farm buildings, if any, and "farming" shall be construed accordingly. D

The taxpayers, however, claim the benefit of s. 11 of that Act, as amended by the Finance Act, 1942, s. 28, whereby it is provided that, if the total annual value of the farm land of an individual does not exceed £100, s. 10 of the Act of 1941 shall not apply and in that event farm land shall fall to be assessed in accordance with the Income Tax Act, 1918, sched. B, which provides:

Tax under sched. B shall be charged in respect of the occupation of all lands, tenements, hereditaments, and heritages in the United Kingdom for every 20s. of the assessable value thereof estimated in accordance with the rules of this schedule. In this Act the expression "assessable value" means in relation to tax under this schedule an amount equal to [twice] the annual value of the lands, tenements, hereditaments, or heritages, or, in any case in which it is proved to the satisfaction of the commissioners concerned that any person occupying any lands and assessed to tax in respect thereof is not occupying those lands for the purpose of husbandry only, or mainly for those purposes ... an amount equal to ... the annual value. E

The issue arises in this way. The two taxpayers occupy a farm on land which they rent from their mother at a rent of £105 per annum. The whole area amounts to 108.152 acres. Of that, 86.241 acres are admittedly farm land, and no question arises about that; 19.287 acres are woodlands—marshland planted with willow trees; and there is a kitchen garden measuring 1.805 acres. The commissioners have found as facts that the 19.287 acres constitute woodlands and that they were not occupied for the purposes of husbandry. As to the garden, they found that it was not occupied for the purposes of husbandry, but that it was used for the production of fruit and vegetables for the taxpayers, their families and friends, none of this produce being sold and any surplus being given to a neighbouring hospital. The work in the garden was done by a gardener who was not employed elsewhere on the land, and his wages and the other garden expenses were not charged in the farm accounts, except that the whole rent was charged in the farm accounts. F

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Schedule B, r. 7, provides that any person occupying woodlands may elect to be assessed and charged to tax in respect of those woodlands under sched. D instead of under sched. B. If no such election is made, it remains to be dealt with in accordance with sched. B, and that rule is expressly retained by the Finance Act, 1942, s. 28. Therefore, of this area of 108 acres the commissioners found quite clearly that part is farm land, part is woodland, and part is kitchen garden. If the farm land alone is considered, the annual value may be under £100 per annum, but if the whole property is all treated as farm land the annual value will be over £100.

Although all the facts are found in favour of the taxpayers' view, the commissioners have held that they are bound to treat the whole 108 acres as farm land, because more than half of it is being used as farm land, and, therefore, the land is, at any rate mainly, "occupied for the purposes of husbandry." In other words, the view they seem to have taken is that, if a man owns 1,000 acres and 550 acres are farmed, whatever use is made of the other 450, the whole holding must be treated as farm land because the 1,000 acres, regarded as a whole, are mainly occupied for the purposes of husbandry more than half of it being so occupied. The taxpayers argue that the commissioners have misunderstood the meaning of the words "wholly or mainly," and that those words must be construed with reference to the particular land under consideration and not with reference to the entire holding of the owner. In other words, they say they are entitled to severance and, being entitled to severance, to have the respective plots assessed in the proper way.

There has been one case, which went to the House of Lords, *Bomford v. Osborne* (1), where the question of severance was fully dealt with and which, to my mind, makes it clear that the taxpayers are right and are entitled to have these three different plots separately assessed. In that case the appellant occupied 550 acres of land which he worked as a mixed farm in one unit. On the arable land, which amounted to 229 acres, he grew vegetables and fruit for sale. On the remaining land he had mowing grass, grazing, and osiers, and he kept horses and cattle and pigs and sheep on the land. Rule 8 of sched. B, provides :

The profits arising from lands occupied as nurseries or gardens for the sale of the produce (other than lands used for the growth of hops) shall be estimated according to the provisions and rules applicable to sched. D, but shall be assessed and charged under this schedule as profits arising from the occupation of lands.

The appellant in that case had been assessed to income tax under r. 8 in respect of the profits derived from the 229 acres of arable land and on the assessable value in respect of the remaining land. The appellant contended that it all ought to have been assessed in one assessment, and that no part of his land was occupied as gardens for the sale of produce. The commissioners had decided that the total holding could be divided for the purposes of assessment and that the arable land was occupied as gardens for the sale of produce, the ordinary farming operations being merely ancillary to the market gardening. On appeal to the House of Lords it was held that the whole of the farm was assessable on the annual value under the ordinary rules—in other words, that, on the facts of that case, there could be no severance.

LAWRENCE, J., dealt with the case first and, in stating the point, he said ([1939] 3 All E.R. 262) :

This consideration raises questions of importance where a mixed farm is being assessed, on which, in the course of rotation of crops, produce such as wheat may be followed by strawberries. Can it be said that a part of a mixed farm is occupied as gardens when, in the course of rotation, it is occupied in one year by what may be called a farm crop and in the other by what may be called a garden crop? The counsel for appellant contends that it cannot. He argues . . . that it is not permissible to split up the assessment of a mixed farm worked as one unit . . . that the nature of the produce grown is not the sole consideration under r. 8 . . . Only two authorities have been cited upon the question of splitting up an assessment. The first is *Dennis v. Hick* (2), where FINLAY, J., said at p. 228 : "It may be that in some cases the proper course is to split up the thing and to say : 'Well, these are two quite distinct things, you occupy part of your land as a garden, and you occupy another part of your land as a farm, you have to be separately assessed in respect of these two things.'" The second is *David Lowe & Sons, Ltd. v. Inland Revenue Comrs.* (3), where, although the question was not argued (see *per* LORD CARMONT, at p. 607), the Court of Session held that the

commissioners can apportion the assessment even where lands are held and worked as one unit. I think that I must follow this decision, although in my own view the *dictum* of FINLAY, J., is to be preferred to the view of the Court of Session.

So he decided contrary to his own view. The case went to the Court of Appeal and SCOTT, L.J., was for allowing the appeal, but he was in a minority, and, therefore, the appellant appealed to the House of Lords where they succeeded.

SCOTT, L.J., summarised his views in this way ([1940] 1 All E.R. 108) :

(1) The statutory "garden" must be, within reasonable limits, a defined unit of occupation in relation to space, and also time, for it must have some degree of permanence and continuity, so as to permit, in the normal case, of the gardening profits of the year of assessment being measured by gardening profits of the preceding 3 years, as it used to be, or one year, as it is now (except where a permanent garden has begun so recently as to make the year of assessment the measure under the Act). (2) The "splitting" of a farm into two separate units of the kind indicated in (1) is legitimate only if such a division is present in fact. (3) A finding that a farm is "worked as a single mixed unit" *prima facie* means that it is one in management, cultivation, labour, business accounting and so on, and, therefore, that it is a single farming unit, and, if so, that fact must necessarily exclude the possibility of "splitting." (4) If any given unit of occupation is worked in part as a farm and in part as a garden, but is not susceptible of splitting within conclusion (2), it must be held to be either wholly a farm, or wholly a garden, and it cannot be held to be a garden unless gardening is the dominant purpose of the whole and such a conclusion is not legitimate, unless the farming part is found as a fact to be truly a necessity of and for the garden . . .

LORD SIMON said ([1941] 2 All E.R. 428) :

The present appeal, however, can be decided without adventuring upon the difficult task of precise definition. I am quite prepared to accept the view that a defined area may be a "garden," for the purposes of r. 8, even though it is not fenced round, as long as it is a distinct and separate unity devoted to gardening. On the other hand, as I have already said, a field or fields of farming land should not be called a "garden" merely because they grow products which used to be characteristic products of gardens or even products which are still mainly or largely found in gardens. The main test, in my opinion, is that the defined area shall be subject to that nature and intensity of treatment which are characteristic of horticulture . . . The first question which arises is whether it is in point of law competent to "split" a single holding into two parts with a view to applying r. 8 to one portion of it, while leaving the other portion to be assessed under the ordinary provisions of sched. B. The possibility of this was affirmed by the Court of Session in *David Lowe & Sons, Ltd. v. Inland Revenue Comrs.* (3), and was recognised by FINLAY, J., in the course of his judgment in *Dennis v. Hick* (2) (at p. 228). I accept the possibility of such a division of a unit of occupation, provided that the distinction between the portion which is "occupied as gardens for the sale of produce" and the separate portion which is not so occupied is really made out. In the present case, however, the facts found . . . do not, in my opinion, justify such splitting.

Then he refers to what SCOTT, L.J., had said and agrees with it. LORD MAUGHAM said (*ibid.*, p. 433) :

It seems to be clear that the nurseries or gardens for the sale of the produce must have boundaries capable of being definitely ascertained . . . I do not wish to be understood as saying that a farmer cannot carry on ordinary farming and at the same time carry on the business of a garden for the sale of produce on a distinct area adjacent to or situate within his holding, so that, as regards the latter, he would be taxable under r. 8. I do, however, express the opinion that it is wholly erroneous to select from the area of a farm occupied and worked in one unit, which is used for raising crops and small fruits predominantly, of kinds grown by farmers all over the country, the land being cultivated by ordinary agricultural methods and by ordinary agricultural labourers working indiscriminately on the whole farm and to give to the selected portion the name of a "garden for the sale of produce." To my mind, there is no finding of fact in the Case Stated which justifies such a conclusion.

LORD PORTER summarised his view thus (*ibid.*, p. 446) :

I did not understand the appellant to seek to establish that in a proper case a holding could not be divided into two portions, one of which was occupied as a "garden" (for brevity's sake I omit the words "for the sale of produce") and the other not so occupied. Nor do I think he would be right if he did. Provided it is clearly shown that one part of the land is so occupied and there is a definite separation in the method of working, I see no reason why the two portions should not be separately assessed, and, speaking for myself, I think this conclusion might be arrived at though the portions separately worked were not divided into two continuous parts, but were made up of broken

portions of the area. In the latter case, however, it would, I think, require very clear evidence that the working and method of working of the part classified as a garden differed from that of the other portion of the lands.

A It seems to me that those opinions establish that in a proper case a holding can be divided into two or more portions and ought to be so divided if different rules are applicable for assessment to tax, but there must be definite separation of the portions in respect of which a separate assessment is claimed, and a certain permanence of purpose and use to which they are put. There is no rule of law requiring a tribunal to look at the major part of the whole holding and hold that the character of that part must be attributed to the rest. Here, where there is a definite separation of the woodlands and a definite separation of the garden, with permanence of purpose and use in each case, the question is whether that land is wholly or mainly occupied for the purposes of husbandry. In my opinion, they are entitled to separate consideration. It is plain that no part of the woodlands nor of the garden was occupied for the purposes of husbandry. On the facts found it seems to me to follow that, applying all or any of the tests suggested in *Bomford v. Osborne* (1), the taxpayers were entitled to have the woodlands and the gardens separately assessed. The commissioners said in the last paragraph of the Case :

C We, the commissioners, decided that the 19.387 acres should be assessed as woodlands and that the kitchen garden of 1.805 acres should not be included in the occupation of the farm, but we decided that the occupation of the 108.152 acres should be treated as a whole and was wholly or mainly occupied for the purposes of husbandry.

D I think they were wrong in taking the view that they had to look at the whole holding and see if the major part of it was used for the purposes of husbandry, and, if it were, then it stamped that character on the rest, however separate and however distinct the user of the other parts in fact was. The garden was not even touching any part of the rest of the farm. It is shown as a green patch on the map quite distinct from the farm, and the woodlands had such clearly defined boundaries that there has been no difficulty in getting absolutely accurate measurements. The appeal succeeds, and the Case will have to go back to the commissioners for them to fix the proper assessments.

Appeal allowed.

E Solicitors : *Ellis & Fairbairn* (for the taxpayers) ; *Solicitor of Inland Revenue* (for the Crown).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

F WOOLFENDEN (otherwise CLEGG) v. WOOLFENDEN (otherwise CLEGG).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), October 31, 1947.]

G *Divorce—Practice—Decree absolute—Setting aside—Decree nisi made absolute on premature application by guilty spouse—No summons to registrar—No notice to innocent spouse—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 183 (3) (as amended by the Matrimonial Causes Act, 1937 (c. 57), s. 9)—Matrimonial Causes Rules, 1947 (S.R. & O., 1947, No. 523/L.9), r. 40 (3).*

H The Supreme Court of Judicature (Consolidation) Act, 1925, s. 183 as amended by the Matrimonial Causes Act, 1937, s. 9, provides : “ (3) Where a decree *nisi* has been obtained . . . and no application for the decree to be made absolute has been made by the party who obtained the decree, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the decree *nisi* has been granted shall be at liberty to apply to the court and the court shall . . . have power to make the decree absolute . . .” By the Matrimonial Causes Rules, 1947, r. 40 : “ (3) An application by a spouse to make absolute a decree *nisi* pronounced against him shall be by summons to the registrar, accompanied by a notice of application in Form 14, on not less than four days’ notice . . .” On

May 5, 1947, a wife obtained a decree *nisi* of divorce. On June 24, 1947, the husband applied to the registrar for the decree to be made absolute, and on that day the application was granted. There was no summons to the registrar, no notice was served on the wife, and three months had not elapsed from the earliest date on which the wife could have applied for the decree to be made absolute.

HELD: as the husband had not complied with the statute, the making of the decree absolute could not be treated as a mere irregularity, but must be treated as a nullity and the decree must be set aside.

Craig v. Kanssen, ([1943] 1 All E.R. 108; [1943] K.B. 256), *applied*.

[AS TO APPLICATION FOR DECREE ABSOLUTE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 828-831, paras. 1325-1328; and FOR CASES, see DIGEST, Vol. 27, pp. 550-553, Nos. 6028-6068.]

Cases referred to:

- (1) *McPherson v. McPherson*, [1936] A.C. 177; 105 L.J.P.C. 41; 154 L.T. 221; *Digest Supp.*
- (2) *Craig v. Kanssen*, [1943] 1 All E.R. 108; [1943] 1 K.B. 256; 112 L.J.K.B. 228; 168 L.T. 38; *Digest Supp.*

MOTION by a wife to set aside a decree absolute made at the instance of her husband in a suit in which the decree *nisi* had been pronounced against him. BARNARD, J., ordered that the decree absolute be set aside. The facts appear in the judgment.

Mais and *R. B. Willis* for the husband.

J. R. Adams for the wife.

BARNARD, J.: This is a motion by Phyllis Woolfenden, otherwise known as Phyllis Clegg, asking the court to treat the making of a decree absolute as a nullity and to set aside a certificate under the seal of the registry dated June 24, 1947, that such a decree was made absolute on that date.

On May 5, 1947, the applicant, who was the respondent in a divorce suit, obtained a decree *nisi* on her answer, the court being satisfied on the evidence that her husband, Ernest Woolfenden, otherwise Clegg, the petitioner in the suit, had deserted her without cause for a period of at least three years immediately preceding the presentation of her answer. Under the Matrimonial Causes Rules, 1947, which came into effect on May 1, 1947, the final decree of divorce is no longer pronounced in open court, and the new r. 40 provides for the procedure necessary for a decree *nisi* to become absolute. Rule 40 reads:

(1) An application by a spouse to make absolute a decree *nisi* pronounced in his favour shall be made by lodging in the registry where the cause is proceeding a notice of application in accordance with Form 14 on any day after the expiration of the period prescribed for making such decree absolute. The registrar having searched the court minutes and being satisfied—(a) that no appeal against the said decree is pending . . . (c) that no appearance has been entered (or . . . that no affidavits have been filed . . .), by or on behalf of any person wishing to show cause against the decree being made absolute, the notice shall be filed: Provided that if the application is made after the expiration of one year from the date of the decree *nisi* there shall be lodged with the notice an affidavit by the applicant accounting for the delay and the notice shall not be filed without the leave of the registrar. (2) Upon the filing of the said notice the decree *nisi* shall become absolute. (3) An application by a spouse to make absolute a decree *nisi* pronounced against him shall be by summons to the registrar, accompanied by a notice of application in Form 14, on not less than four days' notice. On any such application the registrar may make such order as he thinks fit, or may refer the application to the judge. (4) A certificate in accordance with Form 15 or Form 16, whichever is appropriate, that the decree has been made absolute shall be prepared and filed by the registrar. The certificate shall be authenticated by fixing thereto the seal of the registry.

In the case before me it was the husband, the spouse against whom the decree *nisi* was pronounced, who applied for the decree to be made absolute, and the application made on his behalf, which is also dated June 24, 1947, and is in the usual form, reads as follows:

We, C. H. Simpson & Simpson, of 1, Cooper Street, Manchester, in the county of Lancaster, solicitors for the petitioner, give notice that application is hereby made on behalf of the petitioner that the decree *nisi* pronounced in this cause on May 5, 1947, be made absolute. I certify that no notice of appeal has been served on me or the petitioner. Dated June 24, 1947.

Rule 40, sub-rr. (1) and (2), clearly do not apply to the present case, because it was the unsuccessful party who had made the application, but sub-r. (3), which deals with an application to be made by a spouse against whom a decree has been pronounced, has clearly not been complied with, because sub-r. (3) makes it clear that there must be a summons to the registrar, and there was no summons in the present case, and no notice whatever was served on the wife.

A The matter, however, does not rest there. Until the passing of the Matrimonial Causes Act, 1937, a party against whom a decree *nisi* had been pronounced could not in any circumstances apply to have the decree made absolute, and it was only s. 9 of that Act which made such a step possible, by adding to the Supreme Court of Judicature (Consolidation) Act, 1925, s. 183, the following sub-section :

B (3) Where a decree *nisi* has been obtained, whether before or after the passing of this Act, and no application for the decree to be made absolute has been made by the party who obtained the decree, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the decree *nisi* has been granted shall be at liberty to apply to the court and the court shall, on such application, have power to make the decree absolute, reverse the decree *nisi*, require further inquiry or otherwise deal with the case as the court thinks fit.

C This provision regulates the procedure by which the guilty party is enabled to apply for the decree to be made absolute under the statute. It is obvious from the date of the certificate of the decree absolute in the case before me that the time required by the statute had not elapsed to enable the guilty party to apply under r. 40 (3) to the court for the decree to be made absolute. I am glad to say that on the affidavit evidence before me I am satisfied that the husband's solicitors acted in ignorance and that there is no question here of any fraud being perpetrated on the court.

D Counsel for the husband has asked me to allow the decree absolute to stand on the ground that there has only been an irregularity in procedure which the court is entitled to overlook, and he has referred me to *McPherson v. McPherson* (1). In that case, which was an appeal from the Supreme Court of Alberta to the Privy Council, the judge who heard the divorce action inadvertently
E heard the action in private, and the Privy Council came to the conclusion that, although there had been an irregularity in procedure, the decrees in question were voidable only and not void and that the time for avoiding them had long gone by. I have also been referred, by counsel for the wife, to *Craig v. Kanssen* (2), in which it was held ([1943] K.B. 256) that :

F . . . Failure to serve process where service of process is required renders null and void an order made against the party who should have been served. The court can set aside such an order in its inherent jurisdiction and it is not necessary to appeal from it.

LORD GREENE, M.R., after citing a number of authorities, stated (*ibid.*, p. 262) in his judgment :

G Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside.

In view of the fact that the husband has not complied with the statute, I have come to the conclusion that I cannot treat the making of this decree absolute as a mere irregularity, and I must treat it as a nullity. The certificate dated June 24, 1947, to the effect that the decree was on that date made final and absolute must, therefore, be set aside.

H Solicitors : *C. H. Simpson & Simpson*, Manchester (for the husband) ; *Aston, Harwood & San Garde & Green*, Manchester (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

Order accordingly.

EVANS v. EVANS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Croom-Johnson, JJ.), October 31, 1947.]

Husband and Wife—Maintenance—Enforcement of order—Wife “residing with” husband—Wife continuing to live in separate part of husband's house “Resides with”—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (c. 51), s. 1 (4).

A
A committal order was made by justices on the husband's default in making payments under a separation order which the wife had obtained against the husband on the grounds of his desertion. At the time when both orders were made the parties occupied and slept in separate parts of a house of which the husband was tenant. They did not have their meals together and the wife performed no domestic duties for the husband. The husband had ordered the wife out of the house, but she had refused to go and, on his bolting the doors against her, she had re-entered by a window. The wife paid no rent. On appeal against the committal order,

B
HELD (CROOM-JOHNSON, J., *dissenting*): on a true construction of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the wife was residing with the husband, and, consequently, the separation order was unenforceable and no liability attached to the husband.

C
[FOR THE SUMMARY JURISDICTION (SEPARATION AND MAINTENANCE) ACT, 1925, s. 1 (4), see HALSBURY'S STATUTES, Vol. 9, p. 415.]

Case referred to:

(1) *Watson v. Tuckwell*, Oct. 27, 1947 (unreported).

CASE STATED by Sussex justices.

D
A complaint was preferred by the wife before a court of summary jurisdiction sitting at Worthing alleging that, by an order made by the court on June 20, 1947, under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, the husband was ordered to pay the wife £2 weekly for her maintenance and 10s. weekly for the maintenance of each of the two children of the marriage while they were under 16 years of age, and that payments had not been made in accordance with the order, the sum of £6 being in arrears. The complaint was heard on July 16, 1947, when the justices committed the husband to imprisonment for one month, but suspended the committal for fourteen days. The husband now appealed, and his appeal was allowed by a majority of the court.

John Foster for the husband.

Harold Brown for the wife.

F
LORD GODDARD, C.J.: This is a Case stated by justices for the petty sessional division of Worthing on a complaint by a married woman that her husband had made default in paying sums of money which he had been ordered to pay by the court. The wife had obtained a separation order against her husband on the ground of desertion, and an order had been made on the husband to pay her £2 a week and 10s. for each of the children. The husband defaulted, and, on a complaint by the wife the justices made an order against him for payment, and, in default, for committal for fourteen days.

G
The husband claimed that he is protected by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4), which provides:

F
No order made under the principal Act (*i.e.*, the Summary Jurisdiction (Married Women) Act, 1895), shall be enforceable and no liability shall accrue under any such order whilst the married woman with respect to whom the order was made resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband.

F
In the Case the justices have found that the husband is the tenant at Worthing of a house which consists of a front room, a kitchen and a scullery on the ground floor and three bedrooms on the first floor. The parties occupy different parts of the house. The husband sleeps upstairs and makes his own bed, while the wife sleeps downstairs. They do not have their meals together, and the wife does no washing or other domestic duties for the husband. The husband has ordered the wife out of the house, but she has refused to go. He has bolted

the doors of the house against her, and she has re-entered by the windows. She pays no rent, and there is no change in the means of the husband since the date of the making of the order. The justices also find that there had been no change in the relations between the husband and the wife since the date of the making of the order and that the husband had made no payment in respect of the maintenance of the wife or the two children. In those circumstances the justices held that the mere continued living of the wife in the same house as the husband did not constitute residence within the meaning of s. 1 (4) of the Act of 1925. They found, as a fact that there was no common household, but that in every sense the husband and the wife were living separate and apart from each other; that since the making of the order there had been no resumption of cohabitation; that the husband, by word and conduct, endeavoured to bar the wife from the house, and that there was wilful refusal by the husband to make the payments under the order.

The husband's complaint is that, in spite of the wife having obtained a separation order which contained a non-cohabitation clause, she insists on living in his house. If these facts had come *de novo* before the Divorce Division, it might have been held that the husband had deserted his wife, but it does not follow that the same considerations apply now as would have applied if proceedings had been taken in the Divorce Division. The question turns on what is the true construction of s. 1 (4) of the Act of 1925. This Act is an Act to amend the law relating to separation and maintenance orders. Section 1 (1) provides that a married woman may apply for an order under the Act on the ground of cruelty by her husband notwithstanding that the cruelty or neglect complained of has not caused her to leave and live separately and apart from him. Before this Act was passed it was a condition precedent to an application by a married woman that she should have left her husband, and I know of no case in which it was held before the Act was passed that a wife could come to the court and say: "I have left my husband and I am living separately from him although I am living in the same house." The fact that the wife, when she applied, had to show that she was living separately from her husband was thought to be a hardship, and hence the provision in s. 1 (1). The Act, however, goes on to provide in s. 1 (4) that the order is not to be effective so long as the wife resides with her husband.

In my opinion, we have to give the ordinary meaning to the words "resides with," and, consequently, the order is not to have effect until she does leave and live separately and apart from her husband. In a recent case* under the Bastardy Laws Amendment Act, 1872, a married woman had applied for a bastardy order, and it was necessary to show that she was a single woman within the meaning which has been given to that expression in the Bastardy Acts. The facts were very similar to the facts of this case. The wife, having quarrelled with her paramour had, through stress of circumstances, returned to live in her mother's house, where the husband had continued to reside as a lodger after the wife had deserted him. They occupied separate rooms. The husband did not contribute to the wife's keep, and she did not perform any wifely duties for him. We held that for the purpose of the Bastardy Acts the wife was a single woman. There was, however, one great distinction between that case and the present case. In that case, although the parties were living under the same roof, they were not living in a house which belonged to either of them. We pointed out in that case that, if we held that the woman was living with her husband, we should have to hold the same if a husband and wife happened to find themselves in the same hotel, one living in one room and the other living in another, but having nothing to do with one another. In my opinion, the considerations which applied in that case can have no bearing on the present matter where the two spouses are living together in the husband's house. This husband and wife are living there and it is the home of both of them.

Section 1 (4) of the Act of 1925 is directed to the case of a married woman residing with her husband. Section 2 (2) deals with a different state of affairs, viz., a resumption of cohabitation. Cohabitation implies something different from mere residence. It must mean that the woman is acting as a wife and has

* *Watson v. Truckwell* (1).

resumed her status and position as a wife. I am not using the word "status" in the very technical sense. I mean that she is acknowledged by the husband to be his wife, and that she has rendered wifely services for him. The parties can, of course, cohabit without there being sexual intercourse between them. That is not a necessary feature of cohabitation, although it is usual. Sub-section (2) of s. 2 provides :

Where a married woman with respect to whom an order had been made under the principal Act resumes co-habitation with her husband after living apart from him, or where she has before the date of the commencement of this Act so resumed cohabitation, and is at that date cohabitating with him, the order shall cease to have effect on the resumption of such cohabitation or at the commencement of this Act, as the case may be.

When one compares that sub-section with s. 1 (4) it is clear that the legislature is providing for different sets of circumstances. In s. 1 (4) they are dealing with mere residence. Where a husband and a wife are living under the same roof, although their relations may be such that they not only occupy separate rooms, and also that they will not even have their meals in the same room. I find it very difficult to say, while they are clearly not cohabitating, that they are residing the one with the other. For these reasons, in my opinion, the justices came to a wrong decision on this matter, and the appeal should be allowed.

HUMPHREYS, J. : I have arrived at the same conclusion. The question in this case may be put in this way : Does a married woman who is living in her husband's house, in which her husband also is living, necessarily reside with him ? I use the word "necessarily" because the justices have found on the facts that, although the wife continued to live in her husband's house while he was there, that did not constitute residence within the meaning of s. 1 (4). If that were a question of fact we could not interfere, but I cannot treat it as a question of fact. All the facts are stated clearly, and, no doubt, accurately, by the justices. The question which they ask is one of pure legal construction, viz., whether the mere continued living by the wife in the same house as the husband constituted residence within the meaning of s. 1 (4) of the Act of 1925.

If it does not constitute residence, what does ? Counsel for the wife referred us to a number of divorce cases, but he was unable to answer that question when it was put to him. I cannot imagine that the legislature did not intend the word "residence" to be given in s. 1 (4) its natural and ordinary meaning. It is to be observed that the statute does not say that no order shall be made. On the contrary, it provides by s. 1 (1), in terms, that an order may be made if cruelty and neglect on the part of the husband are proved although the wife has not been thereby caused to leave and live separately and apart from the husband. Then one finds the rather unusual words that no order made in such circumstances shall be enforceable and no liability shall accrue under such an order while the wife is residing with her husband. I can only attach to those words the meaning which my Lord has applied to them, i.e., that, while the wife is entitled to obtain an order from the justices without leaving her husband, yet, if she wishes to enforce that order, she must cease to be a person who is residing with him. Counsel for the wife suggested that "residence" presupposed that the wife was doing something in the nature of rendering wifely services to her husband, but, as counsel for the husband says, one cannot imagine any act added to that of actual residence which would not bring the parties into the position of cohabitating, and cohabitation is dealt with, as my Lord has observed, in a different section of the Act altogether. It is for that reason that I think the only meaning we can give to the word "residence" is the ordinary meaning of residing in the same house, subject to this, that it would not apply if the house happened to be an hotel or something of that nature. In this case the wife is living in her husband's home.

We have had numerous illustrations at the Bar of the hardship which may accrue to a wife in these circumstances. It may be that the statute has not attempted to deal with every conceivable set of facts, but, whatever may be the result in this or in any other case, we have to decide whether the words in s. 1 (4) can bear a meaning different from that which would be applied to them in any other Act of Parliament. I come to the conclusion that the wife was residing with her husband at the time when she obtained the order enforcing the order which she had properly obtained in the first instance, and that the justices

were wrong in holding that she was, although living with her husband, not residing with him.

CROOM-JOHNSON, J. : The difficulty I have felt throughout the argument arises out of the use by the legislature of the word "with" in the expression "residing with." The expression "residing with" seems to me to be a perfectly simple piece of English, and I do not myself see any difficulty in the construction of it. In my opinion, this case raises a question of fact which is peculiarly susceptible of rightful decision by justices. I do not think there is any difference of opinion between the members of the court about the contrast between the expression "cohabitation" in s. 2 (2) and the expression "resides" in s. 1 (4). I call attention to the fact that the expression in s. 1 (4) is not "resides together." Similarly, I think, a distinction has to be drawn between the expression "living separate and apart" and "residing." Having, however, considered all these matters it still seems to me that it is not right on the facts to say that, within the plain ordinary meaning of the expression, the wife was residing with her husband except in the very limited sense that they were both under the same roof. Accordingly, if it is a question of fact, as I think, on that view of it, it is, it was a matter for the justices to determine. They have found as a fact that there was no common household, but that in every sense the husband and wife were living apart and using separate parts of the house. I cannot see anything here which is different from a case in which the wife and the husband are living in separate flats under the same roof. In those circumstances it seems to me that this was a matter for the justices to determine, and, although I think their determination is a little complicated by the fact that they have laid down a test in law, I think there was evidence on which they could find as they did. I should dismiss the appeal.

Appeal allowed.

D Solicitors : *Waller, Neale & Houlston*, agents for *Marsh & Ferriman*, Worthing (for the husband) ; *Burton, Yeates & Hart*, agents for *Charles, Malcolm & Wilson*, Worthing (for the wife).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

E

COMMERCIAL STRUCTURES, LTD. v. R. A. BRIGGS (INSPECTOR OF TAXES).

F [KING'S BENCH DIVISION (Atkinson, J.), October 27, 30, 1947.]

Income Tax—Additional assessments—“If the surveyor discovers . . .”—“Discovers”—Change of mind on question of law—Income Tax Act, 1918 (c. 40), s. 125 (1).

G The Income Tax Act, 1918, s. 125 (1), provides for additional assessments to be made “if the surveyor discovers—that any properties . . . chargeable to tax have been omitted from the first assessments ; or that a person chargeable . . . has been undercharged in the first assessments ; or that a person chargeable has been allowed . . . any allowance . . . or relief not authorised by this Act” :—

H **HELD :** the word “discovers” is not used in a restricted meaning in the section, but covers the finding out that an error in law has been committed in the first assessments, and, therefore, where the taxpayer has been undercharged in the first assessments, additional assessments can be made even though the full information was before the surveyor in the first instance and no additional information has come to him.

Inland Revenue Comrs. v. Mackinlay's Trustees (1938, S.C. 765), and *Williams v. Grundy Trustees* ([1934] 1 K.B. 524), *followed*.

Anderton & Halstead, Ltd. v. Birrell ([1932] 1 K.B. 271), *not followed*.

[AS TO THE MEANING OF “DISCOVERS,” see HALSBURY, Hailsham Edn., Vol. 17, pp. 339, 340, para. 689, and Supplement ; and FOR CASES, see DIGEST, Supplement, Income Tax, 592b-592e.]

Cases referred to :

- (1) *R. v. Kensington Income Tax Comrs.*, [1913] 3 K.B. 870 ; 83 L.J.K.B. 364 ; 109 L.T. 708 ; 6 Tax Cas. 279 ; *on appeal*, [1914] 3 K.B. 429 ; *and sub nom.*, *Kensington Income Tax Comrs. v. Aramayo*, [1916] 1 A.C. 215 ; 38 Digest 121, 888.
- (2) *R. v. Kingsland Parish, Inspector of Taxes, Ex p. Pearson, Kingsland Estate, R. v. Income Tax Comrs. and Kingsland Parish, Inspector of Taxes*, (1922), 8 Tax Cas. 327 ; 28 Digest 101, 620.
- (3) *Anderton and Halstead, Ltd. v. Birrell*, [1932] 1 K.B. 271 ; 101 L.J.K.B. 219 ; 146 L.T. 139 ; 16 Tax Cas. 200 ; Digest Supp.
- (4) *Williams v. Grundy Trustees*, [1934] 1 K.B. 524 ; 103 L.J.K.B. 204 ; 150 L.T. 378 ; 18 Tax Cas. 271 ; Digest Supp.
- (5) *British Sugar Manufacturers, Ltd. v. Harris*, [1938] 1 All E.R. 149 ; [1938] 2 K.B. 220 ; 107 L.J.K.B. 472 ; 159 L.T. 365 ; 21 Tax Cas. 528 ; Digest Supp. ; *revsg.*, [1937] 3 All E.R. 702.
- (6) *Inland Revenue Comrs. v. Mackinlay's Trustees*, 1938, S.C. 765 ; 22 Tax Cas. 305 ; Digest Supp.
- (7) *Multipar Syndicate, Ltd. v. Devitt*, [1945] 1 All E.R. 298 ; 173 L.T. 84 ; 26 Tax Cas. 359 ; Digest Supp.
- (8) *Vestey's (Baron and Baronet) Executors v. Inland Revenue Comrs.*, (1946), Tax Leaflets, No. 1418.

CASE STATED by General Commissioners of Income Tax.

The commissioners held that, where the taxpayer had obtained exemption or relief not authorised by the Income Tax Acts, additional assessments to income tax could be made on him under the Income Tax Act, 1918, s. 125, notwithstanding the fact that full information was before the surveyor when he made the first assessments. ATKINSON, J., now dismissed the taxpayer's appeal from the decision of the commissioners.

N. C. Armitage for the taxpayer.

The Solicitor-General (Sir Frank Soskice, K.C.), and *R. P. Hills* for the Crown.
Cur. adv. vult.

Oct. 30. ATKINSON, J., delivered the following judgment. In this case the appellants, Commercial Structures, Ltd., are appealing against certain additional assessments under the Income Tax Act, 1918, sched. A, made on them as owners of premises in Gee Street, E.C.1. These additional assessments cover a number of years—part of the year 1940-41 and the four succeeding years up to the end of 1945.

The point arises in this way. The appellants were the owners of a factory, the factory was requisitioned, and thereupon they became entitled to compensation to be fixed in accordance with the Compensation (Defence) Act, 1939, s. 2 (1), which provides as follows :

The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums, that is to say, (a) a sum equal to the rent which might reasonably be expected to be payable by a tenant in occupation of the land, during the period for which possession of the land is retained in the exercise of emergency powers, under a lease granted immediately before the beginning of that period, whereby the tenant undertook to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses . . . and (b) a sum equal to the cost of making good any damage to the land which may have occurred during the period for which possession thereof is so retained (except in so far as the damage has been made good during that period by a person acting on behalf of His Majesty), no account being taken of fair wear and tear or of damage caused by war operations . . .

The premises are assessed in accordance with the Income Tax Act, 1918, sched. A., No. I of which provides :

In the case of all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value (except the properties mentioned in No. II and No. III of this schedule), the annual value shall be understood to be—(1) the amount of the rent by the year at which they are let, if they are let at rackrent and the amount of that rent has been fixed by agreement commencing within the period of 7 years preceding Apr. 5 next before the time of making the assessment ; or (2) if they are not let at a rackrent so fixed, then the rackrent at which they are worth to be let by the year.

Rule 7 (1) provides for a reduction of tax in respect of repairs where tax is charged on annual value estimated otherwise than by relation to profits. In

the present case, which comes under r 7 (1) (b), as amended by, and r 7 (1) (c), as added by, s. 28 (1) and (2) of the Finance Act, 1923, the authorised reduction was "£20, together with a sum equal to one-sixth part of the amount by which the assessment exceeds £100."

A When the authorities dealt with this originally, their task was to find out what was the full rental value of the premises. They had got a figure agreed between whoever requisitioned the premises and the appellants, a rent of £4,940, and it looks as if they assumed that that sum represented the full annual value of the land. The appellants were assessed accordingly, and they paid tax on £4,940, less one-sixth, for the then current year and the four years following. During the latter part of the year 1944-45, the authorities changed their mind. The Case is silent about what led them to do so, but they then formed the view that it was not right that the appellants should get an allowance for repairs of a sixth off their annual value, if they were entitled to have the repairs paid for under the Compensation (Defence) Act, 1939, by the military. The surveyor, therefore, proceeded to make additional assessments in respect of this period of some five years and worked it out in this way: Compensation rent, £4,940; add 10 per cent. for repairs by the tenants, i.e., £494 (that is, the value of this liability to make good damage); and then a deduction of the statutory amount, arriving at a nett assessment of £4,525. Having done that, the surveyor proceeded to demand these further payments. The appellants appealed, and no question was raised before the commissioners about this new view being the right view. The Case finds:

The said additional assessments represent the adjustment admitted by the company to be necessary by reason of the compensation rent not being a rackrent.

That point, therefore, is not before me, but it was argued that there was no power to make an additional assessment.

D Additional assessments are made under the Income Tax Act, 1918, s. 125, the opening words of which are:

(1) If the surveyor discovers that any properties . . . chargeable to tax have been omitted from the first assessments; or that a person chargeable . . . has been undercharged in the first assessments; or that a person chargeable has been allowed . . . any allowance, deduction, exemption, abatement, or relief not authorised by this Act, then and in every such case . . .

E further assessments may be made. This case turns on the effect to be given to that word "discovers." It is plain on the admissions that the appellants were undercharged in the first assessments. The only point is: Can the surveyor be said to have *discovered* this mistake? Sometimes a surveyor learns some new fact which he did not know at the time of the first assessment. Sometimes a decision of the courts tells him that some view he has taken was wrong. F There are instances of that kind where it could fairly be said that the surveyor had "discovered" something which he did not know before. But here the appellants' case is that there was a mere change of view. It is not, they say, suggested that there was any additional information which came to the surveyor, indeed it is found as a fact that full information as to the terms of the letting was reported to the inspector of taxes by the company's agents on Apr. 2, 1942. In other words, it is argued, the surveyor had everything before him then, and there is no suggestion of anything happening or anything being discovered which would indicate to him that he had made a mistake. I think, G therefore, that this case has to be argued simply on the basis that the surveyor changed his mind without anything new coming to his attention or without his learning anything from other surveyors or those above him. On that it is said that the surveyor cannot say he has discovered anything.

A number of cases were cited. The first was *R. v. Kensington Income Tax Comrs.* (1) where the taxpayer obtained a rule calling on the general commissioners to show cause why a writ of prohibition should not be awarded to prohibit them from proceeding on the additional assessments. BRAY, J., in giving judgment, said (6 Tax Cas. 281):

Now the Solicitor-General rightly says that that is a most important point [the point being whether, in that case, anything could have been said to be discovered] because the greatest difficulty will arise if *Mr. Danckwert's* point is correct, that the surveyor can only put the additional commissioners in motion if he has ascertained on legal evidence that there are such profits.

Later, dealing with his view of the meaning of the word "discovers," he said (*ibid.*, 283):

Has the surveyor any rights given to him to obtain legal evidence? He has none. Up to this point he has no right whatever to see the books of the taxpayer, or to make anybody in the service of the taxpayer or anybody else make an affidavit. It would seem, therefore, most unlikely that the legislature should have intended by the word "discover" that he was to ascertain by legal evidence. It provides for a later trial, if I may call it so, of the question when either party appeals. This is not the time for legal evidence, and it seems to me to be quite clear that the word "discover" cannot mean ascertain by legal evidence; it means, in my opinion, simply "comes to the conclusion" from the examination he makes, and, if he likes, from any information he receives.

Towards the end of his judgment, BRAY, J., said (*ibid.*, 289):

The other point of substance between the parties is as to the meaning of the word "discovers" in s. 52 [*i.e.*, the corresponding section of the Act of 1880]. I think that word means "has reason to believe." If it is construed in the sense "has reason to believe," it is consistent, and only in that way is it consistent, with the whole scheme of this legislation.

LUSH, J., put it this way (*ibid.*, 290):

Now if you take the word "discovers," as I think it clearly was intended to be taken, as merely an alternative to "find" or "satisfy himself" the difficulty disappears.

The next case was *R. v. Kingsland Parish, Inspector of Taxes, Ex p. Pearson, Kingsland Estate, R. v. Income Tax Comrs. and Kingsland Parish, Inspector of Taxes* (2), and this, again, was a motion for rules *nisi* for writs of prohibition for the same reason. LORD HEWART, C.J., did not say much on this point, but merely referred to it thus (8 Tax Cas. 329):

Section 125 of the Act provides, among other things, that if the surveyor discovers that a person chargeable has been allowed or has obtained from and in the first assessment any deduction not authorised by the Act, then he may make an additional first assessment, subject always to the right of appeal.

He then considered whether prohibition lay in a case of that sort, seeing that there was a right of appeal, but LUSH, J., who was a member of the court, repeated (*ibid.*, 331) what he had said in the *Kensington* case (1):

If he honestly comes to the conclusion that a mistake has been made, it matters nothing so far as his jurisdiction to amend the assessment is concerned, that he may have come to an erroneous conclusion, whether on law or on fact. His jurisdiction to amend is correctly and rightly exercised, even though he has taken an erroneous view of the law with regard to the mistake in allowance that has been made. Therefore, unless it can be shown that the surveyor never has made this discovery, in other words, unless it can be shown that he never inquired into the matter at all or that he never honestly believed that a mistake had been made, the result of his investigation and the amendment that he has made of the certificate he has given to the commissioners cannot be challenged on the ground of want of jurisdiction.

Those two cases seem strongly in favour of an honest change of opinion. Of course, there is no question here about honesty in the change of opinion, and, so far, it would seem that an honest change of opinion comes within the words "if the surveyor discovers."

Then came *Anderton and Halstead, Ltd. v. Birrell* (3), on which the appellants mainly rely. There the assessments were based on certain accounts, and in these accounts a debt due to the company had been treated (I do not know whether in whole or in part) as a bad debt, and the company were assessed accordingly. Some time afterwards the surveyor ascertained that in succeeding years the company had given more credit to the debtors, and he naturally considered that the company never could have really thought that the debt was bad if they had gone on letting the debtors incur further indebtedness. He, therefore, proceeded to make an additional assessment in respect of the period in which he had allowed the debt as a bad debt. The case came before ROWLATT, J., and two matters fell to be dealt with. The first was: Was the surveyor's amended view right?, and the judge held that it was wrong. But he also dealt with the point whether, even if the surveyor had been right on the first question, it could be said that he had discovered anything relevant to the inquiry. ROWLATT, J., said (16 Tax Cas. 208):

The real question is whether, within the meaning of s. 125, the [surveyor] has "discovered" an undercharge in the first assessment. The word "discover" does not, in my view, include a mere change of opinion on the same facts and figures upon the same question of accountancy, being a question of opinion.

He then referred to the *Kensington* case (1), and adhered to the view that I have just read.

If *Anderton and Halstead, Ltd. v. Birrell* (3) remained unchallenged, it would seem to me to cover the present case, because there is nothing here to indicate anything more than a change of opinion on the same facts and figures as were before the surveyor at the time of the original assessment. The cases, however, do not stop there. The matter was considered by FINLAY, J., in *Williams v. Grundy Trustees* (4). There the taxpayers were the trustees under a will by which they were directed to hold the residue of the testator's estate in trust for his grandson if and when he should attain the age of 21 years, and, in the event of his not attaining 21 years, in trust for certain other beneficiaries. The whole of the income of the trust fund was received and accumulated by the trustees and part of the income so received was interest on certain war stock. In 1929 the trustees made a return stating that the 5 per cent. war stock interest was not taxable and that it was held in trust for the grandson until he attained the age of 21 years, and one of the trustees made a statutory declaration that the grandson was the beneficial owner of this stock and entitled to the income thereon. After discussion, the inspector of taxes informed them that an additional assessment to income tax which he was proposing to make would not be made—in other words, that he accepted their view that the income in question was not subject to tax. Four years later another inspector of taxes came to the conclusion that the grandson's interest was contingent in that it arose if and when he should attain the age of 21 years, and, if it were contingent, the income would be taxable, and he, therefore, caused additional assessments to be made on the trustees in respect of the untaxed interest. There was no doubt that the new view was right, and the only question of importance dealt with was: Could it be said that the surveyor had "discovered" anything within s. 125? After referring to the *Kensington* case (1), FINLAY, J., said (18 Tax Cas. 277):

So far, the matter would have appeared to be reasonably clear. Here is a question of whether an interest is vested or is contingent. If vested, one view prevails; if contingent, another; quite obviously, the thing is one on which persons of intelligence applying their minds to the facts, might arrive at an erroneous conclusion, and both parties here quite honestly did, as is admitted, arrive at an erroneous conclusion, with the result, of course, that there was an escape of tax.

Those words, incidentally, describe accurately what happened in the case with which I am dealing. FINLAY, J., continued (*ibid.*, 277, 278):

The argument very clearly put by Mr. Errington on the other side in answer to the argument of the Attorney-General was this: he said: "Well, 'discovery' means the finding out of some fact, the fact being a fact which did, in fact, exist at the time, but was not known to them," and he cited a passage from ROWLATT, J.; and how anxiously one considers everything that ROWLATT, J., says, I need not say. He cited a passage from ROWLATT, J., in the case of *Anderton and Halstead, Ltd. v. Birrell* (3) . . . The facts differ widely from the facts in the present case because there the question was this: there had been an allowance in respect of bad debts and the inspector suggested, not in the light of a new discovery about the time, but in the light of something which he had discovered, some fact which he had discovered years after as to the treatment of their debts by the company, that he had discovered that the allowance was erroneous. It was held by the learned judge that that would not do, and there is one sentence in his judgment which undoubtedly has given me anxiety, because he says this (16 Tax Cas. 208): "But the mere fact of such discussion of the means of ascertainment indicates an assumption that there was something to be ascertained somehow. How greatly it would have simplified the problem if it could have been said that the inspector makes a 'discovery' if he merely changes his opinion, without any new information at all." He goes on with a sentence which rather tends, I think, to favour the view which I take, if it has any bearing, in this way: "Moreover, it is to be remembered the income tax is an annual tax for the service of the year, and when one finds a provision for an additional assessment within a period of 6 years, one is led to expect machinery, not for a mere revision, but for the bringing in of something which had been overlooked."

FINLAY, J., said that there could be no doubt about the result in the case before

ROWLATT, J., (and I have already said that here), but he then continued with these words (*ibid.*, 278) :

... but I do not find it possible to apply the words to every case, in the sense of reading them as meaning that an inspector can never make a discovery if the meaning of that discovery involves a change of opinion. I cannot think that that was what was meant and it does not seem to me that that view is consistent with the authorities to which I have already referred.

In the present case the commissioners followed *Williams v. Grundy Trustees* (4). That case, to my mind, is directly in point, and, if the matter stopped there one would, again, be in no difficulty. The real difficulty, however, arises (and it is the reason why I have gone through the authorities rather carefully) when one comes to consider *British Sugar Manufacturers, Ltd. v. Harris* (5). There, by an agreement, a company, which was carrying on business as manufacturers of beet sugar, agreed to pay to two bodies in each of four years for division between them 20 per cent. of the nett profits in consideration of their giving to the company the full benefit of their technical and financial knowledge and experience. When the original assessments had been made, the view had been accepted by the inspector that that 20 per cent. was a fair payment to be allowed as an expense. Later, he changed his view about that and contended that it was not so, but that it was a division of profits, and, therefore, must not be allowed as an expense, and he made new assessments. The matter came before FINLAY, J., first and he thought the new view was right, and, dealing with the second point which had been taken—that there had been no “discovery” of anything—he adhered to the view he had expressed in *Williams v. Grundy Trustees* (4). The case then went to the Court of Appeal who held that the expense ought to be allowed, and, therefore, in any event, the appeal succeeded. But the point whether there was power to make these further assessments—in other words, had the surveyor “discovered” anything—was fully argued by the Attorney-General, who said ([1938] 2 K.B. 231) :

There was a “discovery” of an undercharge. It is a misapprehension to say that the discovery of a new fact is necessary in order to make the section applicable. The appellants’ case is that an opinion formed with a knowledge of all the facts creates an estoppel and prevents any one from imposing an additional assessment. There is no justification for this. Why should the Crown be precluded from making an additional assessment because the surveyor did not take an objection to an assessment which was available. In *Anderton and Halstead, Ltd. v. Birrell* (3) no new facts were discovered.

Then, in brackets, come the words, “No reply was called for.” SIR WILFRID GREENE, M.R., having held that the new assessments were bad, went on to say (*ibid.*, 238) :

But there is a further point in regard to them on which I feel that I ought to express an opinion, as it was fully argued. It is this, that the three assessments in question ...

The Attorney-General thereupon asked leave to intervene, and said that, so far as the first part of the judgment went, that really ended the litigation, but, as far as the second point was concerned, if the court was against him, it would be a proper case in which to ask for leave to go to the House of Lords, which, of course, would be hard on the appellants. He asked the court to appreciate the difficulties that might arise if they went to the House of Lords and said that the point did not really arise in view of the finding of the Court of Appeal on the first part of the case. The Lords Justices indicated that they were ready to fall in with that view, and ROMER, L.J., said (*ibid.*) :

It will be observed by those interested in such matters that Mr. King was not called upon to reply upon that question ; they will be able to form their own opinion, therefore, as to the views of this court, without hearing the reasons why those views have been formed.

It is obvious that, if there had been no intervention, the Court of Appeal would have rejected this argument of the Attorney-General’s that a mere change of opinion amount to a discovery. It seems to me, however, that I cannot treat the position as the same as if that judgment had been given. If the judgment had been given, the matter would have been taken to the House of Lords, and when their Lordships refrained from giving a judgment, in my view, they meant that they were leaving the law for the moment where it was and were not going to express any opinion to guide future courts.

Within six months of that decision the very question came before the Court of Session, in *Inland Revenue Comrs. v. Mackinlay's Trustees* (6). There, on some rather difficult problem, originally one view had been taken and assessments had been made, and later another view was formed and further assessments were made. The point about "discovery" was taken, and the LORD PRESIDENT (LORD NORMAND) expressed his view as follows (22 Tax Cas. 312):

A I do not think it is stretching the word "discovers" to hold that it covers the finding out that an error in law has been committed in the first assessment, when it is desired to correct that by an additional assessment.

LORD FLEMING expressed this opinion (*ibid.*, 313):

B I can see no ground for putting such a restricted meaning upon the section and, in particular, for holding that it does not apply to a mistake in law. To give it the restricted meaning which the respondents seek to place upon it appears to me to deny meaning and effect to quite a number of the matters which are specifically dealt with in the section.

The other Lords agreed. *British Sugar Manufacturers, Ltd. v. Harris* (5) was called to their attention: [see 1938, S.C. 769]. Of course, the Court of Session are not bound by our Court of Appeal and our Court of Appeal is not bound by the Court of Session, but it is the practice in this court, not merely to follow the judgments of judges of first instance, but also to follow decisions of the C Court of Session, unless, of course, there is something inconsistent with them in a decision of the Court of Appeal here.

There was just a reference to this question in *Multipar Syndicate, Ltd. v. Devitt* (7), where WROTTESELEY, J., said ([1945] 1 All E.R. 303):

D That leaves the second question to be determined, namely, whether, in the circumstances of this case, the inspector can be said, within the meaning of the Income Tax Act, 1918, s. 125, to have discovered an undercharge so as to be entitled to raise the additional assessment on the transaction, the subject of the case. It was said by ROWLATT, J., in the case of *Anderton and Halstead, Ltd. v. Birrell* (3) that a mere change of opinion by an inspector who, with full knowledge of the facts, had honestly held the opinion that tax was not payable, was not a discovery within the meaning of the section. Again, it is clear that in the case of *British Sugar Manufacturers v. Harris* (5), as far as the arguments are concerned, the Court of Appeal were prepared to hold that what took place in that case was not discovery within the meaning of the section. On the E other hand, there is the case of *Mackinlay's Trustees* (6) to the effect that a discovery of a mistake in law in a former assessment is a discovery within the section. Though the decision is that of the Scottish courts, it is one to which I must pay attention. But when I come to the facts in this case, it seems to me to be unnecessary to decide this point.

The same question came before MACNAGHTEN, J., in *Vestey's (Baron and Baronet) Executors v. Inland Revenue Comrs.* (8), where he thought that it was F his duty to follow the law as laid down by FINLAY, J. Although I see the greatest force in ROWLATT, J.'s view [in *Anderton and Halstead, Ltd. v. Birrell* (3)] that a mere change of opinion may well not be a "discovery," I do not think it is necessary for me to express my own view, because I feel that, on the cases as they are, it is my duty to follow the decision of FINLAY, J. [in *Williams v. Grundy Trustees* (4) and in *British Sugar Manufacturers v. Harris* (5)], and of G the Court of Session [in *Inland Revenue Comrs. v. Mackinlay's Trustees* (6)], and that I cannot take an undelivered judgment of the Court of Appeal as being as effective as it would have been if it had been given. Therefore, in my judgment, the appeal must fail.

Appeal dismissed with costs.

Solicitors: *R. C. Bartlett & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

MORGAN v. MANSER.

[KING'S BENCH DIVISION (Streatfeild, J.), October 20, 21, 22, 23, 24, 1947.]

Contract—Frustration—Impossibility of performance—Contract between manager and variety artiste—Artiste called up for army service—Contract treated by parties as still subsisting.

If there is an event, or change of circumstances, which is so fundamental as to be regarded by the law as striking at the root of a contract as a whole and beyond what was contemplated by the parties, and such that to hold the parties to the contract would be to bind them to something to which they would not have agreed had they contemplated that event or those circumstances, the contract is frustrated by that event immediately and irrespective of the volition or the intention or the knowledge of the parties as to that particular event, and even though the parties have continued for a time to treat the contract as still subsisting. In those events, the court will grant relief and pronounce that the contract has been frustrated, either by implying a term to that effect, or otherwise. The belief, knowledge and intention of the parties is evidence, but evidence only, on which the court can form its own view whether the changed circumstances were so fundamental as to strike at the root of the contract and not to have been contemplated by the parties.

By a contract dated Feb. 8, 1938, a variety artiste engaged a manager for a period of 10 years for the purpose of obtaining engagements in music halls, theatres, etc., in any part of the world, the manager undertaking to obtain publicity in advertising in any way he might think fit. In June, 1940, the artiste was called up for service in the army, and, after 18 months of military training, was transferred to the Army Entertainment Pool, in which he continued to serve until he was demobilised in Feb., 1946. The parties continued, so far as it was possible in the circumstances, to treat the contract as still subsisting, the manager endeavouring to keep the artiste's name before the public and potential employers after the war.

Held: there was such a change of circumstances and for such a duration and the original contract, looked at as a whole, was so fundamentally invaded by the calling up of the artiste that it must be considered as frustrated by reason of that event.

[AS TO FRUSTRATION OF ADVENTURE, see HALSBURY, Vol. 7, p. 215, para. 296; and FOR CASES, see DIGEST, Vol. 12, pp. 386-404, Nos. 3172-3252.]

Cases referred to:

- (1) *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; *sub nom.*, *Re F. A. Tamplin S.S. Co., Ltd. & Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315; 12 Digest 390, 3194.
- (2) *Horlock v. Beal*, [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 12 Digest 384, 3166.
- (3) *Cricklewood Property & Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*, [1945] 1 All E.R. 252; [1945] A.C. 221; 114 L.J.K.B. 110; 172 L.T. 140; Digest Supp.
- (4) *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; Digest Supp.
- (5) *Hirji Mulji v. Cheong Yue S.S. Co.*, [1926] A.C. 497; 95 L.J.P.C. 121; 134 L.T. 737; Digest Supp.
- (6) *Bensaude v. Thames & Mersey Marine Insurance Co.*, [1897] A.C. 609; 66 L.J.Q.B. 666; 77 L.T. 282; 29 Digest 47, 93
- (7) *Larrinaga & Co. v. Societe Franco-Americaine des Phosphates de Medulla, Paris*, (1923) 92 L.J.K.B. 455; 129 L.T. 65; 12 Digest 389, 3189.
- (8) *Denny, Mott & Dickson, Ltd. v. Fraser (James B.) & Co., Ltd.*, [1944] 1 All E.R. 678; [1944] A.C. 265; 113 L.J.P.C. 37; 171 L.T. 345; Digest Supp.
- (9) *Distington Hematite Iron Co., Ltd. v. Possehl & Co.*, [1916] 1 K.B. 811; 85 L.J.K.B. 919; 115 L.T. 412; 2 Digest 175, 403.
- (10) *Marshall v. Glanvill*, [1917] 2 K.B. 87; 86 L.J.K.B. 767; 116 L.T. 560; 12 Digest 300, 2468.
- (11) *Unger v. Preston Corp.*, [1942] 1 All E.R. 200; Digest Supp.
- (12) *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 12 Digest 391, 3198.
- (13) *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 12 Digest 399, 3233.

ACTION for damages for breach of contract. The facts appear in the judgment. The contract was held to have been frustrated and judgment was given for the artiste.

Roy M. Wilson and John Wilcox for the manager.

Rodger Winn and Lord Vaughan for the artiste.

A **STREATFEILD, J. :** In this case the plaintiff claims damages from the defendant, who is a variety artiste, for an alleged breach of a contract entered into on Feb. 8, 1938, under which the plaintiff undertook to act as the artiste's manager. Two answers are pleaded, first, that, by reason of the call-up for army service of the artiste in June, 1940, the contract was frustrated, and was none the less frustrated by reason of the fact that the parties thereafter and until 1945 continued, so it is contended, to treat that contract as though it was still subsisting, and, alternatively, that, even if the contract was not then frustrated, B it was in 1945 mutually rescinded in circumstances which I will come to presently. Either of those defences, if established by the artiste, on whom rests the burden of proof, would excuse him from performance of this contract, and entitle him to succeed.

C In 1938 the artiste was in a position of comparative obscurity and was "discovered" by the manager, who recognised his promise and considered that he had the makings of a "star" performer. Accordingly, this contract was entered into between them in 1938. The material parts of the agreement which I have to consider as a whole are these :

D The manager is appointed by the artiste for ten years and in consideration of such appointment he agrees (1) to use his best endeavours on behalf of the artiste to obtain engagements for the artiste at music halls, theatres, broadcasting, gramophone records and cinematograph films in the United Kingdom and elsewhere throughout the world. (2) To use his best endeavours to obtain maximum salaries and payments for the artiste's services as aforesaid.

Paragraph 3 deals with travelling expenses and other agents' commissions. Paragraph 4 reads :

E In consideration of the services the manager will obtain for the artiste to the best of his ability publicity in advertising in any way that the manager may think fit and shall be able and the cost shall be paid by the manager out of the monies due to him under the agreement.

F There follows a paragraph dealing with the remuneration of the manager for his services. It is clear that the fundamental object of that contract was not only that the manager should obtain, but also that the artiste should be in the position to perform, engagements which the manager obtained for him, in music halls and theatres, broadcasting, making gramophone records, and performing in cinematograph films, and it appears to me, looking at the contract as a whole, that the other matters, e.g., the advertising and the publicity, are subsidiary to the main object of the contract, which is that the one should obtain and the other should perform those engagements which the manager was able to secure for him.

G Neither party considered for a moment in Feb., 1938, that during the currency of that agreement there might be an event which would prevent the fundamental object of that contract from being carried out, and the question which I have to decide here is whether the call-up of the artiste and his entry into military service in June, 1940, as opposed to the event of the war itself, amounted to a frustration of this contract. When the war came, before the artiste was called up, there were, certainly, altered conditions. There was an extra outlet for the activities of the artiste through an organisation of which everybody knows, called ENSA, but, at the same time, there were obviously restrictions in that H outlet for his services even during the period from Sept., 1939, until June, 1940. One instance will suffice to illustrate the changed circumstances brought about by the war itself before even the artiste was called up. I have been told that, on one occasion, he and the manager went overseas together to France. The manager told me that he went there really as manager, but, in fact, they were artiste and accompanist. They were each paid a separate fee. It was a different form of activity from that which they had been engaged in before the war. It certainly was not being conducted on the same lines as the engagements under the contract itself, under which the manager was entitled to

a percentage of the fees paid to the artiste. Then there came this blow to the proper fulfilment of the contract. In June, 1940, the artiste was called up into the army, and there he remained until he was demobilised in Feb., 1946. He might have remained in an operational unit during the whole of the war, in which case it would have been clear that there would have been such an interruption in the continuity of this contract as would have amounted to a frustration of its objects. Instead of that, after 18 months of military training, he was transferred to the Entertainments Pool where he continued for the rest of his army career to carry out a very important and useful work, but not for his own benefit, though he did, of course, gain this from it, that he kept his hand in in his ordinary civilian employment, and, no doubt, was able to keep his name before the public—certainly, the army—in that way. During that period, too, the manager undoubtedly did do something to try and keep his name before the public and before potential employers after the war.

What is the frustration of a contract? Various theories have been put forward, and have been examined in the House of Lords, but I do not think that it is necessary that any decision should be made as to the basis on which frustration is founded. It is enough, in my view, that one should look at a few of the cases to which my attention has been drawn from which it is clear what are the tests to which the facts of the case have to be applied. One naturally turns to the well-known passage of LORD LOREBURN in *Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (1) ([1916] 2 A.C. 403):

In order to decide this question it is necessary to ascertain the principle of law which underlies the authorities. I believe it to be as follows: When a lawful contract has been made and there is no default, a court of law has no power to discharge either party from the performance of it unless either the rights of some one else or some Act of Parliament give the necessary jurisdiction. But a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree.

After referring to *Horlock v. Beal* (2) he goes on:

... when our courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded. It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

There LORD LOREBURN is stating what we have been calling the "implied term" theory. The other way in which it is put, not using the words "implied term," is expressed in *Cricklewood Property & Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.* (3) ([1945] 1 All E.R. 255) in a passage in the speech of LORD SIMON, L.C., where he defines frustration in the words:

Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If, therefore, the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally, if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising, frustration

does not occur. Neither, of course, does it arise where one of the parties has deliberately brought about the supervening event by his own choice. (See the cases collected in *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corp., Ltd.* (4)). But where it does arise, frustration operates to bring the agreement to an end as regards both parties forthwith and quite apart from their volition.

On p. 257 the Lord Chancellor says :

A Frustration, where it exists, does not work suspension but brings the whole arrangement to an inevitable end forthwith.

Dealing with the case before him, with regard to a lease, he said he could not regard the interruption which had arisen as such as to destroy the identity of the arrangement or make it unreasonable to carry out the lease according to its terms as soon as the interruption was over. It is noticeable that, in that case, LORD SIMON, although he had himself spoken of the "implied term" theory in *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corp., Ltd.* (4) ([1941] 2 All E.R. 171), in this passage, did not use the words "implied term," but, it seems, having regard to other pronouncements that that distinction may not have been of particular moment.

In *Hirji Mulji v. Cheong Yue Steamship Co., Ltd.* (5) ([1926] A.C. p. 507), LORD SUMNER says :

C An event occurs, not contemplated by the parties and therefore not expressly dealt with in their contract, which, when it happens, frustrates their object. Evidently it is their common object that has to be frustrated, not merely the individual advantage which one party or the other might have gained from the contract. If so, what the law provides must be a common relief from this common disappointment and an immediate termination of the obligations as regards future performance. This is necessary, because otherwise the parties would be bound to a contract, which is one that they did not really make. If it were not so, a doctrine designed to avert unintended burdens would operate to enable one party to profit by the event and to hold the other, if he so chose, to a new obligation.

D On p. 509 LORD SUMNER continues :

Evidently, therefore, whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention or their opinions, or even knowledge, as to the event, which has brought this about, but on its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure. Sometimes the event is such as to speak for itself, like the outbreak of war on Aug. 4, 1914, in *Horlock v. Beal* (2), see per LORD WRENBURY. Sometimes the frustration is evident, when the gravity and the circumstances of the breakdown can be known, as in *Bensaude's* case (6); sometimes, as in the case of requisition, when it can be known that in all reasonable probability the delay will be prolonged and *a fortiori* when it has continued so long as to defeat the adventure. Frustration is then complete. It operates automatically: *Larrinaga & Co.'s* case (7). What the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event by informed and experienced minds.

F A long passage from LORD WRIGHT's speech in *Denny, Mott & Dickson, Ltd. v. James B. Fraser & Co., Ltd.* (8) ([1944] 1 All E.R. 678), has been read to me, but I do not intend to read all of it. Part of it is important. On p. 683 he says :

G It is now, I think, well settled that, where there is frustration, a dissolution of a contract occurs automatically. It does not depend, as does rescission of a contract on the ground of repudiation or breach, on the choice or election of either party. It depends on the effect on the possibility of performing the contract of what has actually happened. Where, as generally happens, and actually happened in the present case, one party claims that there has been frustration and the other party contests it, the court decides the issue and decides it *ex post facto* on the actual circumstances of the case.

H LORD WRIGHT then discusses at some length the basis of the "implied term" rule, and he enunciates what he calls the somewhat heretical theory to which my attention has been drawn. On p. 687 LORD PORTER quotes the passage from LORD LOREBURN in the *Tamplin Steamship Co.* case (1) to which I have already referred, and he continues on that page :

Whether this result follows from a true construction of the contract or whether it is necessary to imply a term or whether again it is more accurate to say that the result follows because the basis of the contract is overthrown, it is not necessary to decide; the principle is well established. But it is the contract as a whole which has to be considered, not a part only.

He then goes on to approve of the passage in *POLLOCK ON CONTRACTS*, 11th ed., p. 255, with one slight amendment which has now been made in the 12th ed., p. 246 :

Further, it is to be observed that the disturbing cause must go to the extent of substantially preventing the performance of the whole contract.

the amendment being that it should be " the contract as a whole."

From those authorities it seems to me that, whether relief is given by way of implying a term or otherwise, the principle may be stated in this way. If there is an event or change of circumstances which is so fundamental as to be regarded by the law as striking at the root of the contract as a whole and beyond what was contemplated by the parties and such that to hold the parties to the contract would be to bind them to something to which they would not have agreed had they contemplated that event or those circumstances, the contract is frustrated by that event immediately and irrespective of the volition or the intention or the knowledge of the parties as to that particular event, and even although they have continued for a time to treat the contract as still subsisting. In those events, the court will grant relief and pronounce that the contract has been frustrated either by implying a term to that effect or otherwise. The belief of the parties and their knowledge and intention is evidence, but evidence only, on which the court can form its own view whether the changed circumstances were so fundamental as to strike at the root of the contract and not to have been contemplated by the parties.

It has been urged on me that, in this case, the parties after the call-up of the artiste, continued to treat the contract, as nearly as they could, as though it was still subsisting. It is agreed that the scope of the contract was necessarily much restricted, but it has been urged that the parties, as far as possible, continued under it, realising that the contract was not wholly impossible to carry out, and that the artiste continued to treat the manager as his manager, and the manager continued to carry out that part of the contract which remained with a view to resuming full activity under the contract when the artiste was fully released from the Army. I am not sure, when the parties carried on in that way and the artiste continued to treat the manager as his manager, that it was really in pursuance of the contract. It may well have been that the artiste regarded it as a matter to his advantage that he should have someone behind him to whom he could refer as his " manager." It may well be that the manager thought that his protege, who had done well in the past, after the war was likely to do well again, and that it was desirable in everyone's interest that he should have his name kept before the public with a view to resuming either that contract or entering into some other contract afterwards. Looking at the contract as a whole, I have to ask myself whether, in spite of the conduct of the parties and their intention afterwards, the contract, or what remained of it, was so fundamentally changed and there was such a delay in prospect and the nature of the interruption was such that, inevitably, this contract could not be continued. One has to look back to those days in 1940 when the artiste was called up, when the fate of this country, as we all remember, hung on a thread, and anyone who was at that stage called up was likely to be in military service for a very considerable time. Either the thread would snap altogether or else it was obvious that the war would be of long duration. The artiste was a young man, and it seems that, so long as he was physically fit for military service, he was likely to be in the army for a considerable time. After he had been transferred to the Pool it seems to me that what he was able to do was not done for his own benefit, except in so far as it kept his name before the public, it may well be, a limited public. What he was doing then was different from what was contemplated by the original contract when it was thought that he would have engagements at music halls or theatres, broadcasting, making gramophone records, cinematograph films, and the like, and it does not seem to me that, if the artiste was able to keep his name before the public during this period, it was in relation to the contract between him and the manager. In my opinion, the parties were keeping the position open so that the work of manager and artiste would be more easily resumed after the latter's period of military service. The contract was essentially one which was personal to both parties. It could only be carried out by the artiste appearing personally in the engagements which the manager obtained for him. It involved the parties

in a continuous relation involving efforts of both sides, and during the period of the artiste's war service neither of them was able to make those efforts in the manner which was contemplated by them. In my view, to affirm their contractual adventure now, although it could not have been acted on, is to substitute a new contract. For that phrase I refer to the words of ROWLATT, J., in *Distington Hematite Iron Co., Ltd. v. Possehl & Co.* (9) ([1916] 1 K.B. 814), where he says :

A This contract does not provide for performance of a future act or a series of disjointed acts, some immediate and others more remote. This contract involves the parties in a continuous relation involving efforts on both sides, of which the essence is continuity. To affirm such a contract as standing generally although at the present time and for an indefinite period it cannot be acted on is not to maintain the original contract, but to substitute a different contract for it. To say that the contractual obligations shall exist now and henceforth and to say that they cannot be performed now and that no one knows when they will become performable again is, having regard to the nature of the obligations in this case, a simple contradiction. The result is that, the war having interfered with the performance of this contract, the contract is dissolved.

C A similar instance of frustration is to be found in *Marshall v. Glanvill* (10). There one of the parties to the contract was called up for military service, after which it became illegal for him to carry out his contract of service with his employers. It may be that in the present case there would be no illegality about continuing the contract, but, at the same time, I consider that it would be impossible to contemplate that a soldier on military service could reasonably carry out the engagements which were provided for in the contract. ROWLATT, J., in *Marshall v. Glanvill* (10) said ([1927] 2 K.B. 90) :

D The effect of the Military Service Act, 1916, was to take the plaintiff out of the employment of the defendants. He could no longer execute their orders or go about their business and they could no longer employ him for the present and for an indefinite period in the future he is out of their employment.

E Another case to which my attention was drawn was *Unger v. Preston Corpn.* (11), where it was held that the internment of one of the parties to a contract for a period other than a very short time operated as a frustration of the contract. In *Bank Line, Ltd. v. Arthur Capel & Co.* (12) ([1919] A.C. 454), LORD SUMNER deals with the matter in this way, after instancing certain cases :

F All these are cases of delay arising out of the exigencies of the present war ; and the length of the delay was especially dwelt on in the particular circumstances of *Tamplin's* case (1). BAILHACHE, J., says that the main thing to be considered is the probable length of the total deprivation of the use of the chartered ship compared with the unexpired duration of the charterparty, and I agree in the importance of this feature, though it may not be the main and certainly is not the only matter to be considered. G The probabilities as to the length of the deprivation and not the certainty arrived at after the event are also material. The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do. On this the judgments in the above cases substantially agree . . . What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided. That fate is dissolution or continuance and, if the charter ought to be held to be dissolved, it cannot be revived without a new contract.

Lastly, there is an instance which was given to me in the following quotation from *Metropolitan Water Board v. Dick, Kerr & Co.* (13) ([1918] A.C. 128), in the speech of LORD DUNEDIN :

H The order pronounced under the Defence of the Realm Act not only debarred the respondents from proceeding with the contract, but also compulsorily dispersed and sold the plant. It is admitted that an interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted. But quite apart from mere delay it seems to me that the action as to the plant prevents this contract ever being the same as it was. Express the effect by a clause. If the Water Board had, when the contract was being settled, proposed a clause which allowed them at any time during the contract to take and sell off the whole plant, to interrupt the work for a period no longer than that for which the work has actually been interrupted, and then bound the contractor to furnish himself with new plant and recommence

the work, does anyone suppose that Dick, Kerr & Co., or any other contractor, would have accepted such a clause? And the reason why they would not have accepted it would have been that the contract when resumed would be a contract under different conditions from those which existed when the contract was begun.

That illustration might well be applied to the facts of this case. There, there was a temporary removal of the material. Here, there was a requisition of the man as opposed to the requisition of a ship, but it seems that the requisition of the man was in such circumstances that the terms of the original contract could not be carried out. So, in spite of the very able argument which has been put forward on the plaintiff's behalf by learned counsel, I have come to the conclusion that there was here such a change of circumstances and for such a duration that the original contract, looked at as a whole, was so fundamentally invaded by the calling up of the artiste that it must be held to have been frustrated by that event.

If I am right in that conclusion, the artiste is entitled to succeed in this action. If, on the other hand, I am wrong about it, I think that it is right that I should come to a conclusion on the alternative defence, *i.e.*, whether there was a mutual rescission of the contract on the assumption that it continued to subsist from 1940 onwards. [His LORDSHIP reviewed the evidence and continued:] In my opinion, the second limb of the defence also succeeds, and it, therefore, follows that there must be judgment for the artiste with costs.

Judgment for the defendant with costs.

Solicitors: *Clare & Clare* (for the manager); *Bartlett & Gluckstein* (for the artiste).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

POWELL v. CLELAND.

[COURT OF APPEAL (Scott, Asquith and Evershed, L.JJ.), October 29, November 12, 1947.]

Landlord and Tenant—Rent restriction—Recovery of possession—Premises required by landlord for own occupation—Purchase of interest in dwelling-house after July 11, 1931—Landlord becoming landlord by taking lease at a rent—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I (h).

The phrase "by purchasing the dwelling-house or any interest therein" in para. (h) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, should, on a true construction, be interpreted in its ordinary or popular sense, *i.e.*, as referring to a "buying" transaction, and, consequently, a landlord who has become landlord after July 11, 1931, by taking a lease of a dwelling-house (subject to the rights of the sitting tenant) at a rent, without payment of any premium or other monetary consideration, has not become landlord "by purchasing the dwelling-house or any interest therein" within the meaning of the paragraph, and is not debarred thereby from claiming possession of the dwelling-house as a residence for himself.

Observations of MORTON, L.J., in Baker v. Lewis, ([1946] 2 All E.R. 594) applied.

[AS TO ORDERS FOR POSSESSION WHEN PREMISES REQUIRED BY LANDLORD FOR OWN OCCUPATION, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 396; and FOR CASES, see DIGEST, Vol. 31, pp. 580, 581, Nos. 7283-7297.]

Cases referred to:

- (1) *Baker v. Lewis*, [1946] 2 All E.R. 592; [1947] K.B. 186; [1947] L.J.R. 468; 175 L.T. 490.
- (2) *Inland Revenue Comrs. v. Gribble*, [1913] 3 K.B. 212; 82 L.J.K.B. 900; 108 L.T. 887; 42 Digest 735, 1582.

APPEAL by the defendant (the tenant) against an order of His Honour JUDGE PUGH, made at Norwich County Court on Dec. 30, 1946, granting possession to the plaintiff, who had become the defendant's landlord by taking a lease of the dwelling-house in 1946 (subject to the rights of the sitting tenant) at a rent, but without payment of any premium or other monetary

consideration. The appeal was dismissed, the court affirming the finding of the county court judge that the plaintiff had not become landlord "by purchasing the dwelling-house or any interest therein" within the meaning of para. (h) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

Lionel Blundell for the defendant.

Beney, K.C., and *Gilbert Dare* for the plaintiff.

A *Cur. adv. vult.*

Nov. 12. **EVERSHED, L.J.**, read the following judgment of the court. This appeal raises a short point of construction under para. (h) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, *viz.*, whether the words "by purchasing the dwelling-house or any interest therein" in the parenthesis at the beginning of that paragraph are apt to cover the taking of a lease of the dwelling-house (subject to the rights of the sitting tenant) at a rent, but without payment of any premium or other monetary consideration.

B The material facts may shortly be stated. The defendant became the tenant of the premises in question, Grove Farm, Stratton, Strawless, in the county of Norfolk, by virtue of an agreement in writing dated May 7, 1941, and made between Stratton-Streles Estates, Ltd. and the defendant. It is conceded by both parties to the action that the premises were at all material times, and are, within the ambit of the Rent Restrictions Acts. The tenancy was a quarterly tenancy. By a notice to quit dated June 26, 1946, and expiring on Oct. 11, 1946—which is admitted by the defendant to have been valid and effectual—the defendant's contractual tenancy came to an end on Oct. 11, 1946. Since that date she has been, and still is, in possession of the premises as a statutory tenant. By an agreement in writing dated Nov. 22, 1946, and made between Stratton-Streles Estates, Ltd., of the one part, and the plaintiff, of the other part, the plaintiff became tenant from year to year of the premises in question, together with certain farmlands, from Oct. 11, 1946, at an annual rent, but otherwise without payment of any consideration in money or money's worth. So far, therefore, as concerns the premises in question, the plaintiff, by virtue of the agreement last mentioned, became the lessee of the reversion expectant on the termination of, and entitled to possession of Grove Farm subject to, the defendant's statutory tenancy, and became, therefore, from Oct. 11, 1946, the defendant's landlord. The plaintiff brought proceedings for possession against the defendant in the Norwich County Court, basing his claim on para. (h) of sched. I to the Act of 1933. The county court judge held that the plaintiff had not become the landlord "by purchasing the dwelling-house or any interest therein" since the date specified in the paragraph, and, having found also in favour of the plaintiff on all other issues in the case, including comparative hardship and reasonableness, he made an order for possession. Against that order the defendant appeals, confining herself, for the purposes of the appeal, solely to the question of construction, *viz.*, the question whether the plaintiff, having become "landlord" by virtue of the tenancy agreement of Nov., 1946, can be said to have become landlord by purchasing the dwelling-house or some interest therein.

G The question in its present form has not previously been before this court, and on it there appears to have been some divergence of opinion in the county courts. The learned county court judge at Norwich relied, however, (*inter alia*) on the language of MORTON, L.J., in *Baker v. Lewis* (1). In that case, possession was claimed against the statutory tenant by two ladies who had become beneficially entitled to the reversion under the will of the former landlord, and one of the questions raised in the case was whether the landlords, who had become such by devise under a will since the material date specified in para. (h) of the schedule, could be said (as the tenant contended) to have acquired their interest by purchasing the dwelling-house or some interest therein. In reference to that issue, the language of MORTON, L.J., was as follows ([1946] 2 All E.R. 594):

H I am well aware that the word "purchaser" and the words "by purchase" have in certain contexts a technical meaning which is well-known to all lawyers, but I am not aware of any case in which the words "by purchasing a dwelling-house" have been given any technical meaning. For my part I feel no doubt that they simply

refer to a transaction of purchase or buying. If I had felt any doubt on that point I should have been assisted by the decision in *Inland Revenue Comrs. v. Gribble* (2), to which counsel for the defendant referred.

On that issue both SOMERVELL and ASQUITH, L.J.J., expressed themselves as being in agreement with the judgment of MORTON, L.J.

It is, no doubt, true that the material question debated in *Baker v. Lewis* (1), was not the same as that raised in the present case. In *Baker v. Lewis* (1), the question was whether, by its use of the word "purchasing," the legislature intended a reference to the old common law significance of "purchase" so as to cover all means of acquisition otherwise than by descent or escheat. In the present case the question is, consistently with this court's rejection of the common law significance: Ought the word "purchasing" to cover any means of acquisition for money or money's worth, whether or not the interest acquired had any previous existence, or should it be confined to "buying" some interest already in existence?

It is, in our judgment, not open to doubt that the "ordinary" meaning of the word "purchasing" in the context in which it appears in para. (h) of the schedule, the meaning which first strikes the mind on reading the formula used, is that suggested in the second alternative stated above, viz., as equivalent to "buying," and this conclusion is supported by the language of MORTON, L.J. (which we have just read) and by the reasoning in the decision to which he referred of *Inland Revenue Commissioners v. Gribble* (2), a case in which this court attributed to the word "purchase" in the Finance Act, 1909-10, the popular or ordinary meaning of "buying." It is also clear—and it has been on many occasions pointed out by the court—that, generally speaking, the various Rent Acts have characteristically preferred a simple and popular means of expression.

Counsel for the defendant, however, has submitted that, at any rate in the present instance, the legislature must be taken deliberately to have used formal and technical language. Briefly, counsel's argument may be summarised thus: (1) The context in which the word here appears is one directing attention to real property law which specifies the kinds of estates or interests capable of conferring on a holder the status of "landlord"; (2) there is, therefore, inevitably, a reference to the sense in which the words "purchaser" or "purchase" are used in real property statutes; (3) this technical implication is necessitated by the use as part of the material phrase of the technical term "or any interest therein"; (4) on any other view an irrational and improbable distinction appears to be drawn between one who becomes landlord by buying the interest of the previous landlord and one who, to avoid the consequences of buying, takes from the previous landlord a lease of a term of years at a rent coupled or not with an option to buy. In support of the argument, counsel referred us to the definitions of "purchaser" to be found in the various Property Acts of 1925—the Law of Property Act, the Settled Land Act, the Administration of Estates Act and the Land Charges Act—and to several illustrations in those Acts of the contexts in which the word, so defined, is used. It is not necessary to refer in greater detail to those citations.

There are certain differences in those definitions which are, we think, of no little importance for the present purpose and to which we later refer, but it is beyond doubt that in all those Acts, the word "purchaser" is used so as to comprehend a lessee for money or money's worth (i.e., a lessee at a rent), and that certain cognate words (though not, in fact, the word "purchasing") are used with corresponding signification. Nor is this wide meaning in real property statutes an artificiality contrived for the purpose of the reforming legislation of 1925. It is equally found in the Conveyancing Act, 1881, and, as regards voluntary conveyances for the defeat of creditors, has a lineage as ancient and respectable as the twenty-seventh year of Queen Elizabeth. And the argument is, on more general grounds, tempting and attractive. Socially speaking, there appears to be no virtue in the lessee at a rent for a term of years absolute (with or without an option to purchase) which is lacking in the buyer of a pre-existing freehold or leasehold reversion, particularly if the former (for reasons derived from a study of the Rent Acts) pays a substantial premium and a small or almost nominal rent. Counsel, indeed, submitted that, were this court's decision adverse to him, a means would be

proclaimed for "driving a coach and horses through the Act," which is but another way of saying that the words of the statute must be so construed as to give expression to the true intention of the Act and to effect the remedy for the mischief which it was passed to achieve.

- Notwithstanding its attraction, however, the argument, in our judgment, cannot succeed. In the first place, when the history of this formula is considered, it is, in our opinion, impossible to arrive at any clear conclusion on the premises on which the last part of the argument must rest, *viz.*, the scope intended by Parliament of the disqualification imposed on landlords becoming such, as it were, over the heads of the sitting tenants. In the original Act of 1915 there was no such disqualification. It appeared for the first time in the amending Act of 1918 and took the form of excluding from the right to ask for an order for possession on the ground that he wanted the premises for his own occupation any landlord who had become such since a specified date "by the acquisition of the dwelling-house or any interest therein otherwise than by the devolution thereof to him under a settlement made before the said date or under a testamentary disposition or an intestacy"—a form of words which might well be held to cover any other form of "acquisition," including the means adopted in the present case of becoming a lessee of the premises subject to the sitting tenant's tenancy. But this apparently comprehensive form of words was, in the following year, replaced by a much shorter formula. In the principal Act of 1919 the landlord disqualified was he who had, since the specified date, "purchased a house" to which the legislation applied. Counsel told us that he felt unable to contend in favour of the application of the Conveyancing Act definition of "purchaser" to the word "purchased" in this context, and, having regard to the general character of the terminology used in the Rent Acts legislation, we think counsel's concession was rightly made. According to counsel, it is the addition in the present paragraph of the words "or any interest therein" (found also in the Act of 1918) which necessarily converts the meaning of "purchasing" from popular or ordinary to technical significance. In our judgment, the argument imposes on the words "or any interest therein" an office and a strain greater than they can—in the absence of any further assistance from the context—be justifiably be called on to bear. If no other sense or content could be found for the words, the result might well be different, but, in our judgment, their obvious purpose was to make clear that the case was covered of the purchase, not of the whole freehold interest in the dwelling-house, but of such less interest, *e.g.*, leasehold interest, as the existing landlord had to sell, or the case where the "purchaser" bought a share with the existing landlord of the latter's interest. It is also to be remembered, as counsel for the plaintiff pointed out, that if the word "purchasing" is to be interpreted by reference to the Law of Property Act, 1925, definition, the words "or any interest therein" would strictly appear to be otiose.

- To return to the history. The formula introduced by the principal Act of 1919 was of short duration, for, by the amending Act of the same year, the relevant s. 5 (2) of the earlier Act was repealed and with it any disqualification on a landlord dependent on the date of becoming such. In the Act of 1920 Parliament approached the problem, as it were, from the opposite direction, for the effect of s. 5 (1) (d) and the subsequent para. (iv) was that proof of the existence of alternative accommodation was unnecessary, *inter alia*, where the landlord "became the landlord" before a specified date and other conditions were satisfied. In other words, a measure of disqualification lay on all landlords becoming such after the specified date by whatever means. This form was repeated in s. 4 of the Act of 1923, but by an Act intitled the Prevention of Eviction Act, 1924, Parliament substituted the formula which is now found in para. (h) of sched. I to the Act of 1933 and is the subject of the present appeal. Some reliance was placed on the title to the Act of 1924, but we are unable to see how the defendant's argument is thereby assisted. On any view, the effect of the Act was to limit the scope of the disqualification by comparison with that imposed by the Acts of 1920 and 1923.

In the result, we find it impossible to discern with sufficient precision what was the intention of Parliament in adopting, in 1924, and after considerable variations of apparent intention, the formula which it has since retained, but,

in our judgment, counsel's difficulties do not end there. We have referred to the differences that are to be found in the definition of the word "purchaser" in the several Property Acts of 1925—differences not to be found in the conveyancing legislation which was in force before the coming into operation of the 1925 code. It is unnecessary to analyse the various definitions. For the present purposes it is sufficient to point to the fact that whereas under the definition found in the Law of Property Act, 1925, s. 205 (1) (xxi), a purchaser is confined to one who acquires his interest for money or money's worth, under the definition in s. 55 (1) (xviii) of the Administration of Estates Act, 1925, the word covers also the case of acquisition for valuable consideration other than in money or money's worth, *e.g.*, under a marriage settlement. It seems to us, therefore, that if in the interpretation of the phrase here in question the ordinary or popular meaning is rejected, the necessity is presented of justifying a choice of one of (at least) three technical meanings, *viz.*, (i) that derived from the Law of Property Act, 1925; (ii) that derived from the Administration of Estates Act, 1925; and (iii) that derived from the old common law. *Baker v. Lewis* (1), binding on us, negatives the third. Why should we prefer the first to the second? It is true that either will suffice for counsel's purposes, but that circumstance does not absolve us from making the choice as a matter of proper interpretation of the statute. In our judgment, there is nothing in the context or in the subject-matter of para. (h) which requires or justifies a choice of one statutory definition rather than the other. Had the word used been "purchaser" rather than "purchasing" ("... who has become landlord as a purchaser of the dwelling-house, etc.") and had the history of the formula provided a safer anchor in clear Parliamentary intention, the conclusion would have been easier, though, in our opinion, even then by no means certain. But the conditions are not satisfied. If in this Act of Parliament dealing with restrictions on the rights of landlords and mortgagees, expressed generally in simple and non-technical language, it had been desired to incorporate by reference the precise definition of the Law of Property Act, it would have been an easy result to achieve. It would have been simple—and proper—to use such a formula as we have indicated and to provide that for the purposes of the paragraph the word "purchaser" should have the meaning assigned to it by the Law of Property Act. This was, indeed, the method adopted in the Landlord and Tenant Act, 1927, in reference to the phrase "term of years absolute": see s. 25 (i). It is a rule of interpretation of statutes that it is permissible to call in aid for the construction of words or phrases used in one Act, meanings given to them in an earlier Act *in pari materia*: see MAXWELL ON INTERPRETATION OF STATUTES, 9th ed., p. 314. In our judgment, the Rent Restrictions Acts cannot be regarded as *in pari materia* with the real property legislation of 1925, and counsel was unable to cite any instance where a word or phrase in one Act of Parliament, having either technical or non-technical import, was held to have the technical meaning supplied by a definition in another Act not *in pari materia* with the first without any cross-reference to the latter Act. On the other hand, *Inland Revenue Commissioners v. Gribble* (2), and cases cited to us under s. 91 of the Bankruptcy Act, 1869, support the view that such cross-reference will not be readily implied.

In the result, and for the reasons we have given, we think that the view taken in this case by the county court judge (and by other county court judges whose judgments have been to the like effect) was correct and that the appeal cannot succeed. Although the decision in *Baker v. Lewis* (1), does not govern the present case, the reasoning of MORTON, L.J., is none the less applicable, and, in accordance with that reasoning, this appeal should, in our judgment, be dismissed.

Appeal dismissed with costs.

Solicitors: *Theodore Goddard & Co.*, agents for *Chittock & Chittock*, Norwich (for the defendant); *Butt & Bowyer*, agents for *Daynes, Keefe & Durrant*, Norwich (for the plaintiff).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

APT (otherwise MAGNUS) v. APT.

[COURT OF APPEAL (Tucker, Bucknill and Cohen, L.JJ.), October 20, 21, 22, 23, November 10, 1947.]

Divorce—Nullity—Marriage by proxy—Validity.

The celebration of marriage by proxy is a matter of the form of the ceremony or proceeding and is not an essential of the marriage, and there is no doctrine of public policy which precludes the recognition in this country of a marriage by proxy celebrated in a foreign country between a person domiciled in England, who has executed in England a power of attorney conferring authority on the proxy, and a person domiciled in that country, provided that the form of the ceremony or proceeding is valid in that country, is performed strictly in accordance with the laws of that country, and contains nothing abhorrent to Christian ideas.

Per curiam : If a proxy were revoked before the ceremony of marriage took place, but the other spouse and the proxy were unaware of the revocation, the court might hold that the purported marriage was void on the ground that it was not a voluntary union, not because of any general objection to marriage by proxy.

Decision of LORD MERRIMAN, P., ([1947] 1 All E.R. 620) affirmed.

[As to CONFLICT OF LAWS OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 6, pp. 283-296, paras. 340-352; and FOR CASES, see DIGEST, Vol. 11, pp. 413-421, Nos. 800-872.]

Cases referred to :

- (1) *Hyde v. Hyde and Woodmansee*, (1866), L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188; 11 Digest 413, 800.
- (2) *Ex p. Suzanna*, (1924), 295 Fed. Rep. 713.
- (3) *R. v. Millis*, (1844), 10 Cl. & Fin. 534; 27 Digest 43, 222.
- (4) *Wolfenden v. Wolfenden*, [1945] 2 All E.R. 539; [1946] P. 61; 115 L.J.P. 1; 173 L.T. 301; Digest Supp.
- (5) *Fender v. Mildmay*, [1937] 3 All E.R. 402; 106 L.J.K.B. 641; 157 L.T. 340; *sub nom.*, *Fender v. St. John-Mildmay*, [1938] A.C. 1; Digest Supp.
- (6) *Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 11 Digest 309, 17.
- (7) *Nachimson v. Nachimson*, [1930] P. 217; 99 L.J.P. 104; 143 L.T. 254; 94 J.P. 211; Digest Supp.
- (8) *Berthiaume v. Dastous*, [1930] A.C. 79; 99 L.J.P.C. 66; 142 L.T. 54; Digest Supp.
- (9) *Chateney v. Brazilian Submarine Telegraph Co., Ltd.*, [1891] 1 Q.B. 79; 60 L.J.Q.B. 295; 63 L.T. 739; 1 Digest 296, 246.
- (10) *Sinfra Akt. v. Sinfra, Ltd.*, [1939] 2 All E.R. 675; Digest Supp.

APPEAL by the wife from a decision of LORD MERRIMAN, P., dated Mar. 18, 1947, and reported in [1947] 1 All E.R. 620, dismissing her petition for nullity.

The facts appear in the judgment of the court read by COHEN, L.J. The appeal was dismissed.

John Foster for the wife.

Colin Duncan for the King's Proctor.

Cur. adv. vult.

Nov. 10. COHEN, L.J., read the following judgment of the court.

This is an appeal from the decision of LORD MERRIMAN, P., dismissing a petition by the wife for a decree of nullity. On Jan. 15, 1941, while the wife was in this country, she being not only resident but domiciled here, a ceremony of marriage was celebrated at Buenos Aires between the husband and the wife. The wife was represented by a person who, by power of attorney executed on Nov. 8, 1940, in London, had been named by her as her representative to contract the marriage. The husband, as found by the learned President, was resident and domiciled in the Argentine at all material times. The wife gave evidence that she had at no material time any intention of revoking the power of attorney, that she was informed in due course of the performance of the ceremony, and that she was not merely ready and willing but eager to join her husband in Buenos Aires, but was prevented from doing so during the war. She further deposed that when, after the war, she renewed her efforts to join the husband, he took no steps to assist her and ignored her alternative suggestion of a meeting in the United States of America, and that it was this conduct on his part which decided her to present the petition in this matter.

Dr. Palacios was called to give evidence about the relevant Argentine law and the result of his evidence, so far as material, may be summarised as follows: (1) Argentine law recognises proxy marriages, and, accordingly, by that law the ceremony was valid and effectual and the marriage would be recognised as a valid marriage by the law of the intended matrimonial domicile. (2) The intending spouse could revoke the power of attorney at any time before the ceremony, but, if the power had been acted on before either the other spouse or the proxy had notice of the revocation, the marriage would be valid. (3) If, however, the spouse giving the power of attorney had meanwhile lost the capacity to contract the marriage, *e.g.*, by an intervening marriage or by becoming of unsound mind, although the marriage certificate would be *prima facie* evidence of the ceremony having been performed, the court would declare the marriage null and void. On this evidence counsel for the wife contended that in the circumstances already stated it would be contrary to public policy for the English courts to recognise the validity of the marriage, and that, accordingly, his client was entitled to the decree she sought. The petition was undefended, but having regard to the importance of the matter the President had invoked the assistance of the King's Proctor and the case was fully argued. The learned President, in a considered judgment, dismissed the petition. After a careful review of all the authorities, English and American, to which his attention had been called, he summarised his conclusions as follows ([1947] 1 All E.R. 630):

My conclusions, therefore, are (i) that the contract of marriage in this case was celebrated in Buenos Aires; (ii) that the ceremony was performed strictly in accordance with the law of that country; (iii) that the celebration of marriage by proxy is a matter of the form of the ceremony or proceeding and not an essential of the marriage; (iv) that there is nothing abhorrent to Christian ideas in the adoption of that form; and (v) that, in the absence of legislation to the contrary, there is no doctrine of public policy which entitles me to hold that the ceremony, valid where it was performed, is not effective in this country to constitute a valid marriage. For these reasons, whatever may be the petitioner's remedies as a wife, I am obliged to hold that this petition must be dismissed.

With these conclusions and with the reasons he gives therefor we so fully agree that it is only because of the importance of the matter and out of respect to the careful arguments addressed to us by counsel on both sides that we state shortly our reasons for rejecting the arguments addressed to us by counsel for the wife. These arguments may be summarised as follows:— (1) It is contrary to the public policy of England to recognise any marriage by proxy. (2) It is not, however, necessary to reach a conclusion on the first point since, in any event, it is contrary to the public policy of England to recognise a marriage by proxy if (a) the party giving the proxy is domiciled in England, or (b) the power of attorney conferring authority on the proxy is executed in England, or (c) the power of attorney authorises a marriage by proxy in a country where the law will recognise, as does Argentine law, the validity of a marriage contracted thereunder notwithstanding the revocation of the proxy if the revocation has not been communicated to the other spouse or the proxy before the ceremony takes place. (3) The granting of a power of attorney in England is governed as to essential validity by English law and it is contrary to English law to recognise powers of attorney given for the purpose of celebrating a marriage.

The first argument is, in our opinion, ill founded. Counsel was unable to suggest any statutory provision which was relevant to it. He referred us to s. 22 of the Marriage Act, 1823, which prohibits marriages otherwise than in a church or without banns or licence, but he admitted that this section only applies to marriages within the English jurisdiction: see s. 33 of the Act. A proxy marriage, such as we are considering, is clearly a Christian marriage within the definition given by LORD PENZANCE in *Hyde v. Hyde* (1), (L.R., 1 P. & D. 133—"a voluntary union for life of one man and one woman to the exclusion of all others." A proxy marriage was recognised as valid by the canon law: see SWINBURNE'S TREATISE OF SPOUSALS OR MATRIMONIAL CONTRACTS, 1686 ed., pp. 162, 163, where, as the President points out, the conditions of such a marriage are described. It is recognised as valid in a number of Christian countries besides the Argentine. The preponderance of

the American authorities to which the President refers indicates that such a marriage is recognised as valid in many States of the United States of America : see especially *Ex parte Suzanna* (2), 295 Federal Reporter, 713). It was said that *R. v. Millis* (3), precluded us from holding that such a marriage would be recognised in England, but that case dealt only with marriages celebrated in England or Ireland. It did not expressly cover the point, and is, in any event, no authority for the general proposition that all proxy marriages wherever

- A President pointed out ([1945] 2 All E.R. 541) the limited operation of *R. v. Millis* (3). Counsel invited us none the less to hold that proxy marriages were contrary to public policy since they would facilitate clandestine marriages, make easy the bestowal of British nationality on foreigners and the carrying on of the white slave traffic, and would make it possible for two minors to get married in, e.g., Mexico, although they were both domiciled in England.
- B So far as the argument is based on clandestine marriages, we have to bear in mind that the English courts have not regarded all such marriages as contrary to public policy, e.g., *Gretna Green* marriages were held to be valid until they were prohibited by statute. Moreover, we have to bear in mind the frequent injunctions of the highest tribunal as to the danger of allowing judicial tribunals to roam unchecked in the field occupied by that unruly horse, public policy : see, e.g., per LORD ATKIN in *Fender v. St. John-Mildmay* (5), ([1937] 3 All E.R. 406). In any event, a consideration of what is "public policy" in a case where the matter is not governed by statute or by clearly established principle must necessarily involve balancing advantages against disadvantages. As against the considerations advanced by counsel must be weighed the following factors : (1) The unsatisfactory position that would arise in that, if counsel is right, the parties would be married in the Argentine, the place of the intended matrimonial domicile, but not married in England ; (2) the fact that, if counsel is right, any children that might result from the marriage would be bastards in the eye of English law, and, above all, (3) we should in effect be holding that the law of the Argentine was contrary to essential justice and morality, a conclusion to which we should hesitate to come : see the observations of SCRUTTON, L.J., in *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (6), ([1921] 3 K.B. 557-559). In all the circumstances
- E we are satisfied that we cannot properly extend public policy to cover all proxy marriages. In this connection we would respectfully adopt and apply some observations of LAWRENCE, L.J., in *Nachimson v. Nachimson* (7), ([1930] P. 233) :

In my opinion, it is contrary to the generally recognised rules of private international law that our courts should refuse to recognise a marriage had in a foreign country conforming in all respects to the laws of that country and to our conception of a Christian marriage merely because under the laws for the time being in force in that country the facilities for divorce happened to be far greater than in England and such as would probably not commend themselves to most English people.

Finally, on this point, we would repeat the citation from LORD DUNEDIN'S speech in *Berthiaume v. Dastous* (8), ([1930] A.C. 83), which was quoted by the learned President :

- G If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage. These propositions are too well fixed to need much quotation.

- H In our opinion, the method of giving consent as distinct from the fact of consent is essentially a matter for the *lex loci celebrationis*, and does not raise a question of capacity, or, as counsel preferred to call it, essential validity.

It will be convenient next to deal with counsel's third point, since it seems to us to founder on the same rock as his first. Counsel was constrained to admit that there was no question of incapacity in the donor of the power or of any statutory invalidity, and that, if the power had related to a commercial transaction, its validity could not be challenged, since the act to be performed under it was valid by the law of the intended place of performance : cf., *Chateney v.*

Brazilian Submarine Telegraph Co., Ltd. (9). ([1891] 1 Q.B. 82, 83), where LORD ESHER, M.R., said :

But the business sense of all business men has come to this conclusion that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country.

See also, *Sinfra Akt. v. Sinfra, Ltd.* (10), ([1939] 2 All E.R. 682). Counsel, however, said that this power relates to a contract of marriage, and that is not a mere matter of contract but affects status. This is, if anything, an understatement, since the main element in the marriage contract is its effect on status : *cf.*, FRAZER ON HUSBAND AND WIFE, 2nd ed., vol. I, p. 170 ; but, as the status sought to be created by the proxy marriage now in question is, as we have already pointed out, that of a Christian marriage such as English law recognises and approves, the argument does not really assist counsel and he is driven to argue that the power of attorney is bad because proxy marriages are against the public policy of England, an argument we have already given our reasons for rejecting.

We return to the second point. In our opinion, this also fails. As regards sub-division (a) thereof, we are unable to see any reason in public policy which would require the English courts, if they recognise the validity of proxy marriages celebrated outside the United Kingdom, to deny to a person domiciled in this country the right of so celebrating a marriage, provided, of course, that he or she has, in other respects, capacity to marry, and does not infringe any provision of English law. Sub-division (b) is really another way of stating counsel's third argument. We think it impossible to hold that, in the absence of some statutory prohibition, it is contrary to public policy to execute in England a power of attorney which the same person could validly execute in the Argentine, the power of attorney being intended to authorise an act in the Argentine which is lawful by the law of that country. As regards (c), we agree with the learned President that this point does not arise. If a case occurs where the proxy is revoked before the ceremony takes place, but the other spouse and the proxy are unaware of the revocation, it may be that the courts of this country would hold that the purported marriage was void, but that would be not because of any general objection to proxy marriages, but because on the facts of the particular case the court was satisfied that the marriage was not a voluntary union. For these reasons the appeal, in our opinion, fails and must be dismissed.

Appeal dismissed.

Solicitors : *Hardman, Phillips & Mann* (for the wife) ; *Treasury Solicitor* (for the King's Proctor).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

ASSOCIATED PROVINCIAL PICTURE HOUSES, LTD. v. WEDNESBURY CORPORATION.

[COURT OF APPEAL (Lord Greene, M.R., Somervell, L.J., and Singleton, J.), November 7, 10, 1947.]

Theatres and Places of Entertainment—Cinematograph—Sunday performance—Permission—Condition—Prohibition of admission of child under 15—Sunday Entertainments Act, 1932 (c. 51), s. 1 (1).

It is not *ultra vires* a licensing authority when allowing, under s. 1 (1) of the Sunday Entertainments Act, 1932, a cinematograph theatre in their area to be opened on Sundays, to take into consideration matters concerning the well-being and the physical and moral health of children and to impose a condition that children under the age of 15 years, whether accompanied by an adult or not, shall be excluded from the theatre.

The court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account matters which it ought to take into account. Once that question

is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, has come to a conclusion so unreasonable that no reasonable authority could ever have come to it, and in such a case the court can interfere. The power of a court, however, to interfere in any case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in it.

Harman v. Butt, ([1944] 1 All E.R. 558) *applied*.

Decision of HENN COLLINS, J., ([1947] 1 All E.R. 498) *affirmed*.

[AS TO SUNDAY OPENING OF CINEMAS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 75-76, paras. 96, 97; and FOR CASES, see DIGEST, Vol. 42, pp. 920-922, Nos. 160-175.]

B Cases referred to

(1) *Harman v. Butt*, [1944] 1 All E.R. 558; [1944] K.B. 491; 114 L.J.K.B. 99; 170 L.T. 355; 108 J.P. 229; Digest Supp.

(2) *R. v. Burnley J.J.*, *Ex p. Longmore*, (1916), 85 L.J.K.B. 1565; 115 L.T. 525; 80 J.P. 382; 42 Digest 921, 161.

(3) *Ellis v. Dubowski*, [1921] 3 K.B. 621; 91 L.J.K.B. 89; 126 L.T. 91; 85 J.P. 230; 42 Digest 921, 162.

C (4) *Roberts v. Hopwood*, [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; *revsq.*, S.C., *sub. nom.*, *R. v. Roberts, Ex p. Scurr*, [1924] 2 K.B. 695; 33 Digest 20, 83.

(5) *Theatre de Luxe (Halifax), Ltd. v. Gledhill*, [1915] 2 K.B. 49; 112 L.T. 519; 79 J.P. 238; 24 Cox C.C. 614; *sub. nom.*, *Halifax Theatre de Luxe, Ltd. v. Gledhill*, 84 L.J.K.B. 649; 42 Digest 920, 160.

D APPEAL by the plaintiffs, proprietors and licensees of a cinematograph theatre, from a refusal of HENN COLLINS, J., (reported [1947] 1 All E.R. 498), to grant a declaration that a condition attached to a permission for Sunday performances granted by the defendants, the licensing authority, was *ultra vires*. The appeal was dismissed. The facts appear in the judgment of LORD GREENE, M.R.

Gallop, K.C., and *Sidney H. Lamb* for the plaintiffs.

E *Fitzgerald, K.C.*, and *Vernon Gattie* for the defendants.

LORD GREENE, M.R. : In the action out of which this appeal arises the plaintiffs, who are the proprietors of a cinematograph theatre in Wednesbury, sought to obtain from the court a declaration that a certain condition imposed by the defendants, Wednesbury Corporation, on the grant of permission for Sunday performances to be held in that cinema was *ultra vires*. The F action was dismissed by HENN COLLINS, J., and, in my opinion, his decision was clearly right.

The powers and duties of the local authority are to be found in the Sunday Entertainments Act, 1932. That Act legalised the opening of cinemas on Sundays, subject to certain specified conditions and such conditions as the licensing authority think fit to impose. The licensing authority is that set up under the Cinematograph Act, 1909. In this case it is Wednesbury G Corporation. Before the Act of 1932, the opening of cinematograph theatres on Sundays was illegal. The position under the Act is stated conveniently by ATKINSON, J., in *Harman v. Butt* (1), where he says ([1944] K.B. 493) :

H It is apparent that there are at least three totally different occasions on which licensing justices may be called on to exercise their discretion to issue a licence and to determine on what conditions the licence shall be issued. The application may be under the Cinematograph Act, 1909, relating to six days of the week, excluding Sundays. It may be one relating solely to Sundays under the Sunday Entertainments Act, 1932, where in the case of a borough the majority of the local government electors have expressed a desire for Sunday performances. Thirdly, it may be one where the local government electors have expressed no such wish, but where the application is made for the benefit of those members of the forces who are stationed in the neighbourhood for the time being.

During the war, under a Defence Regulation, the commanding officer of forces stationed in the neighbourhood had power to make a representation to the licensing authority, and in *Harman v. Butt* (1), that had taken place.

The words in question in the present case are to be found in s. 1 of the Act of 1932, which provides :

(1) The authority having power, in any area to which this section extends, to grant licences under the Cinematograph Act, 1909, may, notwithstanding anything in any enactment relating to Sunday observance, allow places in that area licensed under the said Act to be opened and used on Sundays for the purpose of cinematograph entertainments, subject to such conditions as the authority think fit to impose . . .

That power to impose conditions is expressed in quite general terms, and in the present case the defendants imposed the following condition in their licence : A

No children under the age of 15 years shall be admitted to any entertainment, whether accompanied by an adult or not.

Counsel for the plaintiffs argued that it was not competent to the Wednesbury Corporation to impose any such condition, and he said that, if they were entitled to impose a condition prohibiting the admission of children, they should have limited it to cases where the children were not accompanied by their parents or a guardian or some adult. His argument was that the imposition of that condition was unreasonable, and that, in consequence, it was *ultra vires* the corporation. B

The contention of the authority, in my opinion, is based on a misconception of the effect of the Act in granting this discretionary power to local authorities. The courts must always remember, first, that the Act deals, not with a judicial act, but with an executive act ; secondly, that the conditions which, under the exercise of that executive act, may be imposed are in terms put within the discretion of the local authority without limitation ; and thirdly, that the statute provides no appeal from the decision of the local authority. What, then, is the power of the courts ? The courts can only interfere with an act of an executive authority if it be shown that the authority have contravened the law. It is for those who assert that the local authority have contravened the law to establish that proposition. On the face of it, a condition of this kind is perfectly lawful. It is not to be assumed *prima facie* that responsible bodies like local authorities will exceed their powers, and the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for the local authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law. C D E F

What, then, are those principles ? They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty—those, of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word “unreasonable.” It is true the discretion must be exercised reasonably. What does that mean ? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. G H

He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. WARRINGTON, L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.

- A In the present case, it is said by counsel for the plaintiffs that the authority acted unreasonably in imposing this condition. In the first place, it appears to me clear that the matter dealt with by this condition was one which a reasonable authority would be justified in considering when it was making up its mind what conditions should be attached to the grant of its permission.
- B Nobody, at this time of day, can say that the well-being and the physical and moral health of children are not matters which a local authority, in exercising its powers, can properly have in mind when those questions are germane to what it has to consider. Counsel for the plaintiffs did not suggest that the authority were directing their minds to a purely extraneous and irrelevant matter, but he based his argument on the word "unreasonable," which he treated as an independent ground for attacking the decision of the authority.
- C Once, however, it is conceded, as it must be conceded, that the subject-matter of this condition was one which it was competent for the authority to consider, there, in my opinion, is an end of the case, because, once that is granted, counsel must go so far as to say that the decision of the authority is wrong because it is unreasonable, and then he is really saying that the ultimate
- D arbiter of what is and is not reasonable is the court and not the local authority. It is just there, it seems to me, that the whole argument entirely breaks down. It is perfectly clear that the local authority are entrusted by Parliament with the decision on a matter in which the knowledge and experience of the authority can best be trusted to be of value. The subject-matter with which the condition deals is one relevant for its consideration. It has considered it and come to a decision on it. Theoretically it is true to say—and in
- E practice it may operate in some cases—that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is right, but that would require overwhelming proof, and in this case the facts do not come anywhere near such a thing. Counsel in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense, not that it is what the
- F court considers unreasonable, but that it is what the court considers is a decision that no reasonable body could have come to, which is a different thing altogether. The court may very well have different views from those of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse. All over the country, I have no doubt, on a
- G thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority who are put in that position and, provided they act, as they have acted here, within the four corners of their jurisdiction, the court, in my opinion, cannot interfere.

The case, in my opinion, did not require reference to authority once the simple and well-known principles are understood on which alone a court can interfere with something *prima facie* within the powers of the executive authority, but reference has been made to a number of cases. I can deal quite shortly with them. HENN COLLINS, J., followed the decision of ATKINSON, J., in *Harman v. Butt* (1), where a condition of this character had been imposed, and I think the only difference between the two cases is that in *Harman v. Butt* (1), the licence to open on Sundays originated in a representation by the commanding officer of forces stationed in the neighbourhood. ATKINSON, J., ([1944] K.B. 499) said:

... I am satisfied that the defendants were entitled to consider matters relating

to the welfare, including the spiritual well-being, of the community and of any section of it, and I hold that this condition that no child under the age of sixteen should be admitted to this cinematograph theatre on Sunday is not *ultra vires* on the ground that it is not confined to the user of the premises by the licensee, but relates to the interest of a section of the community.

That decision, in my opinion, is unassailable. *R. v. Burnley JJ.* (2), and, not dissimilar on one point, *Ellis v. Dubowski* (3), were cases where the illegal element which the authority had imported into the conditions imposed consisted of a delegation of its powers to some outside body. It was not that the delegation was such as no reasonable person could have thought sensible, but it was outside their powers altogether to pass on to some outside body the discretion which the legislature had confided to them. Counsel for the plaintiffs relied also on *Roberts v. Hopwood* (4), which was of a totally different class. There the district auditor had surcharged the members of a council who had made payments of a minimum wage of £4 a week to their lowest grade of workers. That sum had been fixed by the local authority, not by reference to any of the factors which go to determine a scale of wages, but by reference to some other principle altogether, and the substance of the decision was that, in fixing the £4 a week as wages, they had acted unreasonably. When the case is examined, the word "unreasonable" is found to be used rather in the sense that I mentioned a short while ago, namely, that, in fixing the £4, they had fixed it by reference to something which they ought not to have entertained and to the exclusion of those elements which they ought to have taken into consideration in fixing a sum which could fairly be called a wage. That is no authority to support the proposition that the court has got some sort of overriding power to decide what is reasonable and what is unreasonable.

An early case under the Cinematograph Act, 1909, much discussed before us, was *Theatre de Luxe (Halifax), Ltd. v. Gledhill* (5). That was a decision of a Divisional Court as to the legality of a condition imposed under the Act to the following effect :

Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p.m.

That case was heard by a Divisional Court of the King's Bench Division consisting of LUSH, ROWLATT and ATKIN, JJ. The majority, consisting of LUSH and ROWLATT, JJ., held that the condition was *ultra vires* as there was no connection, as the head-note says ([1915] 2 K.B. 49) :

... between the ground upon which the condition was imposed, namely, regard for the health and welfare of young children generally, and the subject-matter of the licence, namely, the use of the premises for the giving of cinematograph exhibitions. That case is one which I think I am right in saying has never been referred to with approval, but has often been referred to with disapproval, though it has never been expressly overruled. I myself take the view that the decision of the majority in that case puts too narrow a construction on the licensing power given by the Act in question there. ATKIN, J., on the other hand, delivered a dissenting judgment in which he expressed the opinion that the power to impose conditions was nothing like so restricted as the majority had thought. Quoting again from the head-note, his opinion was (*ibid.*) :

... that the conditions must be (1) reasonable ; (2) in respect of the use of the licensed premises ; (3) in the public interest. Subject to that restriction there is no fetter upon the power of the licensing authority.

If I may venture to express my own opinion about that, I think that ATKIN, J., was right in considering that the restrictions on the power of imposing conditions were nothing like so broad as the majority thought, but I am not sure that his language might not be read in rather a different sense from that which I think he must have intended. I do not find in any of the language that he used any justification for thinking that it is for the court to decide the question of reasonableness rather than the local authority. I do not read him as in any way dissenting from the view which I have ventured to express, that the task of the court is not to decide what it thinks is reasonable, but to decide whether

the condition imposed by the local authority is one which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose. Similarly, when he refers to the public interest, I do not read him as saying more than that the public interest is a proper and legitimate thing which the licensing authority ought to have in mind. He certainly does not suggest that the court is entitled to set up its view of the public interest against the view of the local authority. Once the local authority have properly taken

A into consideration a matter of public interest such as, in the present case, the moral and physical health of children, it seems to me there is nothing in what ATKIN, J., says which suggests that a court could interfere with a decision because it took a different view of what was the public interest. It is obviously a subject on which different minds may have different views. I do not read him as doing any more than saying the local authority can and should take that matter into account in coming to their decision.

B In the result, in my opinion, the appeal must be dismissed. I do not wish to repeat what I have said, but it might be useful to summarise once again the principle, which seems to me to be that the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour

C of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see

D whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it. The appeal must be dismissed with costs.

SOMERVELL, L.J. : I agree.

SINGLETON, J. : I agree.

Appeal dismissed.

E Solicitors : *Norman Hart & Mitchell* (for the plaintiffs) ; *Sharpe, Pritchard & Co.*, agents for *G. F. Thompson, Wednesbury* (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Followed. *Re HOOPER'S SETTLEMENT TRUSTS.*
[1948] Ch. 586.

Followed. *Re HOOPER'S SETTLEMENT TRUSTS.* [1948] 2 All E.R. 261.

Re LORD'S SETTLEMENT, MARTINS BANK, LTD. v.

F LORD AND OTHERS.

[CHANCERY DIVISION, (Romer, J.), October 23, November 6, 1947.]

Perpetuities—Settlement—Limitation to a class—Introduction of new members into original class of takers—Gift to composite class of children and grand-children who should attain 21.

G *Settlements—Rule against perpetuities—Gift of income of trust fund to children of settlor on youngest child attaining 21—Vesting of interest on each child's attaining 21—Proviso that, if any child should die before "attaining a vested interest" leaving any children who should attain 21, such children should take parents' share "by substitution"—Introduction of new members into original class of takers.*

H By a settlement made in 1930 the settlor (by cl. 2) made provision (*inter alia*), by way of discretionary trusts, for the maintenance of his children until the youngest child should attain 21, with a proviso that a rateable proportion of the income of the trust fund should be paid on protective trusts to any child who had attained 21, whereupon the discretionary trusts in favour of that child should cease. At the end of cl. 2 the settlor declared that this proviso should not operate to "vest" in any of the children any share in the capital of the trust fund before the youngest child then in existence should attain 21. By cl. 3, the settlor directed his trustees, on his youngest child then in existence attaining 21, to hold the trust fund in trust in equal shares for all his children who had

attained 21 (or, being daughters, married) "provided always that if any of the said children being male shall die before attaining a vested interest leaving a child or children who . . . attain the age of 21 . . . such child or children shall take by substitution . . . the share or interest in the trust fund . . . which such deceased child of the settlor would have taken had he . . . attained a vested interest." The settlor, who died in 1934, had one child only, a son, who attained 21 on July 3, 1947. The question was whether the provisions of cl. 3 were valid in favour of the son or whether they were void as offending the rule against perpetuities :—

HELD : notwithstanding the use of the words "by substitution" in the proviso to cl. 3, the proviso did not have a substitutionary effect in the proper sense of the phrase (*Goodier v. Johnson* (1881), 18 Ch.D. 441, *distinguished*), but it introduced new members into the original class of takers defined by the earlier part of cl. 3 so as to form one composite class (*dicta* of COZENS-HARDY, M.R., and BUCKLEY, L.J., in *Re Williams, Metcalf v. Williams*, [1914] 2 Ch. 61 at pp. 64, 65 *applied*) ; and, therefore, since it could not be postulated with certainty at the date of the settlement that all possible members of the class would be ascertained or ascertainable within the permitted limit of time, the provisions of cl. 3 were wholly invalid and the whole gift was bad.

Pearks v. Moseley, Re Moseley's Trusts ((1880), 5 App. Cas. 714) *applied*.

[AS TO LIMITATION TO A CLASS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 134-141, paras. 229-235 ; and FOR CASES, see DIGEST, Vol. 37, pp. 98-102, Nos. 342-371.]

Cases referred to :

- (1) *Pearks v. Moseley, Re Moseley's Trusts*, (1880), 5 App. Cas. 714 ; 50 L.J.Ch. 57 ; 43 L.T. 449 ; 37 Digest 68, 98.
- (2) *Re Bence, Smith v. Bence*, [1891] 3 Ch. 242 ; 60 L.J.Ch. 636 ; 65 L.T. 530 ; 37 Digest 105, 396.
- (3) *Re Williams, Metcalf v. Williams*, [1914] 2 Ch. 61 ; 83 L.J.Ch. 570 ; 110 L.T. 923 ; 44 Digest 798, 6540.
- (4) *Lamphier v. Buck*, (1865), 2 Drew. & Sm. 484 ; 34 L.J.Ch. 650 ; 12 L.T. 660 ; 44 Digest 1230, 10641 ; *sub nom.*, *Lamphier v. Buck*, 6 New Rep. 196.
- (5) *Goodier v. Johnson*, (1881), 18 Ch.D. 441 ; 51 L.J.Ch. 369 ; *sub nom.*, *Re Goodier, Goodier v. Johnson*, 45 L.T. 515 ; 37 Digest 102, 369.

ADJOURNED SUMMONS to determine whether the trusts contained in a settlement were valid or were void as offending the rule against perpetuities.

By cl. 3 of the settlement, the settlor directed his trustees, on his youngest child attaining 21, to hold the trust fund in trust, in equal shares, for all his children who had attained that age or, being daughters, had married, with a proviso that, if any male child had died under the age of 21 leaving any child or children who should attain 21, such child or children should take "by substitution" the share the parent would have taken had he survived. ROMER, J., held that the provisions of cl. 3 were wholly invalid. The facts and the relevant clauses of the settlement appear in the judgment.

H. S. Barker for the plaintiffs (the trustees).

Harman, K.C., and *Wilfrid Hunt* for the first defendant (the settlor's son).

Upjohn, K.C., and *W. F. Waite* for the second and third defendants (interested in the settlor's residuary estate).

Ackroyd for the fourth and fifth defendants (the settlor's personal representatives).

Cur. adv. vult.

Nov. 6. ROMER, J., read the following judgment : By a settlement dated Mar. 28, 1930, which was made by Walter Lord as settlor, after reciting that the settlor had transferred to the trustees therein mentioned the shares specified in the schedule thereto to the intent that the same should be held upon the trusts thereafter expressed, it was provided as follows :

(1) The trustees shall either retain the shares so transferred to them as aforesaid so long as they think fit without being liable for any loss occasioned thereby or may with the consent of the settlor during his life and after his death at the discretion of the trustees sell the same or any of them or any part thereof and invest the net moneys produced by any such sale at the like discretion in their names in or upon any of the investments hereby authorised.

(2) The trustees shall hold the said shares and the proceeds of sale thereof and the investments for the time being representing the same (hereinafter called "the trust

fund") upon trust in the first place that as soon as practicable after the execution of these presents the trustees shall raise and pay out of the income of the trust fund all the costs charges and expenses of all parties as between solicitor and client of and incidental to the negotiation for and preparation and execution of this deed including all stamp duties on the same and the transfer of the said shares and of any ancillary notices acts or things in connection therewith and subject thereto if and so long as

- A the settlor shall be under the age of 21 years or being daughters under that age or marry the trustees shall if they in their absolute discretion think fit but not otherwise pay or apply the income of the trust fund or any part thereof in their discretion for or towards the maintenance or benefit of all or any of the children of the settlor whether adults or infants for the time being in existence and the wives and husbands and widows and widowers of such children respectively and in such manner as the trustees shall think proper and shall subject as hereinafter mentioned accumulate any income not paid or applied under the said discretionary trust or power at compound interest as an accretion to the capital of the trust fund with power for
- B the trustees in any year to apply any of the accumulations as aforesaid as if the same were income for the current year for the purpose of the said discretionary trust or power provided always that as each of the said children attains his or her age of 21 years or being a daughter marries (hereinafter referred to as "adult child") the trustees shall thenceforward until the youngest of the said children for the time being in existence attains the said age or being a daughter attains that age or marries pay upon protective trusts to such adult child (if no act or event shall have been done
- C or happened whereby the life interest hereby given to such adult child in the trust fund or some part thereof would if belonging to him or her absolutely become vested in or charged in favour of some other person) a rateable proportion of the income of the trust fund having regard to the number of the said children for the time being and from time to time in existence and such adult child shall thenceforth cease to be an object of the foregoing discretionary trust but this proviso shall not operate to vest in any of the same children any share in the capital of the trust fund earlier than when the youngest of the children of the settlor for the time being in existence
- D attains the age of 21 years or being a daughter attains that age or marries.

(3) As and when the youngest of the said children for the time being in existence shall attain the age of 21 years or being a daughter attains that age or marries the trustees shall hold the trust fund and the income thereof in trust for all or any of the said children in equal shares who being male shall have attained that age or being female shall have attained that age or previously married and if more than one in equal shares provided always that if any of the said children being male shall die before attaining a vested interest leaving a child or children who being male attain the age of 21 years or being female attain that age or marry such child or children shall take by substitution and if more than one in equal shares the share or interest in the trust fund and the income thereof which such deceased child of the settlor would have taken had he or she attained a vested interest and such deceased child may by will or codicil appoint that the income of the whole or any part of such share or interest shall be payable to his or her surviving wife or husband for her or his life or any less period and subject to any restrictions which he or she may think fit any

E interest so appointed to take effect in priority to the trusts in favour of the child or children of such deceased child.

- (4) It is hereby declared that the share in the capital of the trust fund hereinbefore provided for each of the settlor's children whether sons or daughters shall be retained by the trustees and held upon trust (if no act or event shall have been done or happened affecting his or her life interest as aforesaid) to pay the income thereof to such child during the rest of his or her life and if a son upon protective trusts and
- G if a daughter without power of anticipation and after the death of such child upon trust to pay such income or any part thereof (if and to the extent that such child shall appoint by deed will or codicil) to any wife or husband who may survive him or her during her or his life or any less period and subject as aforesaid upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of such child in such shares if more than one and in such manner in all respects as the appointor shall by deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment in trust for all or any
- H of the children or child of such child who being male shall attain the age of 21 years or being female attain that age or marry and if more than one in equal shares . . .

That is followed by a proviso dealing with the hotchpotch.

(5) If the trusts hereinbefore declared of the trust fund shall fail then subject to the trusts powers and provisions hereinbefore contained the trustees shall stand possessed of the trust fund in trust for the settlor absolutely.

The settlor's son, mentioned in the settlement, namely, the defendant, Walter Eric Lord, was born on July 3, 1926, nearly four years prior to the

settlement. This son was the only child that the settlor, who died on May 28, 1934, ever had. Walter Eric Lord attained the age of 21 years last July. The evidence shows that the persons beneficially interested in the residuary estate of the settlor under his will were his widow as to four ninths; the defendant, Walter Eric Lord (on attaining the age of 21 years), as to three ninths; and the defendants, Standley Lord Parker and Rosa Hannah Clegg, as to the remaining two ninths in equal shares. The testator's widow died on May 16, 1938, having by her will given her residuary estate to the defendant, Walter Eric Lord, on attaining the age of 21 years. The legal personal representatives of the settlor are parties to this summons.

The originating summons which is before me was issued on May 29, 1936, and was partly dealt with by EVE, J., who made an order dated July 9, 1936. By that order the court declared that, so long as the defendant, Walter Eric Lord, should be living and under the age of 21 years, the trusts in cl. 2 of the settlement for payment or application of the income of the trust fund or any part thereof in the discretion of the trustees of the settlement for or towards the maintenance or benefit of all or any of the children of the settlor, Walter Eric Lord, and other persons as therein mentioned constituted a valid trust, and by consent, and the court approving on behalf of the then infant, and without prejudice to the ultimate determination of the questions raised in paras. 3 and 4 of the said summons and to the ultimate destination of any accumulations which might be in existence on the defendant, Walter Eric Lord, attaining the age of 21 years, it was ordered that the trustees for the time being of the settlement be at liberty to accumulate any income of the trust fund not paid or applied under the discretionary trust or power contained in cl. 2 of the settlement at compound interest with power for such trustees in any year to apply any of the accumulations as aforesaid as if the same were income for the current year for the purpose of the said discretionary trust or power. The court did not see fit to determine the questions raised in paras. 3 and 4 of the said originating summons until the defendant, Walter Eric Lord, should have attained the age of 21 years. The order gave liberty to apply to any of the parties. As the defendant, Walter Eric Lord, has now attained his majority, questions 3 and 4 of the originating summons are now ripe for hearing, and these were the questions which were argued before me.

The precise questions raised are as follows :

(3) Whether the trusts and powers in cl. 3 and 4 of the said settlement or any and which of them are valid in favour of or given to the defendant Walter Eric Lord or are void as offending the rule against perpetuities to any and what extent ?

(4) If the trust contained in cl. 3 of the said settlement is valid in favour of the said Walter Eric Lord, then whether on his attaining the age of 21 years the trust fund is to be held under cl. 4 of the settlement upon protective trusts as defined in the Trustee Act, 1925, s. 33, for the benefit of the defendant Walter Eric Lord during his life or is to be held on any other and what trusts during his life and whether the respective powers of appointment and trust in default of appointment in such clause are valid to any and what extent ?

Counsel for the second and third defendants rightly conceded in argument that the provisions of cl. 3 are in every way valid down to the beginning of the proviso, but he argued that there is there introduced an expansion of the class which is to take the capital of the trust fund and that persons are let in by the proviso who cannot be ascertained within the limits of the perpetuity rule. The contrary argument is that the proviso should be ignored as being an attempt invalid in law to defeat or whittle down the interests validly created by the earlier part of cl. 3.

The first point for inquiry, I think, is what the settlor meant by the words in the proviso to cl. 3, "before attaining a vested interest." At the end of cl. 2 the settlor seemed to contemplate that there should be no "vesting" of the share of an elder child or children before the youngest child attained 21 or, if a daughter, married. The effect of cl. 3, however, quite clearly is that each child of the settlor should attain a vested interest in the trust fund on attaining 21 or earlier in the case of daughters who married while infants. Is the expression "vested interest," then, in the proviso to cl. 3, referable to the vesting mentioned at the end of cl. 2, or to the interests created by the earlier part of cl. 3 ? In my judgment, it is referable to the latter. The latter

part of cl. 2 was negative in form, and followed on the provisions for the settlor's children and others out of income, which it was the main function of the clause to establish. The operative gifts of *corpus* were reserved for cl. 3 and it was clearly in that clause that the draftsman was directing his mind to the creation of legal interests in capital. I think myself that the cautionary mention of vesting in cl. 2 was referable to beneficial enjoyment rather than legal vesting. Be that as it may, inasmuch as the earlier part of cl. 3 clearly creates interests

A which vest on the happening of the events therein specified, the presumption is that the vested interests referred to in the proviso which immediately follows are those so created and no others. I would add in confirmation of this view that the word "vest," in the absence of a context, is usually taken to mean vest in interest rather than vest in possession. I, accordingly, find little difficulty in interpreting the beginning of the proviso to cl. 3 as meaning "provided always that if any of the said children being male shall die before

B attaining 21." So it is clear that, if the effect of the proviso is to bring into the original class of children of the settlor additional members consisting of the grandchildren therein mentioned so as to form one composite class, the whole gift is bad: *Pearks v. Moseley* (1); *Re Bence, Smith v. Bence* (2); for clearly it could not be postulated with certainty, at the date of the settlement, that all possible members of the class would be ascertained or ascertainable within the permitted limit of time.

C What then is the proper way to read the proviso? The answer to this question is to be found, I think, in the judgment of COZENS-HARDY, M.R., in *Re Williams, Metcalf v. Williams* (3). In that case a testator bequeathed a sum of money to his grandchildren, J. and G., children of his son P., equally share and share alike should they attain the age of 21 years, and he gave his residuary estate:

D "In trust for all my children living at my decease who being sons shall attain the age of 21 years or being daughters shall attain that age or marry in equal shares . . . Provided always that if any child of me shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of 21 years or being a daughter or daughters shall attain that age or marry then and in such case the last mentioned child or children shall take (and if more than one equally between them) the share which his or her or their parent would have taken of and in the residuary trust funds if such parent had survived me and attained the age of 21 years.

E P., to the knowledge of the testator, was dead at the date of the will. The other children of the testator and also J. and G. survived him, and some of the children had attained 21 at the date of the will. The summons which came before the court did not raise or involve any question of remoteness, but the observations of COZENS-HARDY, M.R., as to the effect of the proviso are not the less relevant to the present case on that account. After reading the proviso, COZENS-HARDY, M.R., said ([1914] 2 Ch. 64):

F "Now reading that as an ordinary man uninfluenced by the numerous authorities, I do not feel a doubt about the meaning of the will. The testator says in effect, "There may or may not be living at my decease children of a child of mine already dead, and if there are any such children, and if they attain 21 or being daughters marry, then the class of persons which takes under the earlier gift is to be augmented and increased by the inclusion of those grandchildren." That is, there are two original gifts, the first to the testator's children who survive him and attain 21, and a further gift to

G any children of a child of the testator already dead who survive the testator and attain 21.

BUCKLEY, L.J., said (*ibid.*, 65) that, although a proviso, in the strict sense, must be a qualification of what precedes it:

. . . this so-called proviso is not really a qualification upon the preceding gift. It operates rather by way of an addition to the clause which precedes it.

H The only distinction of any materiality for present purposes between the proviso which the court was there considering and the proviso of cl. 3 of the 1930 settlement is that in the proviso in the present case the grandchildren are expressed to take the share of the parent "by substitution." I attribute to this phrase, however, the loose and secondary meaning to which KINDERSLEY, V.-C., referred (34 L.J. Ch. 656) in *Lanphier v. Buck* (4), and not a substitutionary effect in the proper sense of the word. In these circumstances, cases such as *Goodier v. Johnson* (5), relied on by counsel for Walter Eric Lord, have no application. Adopting and applying, then, the views

expressed by COZENS-HARDY, M.R., and BUCKLEY, L.J., I hold that the effect of the proviso is to introduce new members into the original class of takers which had been already partly defined by the earlier part of cl. 3. It is true that the addition of the grandchildren lessens or might lessen the *quantum* of interest which, but for the proviso, would have devolved on the children who attained vested interests, but, inasmuch as the proviso does not purpose to divest any interests already given, I see no reason to reject it by reason of such diminution. For the foregoing reasons I am of opinion, accordingly, that the provisions of cl. 3 are wholly invalid, and that question 3 of the summons must be answered accordingly. On this view of the matter, question 4 does not arise.

Declaration that cl. 3 of the settlement was bad for remoteness and, accordingly, on the attainment of the age of 21 years of Walter Eric Lord the capital and accumulation of the trust fund should be transferred to the personal representatives of the settlor. Costs of all parties, as between solicitor and client, out of the trust fund.

Solicitors: *Rowntree & Ritson*, Oldham (for the plaintiff); *Hutchison & Cuff*, agents for *J. Bright Clegg & Son*, Rochdale (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Followed. *Re* BRADSHAW. [1949] 2 All E.R. 905. *Distinguished and Criticised.* *Re* BRADSHAW (*decd.*). [1950] 1 All E.R. 643.

Re DONKIN, PUBLIC TRUSTEE v. CAIRNS AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), November 5, 6, 1947.]

Executors and Administrators—Lunatic—Distribution of estate—Lunatic entitled as sole next of kin to estate of intestate brother—Brother entitled at his death to freehold property—Nature of lunatic's beneficial interest in brother's estate—"Beneficial interest in real estate"—Administration of Estates Act, 1925 (c. 23), ss. 33 (1) (4), 51 (2).

H. J. D. died, a bachelor and intestate, in 1928, leaving as his sole next of kin his sister, a person of unsound mind, who was of full age and unsound mind before the commencement of the Administration of Estates Act, 1925, and died intestate in 1934. H. J. D. was, at his death, entitled to certain freehold property and, since no letters of administration of his property were taken out between the date of his death and the date of his sister's death, the legal estate in this property vested in the probate judge under the Administration of Estates Act, 1925, s. 9. Section 33 (1) of that Act provides that the real estate of an intestate is to be held on trust for sale, and, by s. 33 (4), the residuary estate of an intestate includes (but without prejudice to the trust for sale) "any part of the estate of the deceased which may be retained unsold and is not required for" administration purposes. Section 51 (2) of the Act provides: "The foregoing provisions of this Part of this Act" (*i.e.*, Pt. IV, dealing with distribution of residuary estate) "do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act . . . was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to this case" :—

HELD: "beneficial interest in real estate" in s. 51 (2) of the Act of 1925 was confined to such interest as would under the general law in force before the commencement of the Act have devolved in accordance with the law applicable to freehold land; the beneficial interest which the sister had in H. J. D.'s estate on his intestacy was an interest in the proceeds of a trust for sale of land, and not an interest which, under the general law in force before Jan. 1, 1926, could have devolved in accordance with the law applicable to freehold land; and, accordingly, her interest was not a "beneficial interest in real estate" within the meaning of the Administration of Estates Act, 1925, s. 51 (2).

[AS TO TRUSTS ON INTESTACY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 371, 372, paras. 695-697.

AS TO DISTRIBUTION OF ESTATE OF LUNATIC, see HALSBURY, Hailsham Edn., Vol. 10, pp. 592, 593, para. 856.]

A ADJOURNED SUMMONS to determine the nature of the beneficial interest of an intestate, Helen Donkin, who died on Apr. 7, 1934, in the estate of her brother, Henry John Donkin, who was entitled at his death to certain freehold property and who died on Mar. 8, 1928, intestate, leaving his sister as his sole next of kin. Helen Donkin was of unsound mind from before Jan. 1, 1926, until her death, and the question was whether her interest in her brother's estate was a "beneficial interest in real estate" within the meaning of the Administration of Estates Act, 1925, s. 51 (2). ROXBURGH, J., held that it was not. The facts appear in the judgment.

B H. A. Rose for the Public Trustee.
G. D. Johnston for next of kin.
Tonge for the heir-at-law.

C ROXBURGH, J. : This summons raises a curious, and, perhaps, an important, point. Helen Donkin, the intestate, was at her death, which took place on Apr. 7, 1934, a person of unsound mind, and she had been a person of unsound mind since before Jan. 1, 1926. Her brother, Henry John Donkin, died on Mar. 8, 1928, a bachelor and intestate, leaving Helen Donkin as his sole next of kin. At his death he was entitled to certain freehold cottages. No letters of administration of his estate were taken out between the date of his death and the date of Helen Donkin's death, and, therefore, the cottages were vested in the probate judge under the Administration of Estates Act, 1925, D s. 9, which says :

Where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the probate judge in the same manner and to the same extent as formerly in the case of personal estate it vested in the ordinary.

E Counsel for the next of kin attaches great importance to the fact that the cottages were vested in the probate judge and not in an administrator who had no beneficial interest in the estate. I am bound to confess that I cannot see any ground of distinction there, because there is no machinery by which anybody could assert a beneficial interest against the probate judge except the normal machinery of obtaining letters of administration and having the rights of the parties ascertained in accordance with the Administration of Estates Act, 1925. Therefore, I cannot see that it makes any real difference whether the property F was vested in the probate judge, as, in fact, it was, or, as it might have been, in an administrator who was not a beneficiary.

As Helen Donkin on Jan. 1, 1926, and at all material times thereafter, was of unsound mind, the Administration of Estates Act, 1925, s. 51 (2), undoubtedly applies if the property can answer the description in that section. Section 51 (2) is this :

G The foregoing provisions of this Part of this Act [*i.e.*, pt. IV, dealing with distribution of residuary estate] do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to this case. H

Helen Donkin was of full age at the commencement of this Act.

What was the right—I want to use a perfectly neutral term at the moment—of Helen Donkin at the moment of her death, she being of unsound mind? I have to look at the earlier provisions of the Administration of Estates Act, 1925, to see what right she had. The brother was not of unsound mind, and, therefore, there is no doubt that all the relevant provisions of the Administration of Estates Act, 1925, apply to his estate and to its devolution. Miss Donkin's right was to have her brother's residuary estate distributed

in the manner provided by s. 46 of the Administration of Estates Act, 1925. If it was so distributed she, having regard to her relationship with her brother, would get all that was left after the payment of his debts and so forth, but "residuary estate" is defined in the Act, and the definition is important. It is to be found in s. 33, the first two sub-sections of which provide :

(1) On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives (a) as to the real estate upon trust to sell the same . . . (2) Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased . . . the personal representative shall pay all such funeral, testamentary and administration expenses, debts and other liabilities . . .

The material sub-section, sub-s. (4), is :

The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is in this Act referred to as "the residuary estate of the intestate."

Thus, it seems to me that the position as at the date of the death of Miss Donkin was quite clear. The legal estate in the cottages was vested in the probate judge and Miss Donkin's right was a right to have the provisions which I have just read of the Administration of Estates Act, 1925, carried out. It is important to bear in mind, I think, that the stat. 22 & 23 Car. II, c. 10 [the Statute of Distribution, 1670] did not create a trust for sale. What it said was :

III. (2) and also that the said ordinaries and judges respectively, shall and may, and are enabled to proceed and call such administrators to account, for and touching the goods of any person dying intestate ; (3) and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funerals and just expenses of every sort first allowed and deducted) amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down ; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same, by the due course of His Majesty's ecclesiastical laws.

Therefore, if there are any cases under the old law relevant to the decision of this point—none has been cited to me—I do not think that they would necessarily have any application now because there is no doubt that under the Administration of Estates Act, 1925, a trust for sale is plainly created.

The question depends on considering the language of s. 51 (2) of the Act of 1925 as a whole :

The foregoing provisions . . . do not apply to any beneficial interest in real estate . . . to which a lunatic or defective . . . was entitled at his death, and any such beneficial interest . . . shall . . . devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land . . .

It seems to me that, to make sense of that provision, it is necessary to confine the beneficial interests indicated to such interests as would under the general law in force before the commencement of the Act have devolved in accordance with the law applicable to freehold land. If that be the true meaning of the section—and it is not an easy point—the rest seems to follow as a matter of course, because nobody would contend that before 1926 the interest of a beneficiary in the proceeds of a trust for sale of land would have devolved in accordance with the law applicable to the devolution of freehold land. At any rate, nobody has contended that before me. Accordingly, unless I can find some difference between a trust for sale such as could exist before the commencement of the Administration of Estates Act, 1925, and the trust for sale imposed by the Administration of Estates Act, 1925, in the case of an intestacy, it must follow that the beneficial interest which Miss Donkin had in her brother's estate on his intestacy was not one which under the general law in force before Jan. 1, 1926, could have devolved in accordance with the law applicable to freehold land. In my judgment, that is a good ground for holding that the interest which Miss Donkin had was not a "beneficial interest

in real estate" within the meaning of that phrase in s. 51 (2) of the Administration of Estates Act, 1925.

Declaration accordingly. Costs to be taxed as between solicitor and client, and paid in due course of administration.

Solicitors: *Batchelor, Fry, Coulson & Burder*, agents for *Charles E. Layne & Son*, Newcastle-on-Tyne (for the Public Trustee and the next of kin); *Reid Sharman & Co.*, agents for *Hay & Kilner*, Newcastle-on-Tyne (for the heir-at-law).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

R. v. NATIONAL ARBITRATION TRIBUNAL, *Ex parte* HORATIO CROWTHER & CO., LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Croom-Johnson, JJ.), October 29, 30, November 10, 1947.]

Emergency Legislation—Conditions of employment—Trade dispute—Reference to National Arbitration Tribunal—Workmen dismissed before date of report to Minister—Power of tribunal to order reinstatement—Conditions of Employment and National Arbitration Order, 1940 (S.R. & O., 1940, No. 1305), art. 2 (1), 7.

By the Conditions of Employment and National Arbitration Order, 1940, made under the Defence (General) Regulations, 1939, reg. 55AA, a trade dispute may be reported to the Minister of Labour and National Service and referred by him to the National Arbitration Tribunal. Article 2 provides: "(1) If any trade dispute exists or is apprehended that dispute . . . may be reported to the Minister . . . (5) Any agreement, decision or award . . . shall be binding on the employers and workers to whom . . . [it] relates and . . . it shall be an implied term of the contract between the employers and workers to whom . . . [it] relates that the rate of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with such agreement, decision or award until varied . . ." Trade dispute is defined by art. 7 as "any dispute or difference between employers and workmen, or between workmen and workmen, connected with the employment or non-employment or the terms of the employment or with the conditions of labour of any person." "Workmen" is defined as "any person who has entered into or works under a contract with an employer."

Since Nov., 1946, workmen employed by the applicants, a company, through their union had pressed for changes in wages and conditions of service. On Mar. 28, 1947, the company gave the workmen on the manufacturing side of their business, including those in the union, notice terminating their employment as from Apr. 4. On Apr. 14, the matter was reported to the Minister of Labour and National Service, who referred it to the National Arbitration Tribunal. The claim of the workmen included *inter alia*: "(1) The reinstatement from the date of dismissal of the workers dismissed." The award of the tribunal stated: "They find in favour of the claim set out in item (1) . . . and award accordingly." On an application for an order of *certiorari* to quash the award:

Held: (i) although at the date of the report to the Minister of Labour the contract of service between the company and the workmen had been terminated, there was nevertheless a "trade dispute," within the meaning of art. 7 of the Order of 1940, which had been properly referred under art. 2 (1).

(ii) a direction to reinstate the workmen would be *ultra vires* the tribunal, and, as (CROOM-JOHNSON, J., *dissentiente*) the finding on item (1) of the claim was equivalent to such a direction, the award in so far as it related to that finding must be quashed.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, REG. 58AA, AND THE CONDITIONS OF EMPLOYMENT AND NATIONAL ARBITRATION ORDER, 1940, see HALSBURY'S STATUTES, Vol. 33, pp. 659, 734-738.]

Cases referred to :

- (1) *Laceby v. Lacon & Co.*, [1899] A.C. 222 ; 68 L.J.Q.B. 480 ; 80 L.T. 473 ; 63 J.P. 371 ; 37 Digest 37, 293.
- (2) *Selby v. Whitbread & Co.*, [1917] 1 K.B. 736 ; 86 L.J.K.B. 974 ; 116 L.T. 690 ; 81 J.P. 165 ; 2 Digest 515, 1540.

APPLICATION by a company for an order of *certiorari* to bring up and quash an award of the National Arbitration Tribunal on the grounds that (1) there was no trade dispute which could be referred to the tribunal because the contract of service between the company and the workmen had been terminated before the date of reference ; and (2) the tribunal had ordered that the workmen should be reinstated and such an award was *ultra vires* the tribunal. The Divisional Court unanimously dismissed the application on ground (1), but by a majority upheld ground (2). The facts appear in the judgment of LORD GODDARD, C.J.

Sir William McNair, K.C., and *Haggen* for the company.

Paull, K.C., and *Leonard Lewis* for the Chemical Workers' Union.

B. J. M. MacKenna for the Minister of Labour and National Service.

Cur. adv. vult.

Nov. 10. The following judgments were read.

LORD GODDARD, C.J. : In this case counsel for the applicants, Horatio Crowther & Co., Ltd., moved for a *certiorari* to remove into this court an award of the National Arbitration Tribunal made on Aug. 8, 1947, for the purpose of having it quashed. The National Arbitration Tribunal was established under reg. 58AA of the Defence (General) Regulations, 1939, which provides that the Minister of Labour and National Service may by order make provision for establishing a tribunal for, among other things, the settlement of trade disputes and for regulating the procedure of the tribunal. The grounds of the application were that no dispute existed or was apprehended on Apr. 14, 1947, which was the date when the dispute was reported to the Minister under the provisions of the Conditions of Employment and National Arbitration Order, 1940, made under the regulation ; that, whereas the parties to the reference were stated to be the applicants, as employers, and members of the Chemical Workers' Union previously employed by the employers as workmen, no members of that union were at the date of the reference in their employment, and, accordingly, it was said that there was no matter on which the tribunal could arbitrate. A further ground was that the award of the tribunal was bad in that it purported to award the reinstatement of the workmen in the service of the applicants which, it was said, the tribunal had no jurisdiction to award.

The applicants are a company of chemical manufacturers and since Nov., 1946, demands have been made by certain of the company's workmen who are members of the Chemical Workers' Union or by the union on their behalf for changes in wages and conditions of service. The company always resisted these demands. On Mar. 26, the company appears to have been told by their suppliers that their supplies of salt would be cut by 50 per cent., and on Mar. 28 notice was given by the company to all workmen employed on the manufacturing side of their business terminating their employment as from Apr. 4. No question arises as to this being in any way a notice otherwise than in accordance with the contracts of service, and the men, in fact, were discharged from the company's service on the last-mentioned date. This matter was then reported to the Minister of Labour by the workmen or their union and he referred the matter to the National Arbitration Tribunal. The reference has set out the particulars of the trade dispute in this way :

The dispute arises out of a claim made by the workmen as follows : (1) the reinstatement from the date of dismissal of the workers dismissed ; (2) Chemical and Allied Industries Joint Industrial Council overtime rates and conditions ; (3) 30 minutes break within shift to be paid for ; (4) an increase of 1d. per hour to glauber boiler men ; (5) the payment of statutory and annual holidays as laid down by the joint industrial council.

The award of the National Arbitration Tribunal was in these terms :

They find in favour of the claim set out in item (1) of sched. II in para. 1 above, and award accordingly. They also find in favour of the claims set out in items (2), (3) and (5) of sched. II in para. 1, with effect as from the beginning of the first full pay period following the date hereof, and award accordingly. The tribunal find against the claim set out in item (4) of sched. II in para. 1, and award accordingly.

The Conditions of Employment and National Arbitration Order, 1940, after providing for the constitution of the tribunal in art. 1, provides in art. 2 :

If any trade dispute exists or is apprehended that dispute, if not otherwise determined, may be reported to the Minister by or on behalf of either party to the dispute and the decision of the Minister as to whether a dispute has been so reported to him or not and as to the time at which a dispute has been so reported shall be conclusive for all purposes.

- A Sub-paras. (2) and (3) of the article then provide for the reference by the Minister of the dispute to the tribunal. Sub-para. (5) provides :

Any agreement, decision or award made by virtue of the foregoing provisions of this article shall be binding on the employers and workers to whom the agreement, decision or award relates and, as from the date of such agreement, decision or award or as from such date as may be specified therein not being earlier than the date on which the dispute to which the agreement, decision or award relates first arose, it shall be an implied term of the contract between the employers and workers to whom the agreement, decision or award relates that the rate of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with such agreement, decision or award until varied by a subsequent agreement, decision or award.

- B Part III of the Order which deals with "recognised terms and conditions of employment" provides for a reference to the tribunal where there is a dispute on that subject in the same way as if it were a trade dispute, and under art. 7
C "trade dispute" is defined as :

... any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person.

"Workman" is defined as :

- D ... any person who has entered into or works under a contract with an employer ...
It was submitted by counsel for the company that as at the date of the reference due notice had been given to the workmen to terminate their employment and their employment had thereby been terminated, there could be no trade dispute to refer, because there could not be a dispute or difference on any subject between these employers and workmen as the workmen were not in the service of the employers, and he reinforced this argument by reference
E to the definition of "workman" which he submitted contemplated an existing contract of service so, as he put it, that there must be some contract on which the reference could "bite." I cannot agree with that submission. If effect were given to it, it would mean that any employer, or, indeed, any workman, could nullify the whole provisions of the Order and the object of the regulation under which it was made by terminating the contract of service before a reference was ordered, or even after the matter was referred but before the tribunal
F considered it. It is, in my opinion, quite clear that there was here a trade dispute existing at any rate down to the date of the dismissal of the workmen. That is not in issue, and whether the workmen were discharged for the *bona fide* reason that supplies were cut down or whether they were discharged because the company were not willing to accede to their demands is, in my opinion, immaterial. If there was a trade dispute it can, in my opinion, be referred to the tribunal
G whether or not the dispute has resulted in workmen being dismissed or in their having discharged themselves. The object of the regulation is stated to be for preventing work being interrupted by trade disputes. If the employer locked out his workmen with a view to obliging them to submit to the terms which he wished to impose or the workmen struck in an endeavour to secure their demands, there would be, undoubtedly, a trade dispute. True it is that, unless notice was given to the workmen on strike or who were locked out, the contract of
H service would not determine unless and until notice was given, but because dismissal is superimposed on a dispute which has existed up to the moment of dismissal it does not seem to me to prevent the dispute being referred, because the dismissal of the workmen in no way settled the dispute which had hitherto existed. Supposing a dispute arose whether the workers in a particular industry or branch of an industry could be, as the employers contended, dismissed at an hour's notice or whether they were entitled, as the workers contended, to a week's notice. There you would have a dispute connected with the terms of employment. It appears to me clear that an employer could not avoid a

reference by the Minister if the matter was reported to him by discharging his workmen and saying : " They are no longer in my service, whether I rightly or wrongly dismissed them." If an employer discharges his workmen without proper notice, although the workmen would have an action for wrongful dismissal, they are not from the moment of discharge in the employer's service, but if the contention advanced by the employers in this case be right the question of what notice workers in this industry or this factory should be given could not be settled by the tribunal. In my opinion, there was here a dispute which the Minister could refer to the tribunal and on which the tribunal could adjudicate. A

The next, and, to my mind, by far the more difficult and important, question is whether the tribunal have purported to award reinstatement, and, if so, whether they have jurisdiction so to do. It will be remembered that the first matter referred is the claim made by the workmen for " reinstatement from the date of dismissal of the workers dismissed." This means that the workmen claim to be reinstated in the service of the employers as from Apr. 4, 1947, the date when the notices served expired. The tribunal state in their award that : " They find in favour of the claim set out in item (1) of sched. II in para. 1 above, and award accordingly." I can only read this as meaning that they award what the men claimed, namely, reinstatement as from the date that I have mentioned, and by the terms of the order an award is made binding on the employers. If my reading of the award be right, it can only mean that the tribunal direct the re-employment of, and the employers are obliged to re-employ, these men and pay them their wages from Apr. 4. I can see no other way by which on Aug. 8 a man could be reinstated in employment from the date of dismissal which occurred four months earlier. It may be assumed that the tribunal were of opinion that the real cause of dismissal was the trade dispute, that is to say, the claims made by the men which the employers were unwilling to grant. It must also be assumed that the tribunal were of opinion that the employers ought not on that account to have dismissed the men, but I find it impossible to read this award merely as an expression of opinion to that effect. D I can only read it as a direction to the employers having the effect which I have already mentioned.

There are no express words either in the regulation or in the Order which in terms give the tribunal any power to reinstate, but it is said that as they have power to deal with any question relating to employment or non-employment it follows that they must have the power to make an award of reinstatement. E It seems to me a strong thing to say, looking at this regulation which alone gives force to the Order, that a power is thereby impliedly given to the tribunal to grant a remedy which no court of law or equity has ever considered they had power to grant. If an employer breaks his contract of service with his employees either by not giving notice to which the latter are entitled or by discharging them summarily for a reason which cannot be justified, the workmen's remedy is for damages only. F A court of equity has never granted an injunction compelling an employer to continue a workman in his employment or to oblige a workman to work for an employer. If a workman, or any other employee who occupies a higher status than that usually implied by the term workman, breaks his contract with his employer, no injunction has ever been granted obliging that workman or employee to work for the employer. The most that has ever been done is that, if the contract was one by which for a certain period a person has agreed to serve another exclusively, the workman or employee may be restrained from working for anybody else during the term for which he contractually engaged to serve his employer. G Nor is there any provision in the regulation which imposes a penalty on the employer if he refuses after the award to re-employ the man, nor on the workman if, in spite of an award, he refuses to work for an employer. Suppose that after the award the workman sued his employer. H He would be met at once by the defence : " I gave you the notice to which you were entitled, and, therefore, you have no remedy against me for breach of contract." Again, supposing the employers out of deference to the award took the man back into their employment, I cannot find anything in the Order or regulation which would disentitle them to give notice the next day or next week in accordance with the terms of the contract to any individual workman or to all of them. It is true that this tribunal can do what no court can, namely, add to or alter the terms or conditions of the contract of service.

Express power to do so is given by the regulation, while there are no words conferring a power to reinstate or revive a contract lawfully determined.

- Compare this Order and regulation with the Essential Work (General Provisions) (No. 2) Order, 1942, which was made under reg. 58A. That regulation and Order dealt with undertakings engaged in work which the Minister regarded as essential for the war and with employment therein. In effect, the general scheme of the Order was that in those undertakings an employer could not discharge his
- A workman and workmen could not discharge themselves without the permission of a national service officer. If an employer in that class of work discharged a workman the discharge would be ineffective if it were done without the consent of a national service officer and equally if a servant quitted his employment his action would not determine the contract of service, even though he had given the proper notice, without a like consent. It will, therefore, be seen that in those cases the effect of the Order was that the contract of service could
- B not be terminated without the consent of a national service officer, and there was, therefore, no difficulty in the latter ordering the employer to continue to employ, or the workman to continue to serve, and in the former case it is expressly provided that the workman can recover his wages for any time that has elapsed between the purported dismissal and his reinstatement. In one case, namely, where the dismissal was for serious misconduct, the employer
- C could discharge a workman without the previous consent of the officer, but again the Order provided that a dismissal for serious misconduct should in the first instance be provisional only and if within the period allowed the workman required the national service officer to submit the matter to the local appeal board and thereafter the national service officer directed reinstatement, the dismissal was to be treated as having been ineffective. Moreover, under the terms of that regulation and Order heavy penalties were imposed on an employer
- D who failed to reinstate a man and pay him the wages for the period which elapsed between the dismissal and the reinstatement. It is plain, therefore, that quite different considerations applied to workmen who were engaged in essential undertakings and those who were not.

- If in a case to which reg. 58AA applies the employer or workman ignores the award of the National Arbitration Tribunal as to reinstatement I can find no method of compelling either to obey it whether by means of a prosecution or
- E by a civil action except, perhaps, in the case I am now about to mention. In the case of a strike or lock-out where one side or the other has not given a notice to terminate the employment required by the contract and the other side have not accepted the breach, whether failure to employ or failure to serve, the contract still exists. It not infrequently happens that men strike without giving notice and the employers, who are still open to negotiate terms, do not give
- F notice to the men terminating their contract of service. In such a case it may well be that the tribunal could make an award which would have the effect of continuing the men in the service of the employer from which they have never been dismissed on such terms and conditions as the tribunal might award and which they have power to make terms of the employment. Where, however, notice has been given by one side or the other and has duly expired so that the contract is at an end, I can find nothing in the regulation which entitles the
- G tribunal to say: "You shall re-employ your workmen." As I have already said, if this award had been made in those terms, the employers would have incurred no penalty for disobeying it, for none is provided. Nor can I see what sanction or action at law would lie at the suit of the workman for not being employed, still less for his wages from the time when his contract was terminated. It may well be that in circumstances such as arise here the tribunal could express their opinion that these men ought not to have been dismissed. It
- H may be that in some cases that would have the effect of inducing the employers to re-employ them, and if I could read the award of the tribunal merely as an expression of opinion I should not feel any doubt that it was within their power to express it, but, as I have said, I cannot read it as otherwise than a direction to these employers to re-engage the men, and, apparently, also to pay them wages from the time the contract was terminated. If there is and can be no means of enforcing that award, it seems to me a cogent, if not a compelling, reason for saying that the tribunal has no power to award it.

No objection can be found to the rest of their award, and, in my opinion,

the result is that a *certiorari* must go to bring up the award and to quash the first paragraph as being made without jurisdiction. The rest of the award will stand. As each side has partly succeeded and partly failed, I would give no costs to either side.

HUMPHREYS, J.: I have arrived at the same conclusion. If I had had an opportunity of reading the judgment which my Lord has just pronounced I doubt whether I should have thought it necessary to add anything to it, for I agree with it. As, however, I have prepared, independently, a short judgment, I will read it. A

The power of the Minister to refer a trade dispute to the National Arbitration Tribunal for settlement depends on the trade dispute having been reported to the Minister by a party to the dispute, and that report can be made only if the trade dispute is then existing. It follows that in this case the trade dispute in question must have been existing on Apr. 14, the date of the report, to justify the Minister in referring it. The first objection to the award raised by counsel for the company was based on the absence of any trade dispute at that date. It appears that the workmen, parties to the dispute, had been given notice to leave the company's service, which notice had expired on Apr. 4. It was argued for the company that there was, in consequence, no trade dispute existing after that date. I think that argument fails. In my opinion, there may be a trade dispute existing although the cause or causes of the dispute may be in the past. Strikes and lockouts, the avoidance of which is the main object of the Order creating the National Arbitration Tribunal, are concerned with apprehensions for the future quite as much as grievances in the past, and I think there was in existence on Apr. 14 a trade dispute between the company and the workmen who had been, as they alleged, unjustifiably dismissed, connected with each of the three heads of the definition of trade dispute, namely, the terms of employment, the conditions of labour, and the employment or non-employment of the workmen. On this short ground I hold that the reference to the tribunal was *intra vires* the Minister. B
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The second point taken by counsel is, in my opinion, a more formidable one. The reference by the Minister describes the particulars of the trade dispute as follows:

The dispute arises out of a claim made by the workmen as follows: (1) the reinstatement from the date of dismissal of the workers dismissed ... E

The award so far as material is in these terms:

The tribunal find in favour of the claim set out in item (1) and award accordingly. It was argued that the tribunal had no power under the Order to hear and determine a claim to such reinstatement. Reference was made to the Essential Work (General Provisions) (No. 2) Order, 1942. It is, I think, plain that the tribunal had no power under that Order to direct the reinstatement of the men dismissed, that power being reserved to a national service officer in the case of a specified person who has been suspended without payment, the specified person having been employed in an undertaking classed as essential work. That Order was made under the powers conferred on the Minister by reg. 58A. There is no similar power given to any person or body of persons by reg. 58AA or the Order made under it. If, then, the tribunal has directed reinstatement, I think they have exceeded their powers. The award in the present case does not in terms purport to be or to include a direction for reinstatement. If it is said that the award has the effect of, or that it is in substance, such a direction, that would afford no ground for an order of *certiorari* so long as the tribunal did not exceed the powers conferred on them: see *Laceby v. Lacon* (1). The form of the claim under item 1 is, in my view, unfortunate. The real grievance of the workmen lay in what they regarded as their dismissal without adequate cause. Reinstatement is the suggested remedy. If the claim had been expressed to be a claim for an award that the dismissals were unjustified the tribunal would, in my opinion, have been well within their powers, assuming they so found, in adding a recommendation for reinstatement. The tribunal was brought into being (art. 1 of the Order of 1940) "for the purpose of settling trade disputes which cannot otherwise be determined." The Order constituting them is itself stated to be made "with a view to preventing work being interrupted by trade disputes." F
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The question then seems to be : Can the award be treated as a finding that the claim of the workmen to have been unjustifiably dismissed was made out and expressing the view of the tribunal that they should be reinstated. No doubt, the tribunal as well as the workmen, and I am inclined to add the employers, would assume that an award to the effect that workmen had been wrongfully dismissed would be loyally accepted by all parties and that reinstatement would follow as the natural consequence of such a decision, but the fact remains that both the claim and the award are "for the reinstatement of the men dismissed." Then it is said that the award is bad since there are no means of enforcing it. I do not propose to inquire in what manner such an award can be enforced. I doubt whether on the facts of this case there exist any practical means of enforcing it, but, assuming it to be a *brutum fulmen*, that by itself is not, in my opinion, a ground for holding that it was made without jurisdiction. A direction to reinstate under the Essential Work Order, 1942, might be impossible of enforcement because, for instance, the business of the person directed had ceased to exist, but the direction would not on that account be liable to be quashed on *certiorari*. I would add that, in my opinion, this independent tribunal, consisting of not undistinguished persons, must be taken to have been aware of the limitations on their powers of enforcement of their awards. Article 2 (5) of the Order provides a practical method of enforcing an award relating to wages to be paid or conditions of employment to be observed in that the terms of the award are to be an implied term of the contract of service. No such provision is to be found relating to an award on a trade dispute connected with the employment or non-employment of any person, nevertheless the definition of trade dispute expressly includes such a difference between employers and workmen.

I have come to the conclusion that the tribunal did not intend to award reinstatement in the sense of directing it and I am anxious "to approach the award with a desire to support rather than to destroy it" : *Selby v. Whitbread* (2) ([1917] 1 K.B. 748) ; but I have found no answer to the argument on behalf of the applicants that the claim was expressed and the award is couched in such plain terms that I am bound to hold that the award under item 1 did direct reinstatement and is, therefore, bad as being made without jurisdiction. Accordingly, I agree that this part of the award should be quashed.

CROOM-JOHNSON, J. : Since I prepared the judgment which I am about to read I have had the opportunity of reading and considering that of my Lord, the Lord Chief Justice, which he has just read. If I thought that the effect of the award was equivalent to an order to reinstate or in the nature of an injunction I should have been content to express my concurrence with that judgment. As, however, I take a different view on one point, I propose to summarise the regulation and Order as I see them and to express my own conclusions on that point in my own words.

On the first question, whether a dispute existed or was apprehended on Apr. 14, 1947, I agree that the answer must be in the affirmative for the reasons given by my Lord with which I fully concur.

On the second question, I agree, also for the reasons stated by my Lord, that the tribunal had no jurisdiction to order the employers to reinstate the workmen or to enter into a fresh contract of employment the former one having been determined by lawful and appropriate notice, whatever the reasons or motives of the employers may have been. My difficulty arises on a consideration of the question whether the tribunal, on the true construction of the award, has made or purported to make such an order. No doubt, the effect of the award is to decide that the employers are bound or ought to reinstate the dismissed men and as from the date of their dismissal. No doubt, also, that in the ordinary case on such an award the parties would decide to carry it into effect, but on an application for an order of *certiorari* I think it must be clearly established that the award goes as far as the applicants for the order in this case contend. I am not satisfied that it does.

Regulation 58AA of the Defence (General) Regulations, 1939, is very wide in its terms and confers very wide powers on the Minister of Labour and National Service. Under it, with a view to preventing work being interrupted by trade disputes, he may by Order make provisions :

(a) for establishing a tribunal for the settlement of trade disputes, and for regulating the procedure of the tribunal ; (b) for prohibiting, subject to the provisions of the Order, a strike or lockout in connection with any trade dispute ; (c) for requiring employers to observe such terms and conditions of employment as may be determined in accordance with the Order to be, or to be not less favourable than, the recognised terms and conditions . . .

The Arbitration Acts, 1889 to 1934, do not apply. The relevant Order made under that regulation on July 18, 1940, the Condition of Employment and National Arbitration Order, 1940, constitutes the National Arbitration Tribunal (art. 1). When a dispute exists or is apprehended the Minister, in certain circumstances, must refer the dispute for settlement to the tribunal (art. 2 (4)). Any award made by virtue of the provisions of that article is binding on the employers and workers to whom the award relates as from the date of the award or as from such date as may be specified in the award not being earlier than the date on which the dispute to which the award relates first arose (art. 2 (5)). Lockouts and strikes are prohibited as provided by and subject to the provisions contained in art. 4, but no penalty or other sanction for disobedience to that prohibition is provided for by the Order. The tribunal has power to make an award retrospective to such date as may be specified in the award : the Conditions of Employment and National Arbitration (Amendment) Order, 1944, art. 2 ; and must have regard in making an award on certain questions, not material to the present case, but arising out of questions as to recognised terms and conditions of employment, to collective agreements and certain special provisions of the Order : see art. 5 (3). Subject to those two special provisions, the Order nowhere defines or seeks to define or particularise the powers of the tribunal. The provisions of the Defence (General) Regulations, 1939, reg. 58AA, are not incorporated in the Order. The only reference to the duty of the tribunal to make an award is contained in para. 6 of the schedule which provides :

(1) The tribunal shall make its award or furnish its advice as the case may be without delay and where practicable within fourteen days from the date of reference. (2) An award on any matter referred to the tribunal for settlement may be made retrospective to such date not being earlier than the date on which the dispute or question to which the award relates first arose. The decision of the tribunal as to such date shall be conclusive.

In view of that provision I think it is incumbent on the tribunal to make an award and they are plainly empowered to make their award retrospective. The Order envisages, apparently, that when the matter is brought before the tribunal there will be an " agreement, decision or award " : see art. 5. So far as any such agreement, decision or award relates to rates of wages to be paid and conditions of employment to be observed, it is to be an implied term of the contract of employment between the employers and workers that such rates of wages shall be paid and such conditions of employment shall be observed under the contract until varied as provided : art. 2 (5). If an award deals with any other matter, such matter does not become by implication a term of the contract. So far as I can see, therefore, if an award dealing with such other matter is not observed by either party, the other party is left to his remedy at law, whatever it may be, to enforce it, presumably by action on the award. Whether the tribunal has any power to declare a lockout or strike illegal or contrary to the provisions of art. 4 of the Order (although, no doubt, it must try to settle the dispute which gives rise to the lockout or strike by agreement, decision or award) may be open to doubt.

It is in this undefined state of affairs that the question to be decided in this case arises. What is the effect of the award made by the tribunal and what are the powers of the tribunal to make it, bearing in mind that it is binding, as I have said, on the employers and the workers ? Having regard to the express object of the Order " with a view to preventing work being interrupted by trade disputes " and the time at which it was made, I am inclined to think that the Order ought to be construed in such a way, if possible, as to effectuate that object in the national interest. The alleged dispute arose out of claims by certain workmen, members of the Chemical Workers' Union previously employed by the company, to be reinstated by the company and that the company should observe certain specified rates of wages and conditions of employment. That dispute was referred by the Minister to the tribunal who made an award. It is

now contended that the tribunal had no power to make the award under the Order or otherwise. The workmen, who had received proper notice under their contracts of employment terminating their employment, alleged that they had been dismissed and claimed to be reinstated in their employment as from the date of their dismissal. The real claim was that the alleged reason for their dismissal was not the true one and that they had been "victimised," i.e., been got rid of because they were members of the Chemical Workers' Union. The award on the claim for reinstatement is as follows: "The tribunal find in favour of the claim . . . and award accordingly." As I read that award it does not order or purport to order the company to reinstate the workmen. All that is awarded is that the workmen are right in their claim. In that simple form the argument is that, the contract of employment having been terminated by lawful notice, the tribunal has no power to compel the company or the workmen to make a new contract of employment. I do not think they have, but

- A I do not think they have done so. How the award may be enforced or whether it is enforceable at all is not, I think, a matter for this court in these proceedings, which are for an order of *certiorari* to bring up and quash the award on the ground, to put it shortly, of want or excess of jurisdiction. In these circumstances I do not propose to examine the questions raised before us as to the effect or meaning of an order of reinstatement since, in my view, they do not arise for our determination. Once the dispute has been reported to the Minister (as to which his decision is conclusive for all purposes: art. 2), and he has referred it to the tribunal for settlement, they are, in my judgment, clothed with authority (regulating its procedure and proceedings as it thinks fit: schedule, para. 7), to try and settle it and to make an award. Putting the construction that I do on their award, I can see no excess of jurisdiction in the tribunal. Whether or not the Minister thinks fit to refer the settlement of a reported dispute to the tribunal is a matter for his discretion: see art. 3. If the award had purported to order the company to reinstate or re-employ the workmen different considerations may have arisen. For example, the court will not make a mandatory order or injunction to carry out or perform a contract of personal services and that reason might have applied to render nugatory or at least unenforceable an award in that form. I may add that I am not impressed by the argument that an order for reinstatement *simpliciter* would be unenforceable by reason of its vagueness. I think to reinstate is merely to put back into the state previously existing. I should dismiss the application.

Order for certiorari to quash award relating to reinstatement.

Solicitors: Gregory, Rowcliffe & Co., agents for Craven, Clegg & Theaker, Leeds (for the company); A. L. Phillips & Co. (for the Chemical Workers' Union); and The Solicitor, Ministry of Labour and National Service (for the Minister).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. COOPER AND COMPTON.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Singleton, L.JJ.), October 20, 1947].

Criminal Law—Indictment—Conspiracy—Inclusion of charge—Verdict—Guilty of conspiracy, but Not Guilty on specific charges—Unreasonable verdict—Criminal Appeal Act, 1907 (c. 23), s. 4.

Two police officers were charged on an indictment containing nine counts.

The first count was a charge of conspiracy to steal, and there followed four counts alleging four separate cases of robbery, and, finally, four counts alleging larceny in each of the same four cases. The only evidence offered at the trial was that of the four persons from whom the accused were alleged to have stolen, together with testimony corroborating that evidence. The jury found the officers Guilty on the first count, and Not Guilty on all the others.

HELD: in the circumstances a verdict of Guilty on the first count could only be supported if the jury believed the general story, and, as the jury had shown by their verdict on counts 2 to 9 that they did not believe the

general story, their verdict on count 1 was unreasonable and could not be supported by the evidence and must be set aside under the Criminal Appeal Act, 1907, s. 4.

Observations on the desirability of the inclusion of a count charging conspiracy in an indictment which charges specific offences in further counts where it is plain that the charge of conspiracy must stand or fall with the other counts.

Observations, also, on the desirability of the Court of Criminal Appeal being granted power to order a new trial. A

[AS TO CONSPIRACY, see HALSBURY, Hailsham Edn., Vol. 9, pp. 43-48, paras. 43-47; and FOR CASES, see DIGEST, Vol. 14, pp. 110-114, Nos. 805-830, and pp. 120-125, Nos. 912-954.]

Cases referred to :

(1) *R. v. Luberger*, (1926), 135 L.T. 414; 90 J.P. 183; 28 Cox, C.C. 264; 19 Cr. App. Rep. 133; Digest Supp. B

(2) *R. v. Boulton*, (1871), 12 Cox, C.C. 87; 14 Digest 122, 930.

APPEAL against convictions.

The appellants were convicted at the Central Criminal Court before LYNSEY, J., of conspiracy to steal, but were acquitted on charges of specific larcenies. The Court of Criminal Appeal now held the verdict on the conspiracy count to be unreasonable and unsupported by evidence within the Criminal Appeal Act, 1907, s. 4, and the convictions were quashed. The facts appear in the judgment of the court. C

Roberts, K.C., and *Durand* for the defendant Compton.

Flowers, K.C., and *M. Waters* for the defendant Cooper.

Anthony Hawke for the Crown.

HUMPHREYS, J. delivered the following judgment of the court. These two appellants were tried at the Central Criminal Court on an indictment which contained nine counts. The first count was a charge of conspiracy to steal. The second, third, fourth and fifth counts alleged that in four separate cases the appellants had been guilty of robbing four separate persons, that is, forcing them to give their money or goods as the results of threats and owing to fear. The next four counts charged that in those same cases they had stolen the money of those four persons, simple larceny. D

The main ground of this appeal is put well in the grounds of appeal. The jury found a verdict of Guilty on the first count. They found a verdict of Not Guilty on each and all of the remaining counts, and it is argued in support of the appeals that in those circumstances a verdict of Not Guilty on the substantive counts 2 to 9 leaves the first count unsupported by sufficient, or any, evidence. In other words, the appellants take advantage of the language of the Criminal Appeal Act, 1907, s. 4, which provides that the verdict of a jury may be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. E

The appellants argue that the jury had to consider the facts of the four separate cases. There was no other evidence than that of those persons who were called in one or other of the four cases to support the case for the prosecution, and in each case it was substantially the same story. It was said by each one of these four persons, who were all foreigners or persons who had been foreigners, that the two appellants, who are police officers of considerable length of service and of good character, came to the premises of the individual who may be called the prosecutor in that particular case, made some allegation as to that person's conduct—saying that he was suspected of receiving stolen property or uncustomed property, i.e., property which had been smuggled into the country and had not paid the proper duty, or something of that nature—and took advantage of their position as police officers to induce the person concerned to hand over money to them for their own purposes, or, in some cases, actually took from the person of that individual his wallet and stole the money which he had upon him. It was also alleged that they stole goods. The case for the appellants is that, that being the whole of the evidence and the jury having found a verdict of Not Guilty, as they did on counts 2 to 9, there was nothing left to support any other charge against the defendants. F

It may be observed that the appellants, being police officers, did under authority many things which otherwise would have been very suspicious, and, perhaps, even illegal if they had not been police officers, for instance, entering a person's premises and insisting on seeing his property and his books and so forth. *Prima facie*, that is a lawful act on the part of a police officer who wishes to make an investigation about a suspected person. So there was very little in dispute between the appellants, on the one hand, and the prosecutors, on the other. There was no dispute as to identity. There was very little dispute as to the circumstances in which the appellants entered the premises and discussed with the prosecutors certain aspects of the criminal law, suggesting that un-customed goods, or stolen property of that nature, were the subject of their investigations. Where the prosecutors, on the one hand, and the two appellants, on the other hand, differed completely was in the allegation that the police officers took from the prosecutors valuable property, money and various other things, for their own purposes. The answer of the appellants in three out of the four cases was that they took away nothing whatever, but in one case the officers agreed that they did take some stockings which the prosecutor said he was thinking of buying, and they said that they did so, not because they were in a position to make any charge against that particular man, who was named Godel, but because Godel himself said: "I do not want these stockings. If they are going to get me into any trouble I will not have them. I will not buy them, and I would rather you took them away." So, they said, they took them away to return them to the person whose property they were. In the other cases they simply said that the story that they had taken the prosecutor's money or goods was a lie. That was the issue the jury had to try, and the appellants say that, the jury having found that they do not believe the stories of the prosecutors, there is no evidence left to support a charge that the appellants entered into any unlawful agreement to steal or to do anything else unlawful. At first sight, it seems very difficult to see any answer to that argument.

Some observations have been made about the summing-up of the judge. In our opinion, there was no misdirection by the judge, and no ground for criticism of the way in which the case was tried. When the judge came to sum up, he told the jury that the first count was one of conspiracy to steal, and there was nothing more to be said about it. After telling the jury the nature of the simple charges which followed, he proceeded to deal with the evidence. Finally, having directed the jury as to the facts, the judge, by way of summarising his observations to the jury, said:

Those are the whole of the facts. You have to consider first of all whether you accept the evidence of the prosecution. Are you convinced by the evidence that what the prosecution say substantially happened? You cannot expect a man after a lapse of time to remember every detail exactly, but are you satisfied by the evidence of the prosecution that what they say substantially happened? If you are, then you will probably have little difficulty in coming to a conclusion that these men were working in agreement.

That is all he said on the conspiracy charge. It is not to be wondered at that he did not think it necessary to say more, because it must have been apparent to anybody that that was, not only the law, but also the commonsense of the matter. If the case for the prosecution were proved, there was conclusive evidence of conspiracy. It seems to follow as a natural result that, if the jury did not accept the evidence of the prosecution, there was no evidence of conspiracy. True, the judge did not say so in terms, but the jury might be expected to accept that corollary as a matter of course. The jury, after a retirement lasting an hour or two, came back and, being asked whether they were agreed on their verdict, replied: "On one count only there is agreement." The judge might, if he had thought right, have said: "Very well, then, I will take your verdict on the one count on which you are agreed, and we will see whether there is any use in sending you back to consider the matter on the other count." He did not take that course, but, after saying to the jury most properly that he did not want them to tell him how their difficulty arose or anything of that sort, he told them they had better retire again and see whether they could agree on the indictment as a whole. So the jury retired, but before they did so they made it plain that their difficulty was concerned with the word "con-

spiracy." They asked whether they had rightly understood the judge to say that the definition of "conspiracy" was an agreement to do an unlawful act or to do a lawful act unlawfully. The judge replied: "That is the definition of 'conspiracy,' but the particular conspiracy which is charged in this case is a conspiracy to commit the unlawful act of stealing." So it must have been present to the minds of the jury, if they followed that plain direction, that conspiracy to steal must be proved and not an agreement to do something else which was unlawful. The jury finally returned half an hour later and returned a verdict of Guilty on the first count and Not Guilty on each of the others. The judge then said to counsel for the defence:

As I understand the verdict, *Mr. Flowers*, what they have found is that there was a conspiracy existing between these two men to steal in the course of their duties, but that they are agreed, so far as the particular instances before the court are concerned, that conspiracy was not, in fact, carried out.

Counsel for the defence said that that was the way in which he understood the verdict. That, too, is the way in which the verdict has been construed in this court, and it may be that it is correct, but this court always has taken the view that it is not prepared to speculate on what a jury means by a verdict. We can only deal with the actual language used by the jury in returning the verdict. In the course of the argument a number of theories have been put forward as to what the jury thought. We do not join in that speculation. All we can say is that the jury has said in terms: "We are not satisfied with the case for the prosecution on counts 2 to 9. We are satisfied with the case for the prosecution on count 1."

Is it possible that this court can uphold that verdict as being reasonable? In a great many cases there is no doubt that a verdict of Guilty of conspiracy, but Not Guilty of the particular acts charged, is a perfectly proper and reasonable one. In such cases it would be wrong not to insert in the indictment a charge of conspiracy. Criminal lawyers know it often happens that, while a general conspiracy to do such a thing as to steal is likely to be inferred by the jury from the evidence, it may be that the evidence of the particular acts constituting the larcenies charged in the indictment are supported by rather nebulous evidence. That is a case where the jury may say, and very likely will say, Not Guilty of larceny but Guilty of being concerned with others to commit larceny. It was said in *R. v. Luberg* (1) that difficulty had arisen in that case as the result of putting in a count for conspiracy together with a number of counts charging particular acts forming criminal offences against the Larceny Act, 1916, s. 32, which makes it an offence to obtain goods by fraud or by false pretences. In giving the judgment of the court, SANKEY, J., said (19 Cr. App. Rep. 136):

But we do desire to say one word about the whole indictment. It will be observed that it starts with the general count for conspiracy. I am far from saying that that is wrong. It is perfectly open to prosecutors to do that, but it does, in our judgment, place the defendants in a case like this in some difficulty. The reason is that it renders admissible evidence of what one prisoner says in the absence of the others, because if they are all conspirators, what one of them says in furtherance of the conspiracy would be admissible evidence, even though it was said in the absence of the other conspirators. This is not only my own opinion. There is the well-known case of *Boulton and Others* (2), where COCKBURN, C.J., in summing up, refers to this procedure and says (12 Cox, C.C. 93) "I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it, for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses." It is perfectly true that that case was different from the present one. It is equally true that since the decision in that case an Act of Parliament has been passed which enables a prisoner to go into the witness-box and give evidence. It is a perfectly admissible and proper course to pursue, and a course which is often pursued, but we think that if that course is pursued, great care and great caution is necessary during the hearing of the evidence to be quite sure that no evidence is given which is inadmissible, and great care is required in the summing-up to keep all the several issues perfectly clear.

In the present case it appears to us that there was no necessity from any point of view for the insertion of any charge of conspiracy. A verdict of Guilty could only be supported if the jury believed the general story, and the general story was told by four different persons, each of whom, if he was believed, proved conclusively a charge of stealing which, from the point of view of the punishment, is a more serious offence than that of conspiracy and punishable with heavier punishment. It is owing to the insertion of the conspiracy count that this trouble has arisen. Counsel for the prosecution, of course, did his duty in considering whether or not it was desirable to insert a count for conspiracy in this indictment. He thought it was. In a similar case in future counsel for the prosecution who is instructed to draw an indictment will probably think, and think very long, before he clogs a perfectly simple case of stealing in one or more instances with a count of conspiracy, because it is so well-known that juries not infrequently do fail to understand what the lawyer finds so simple to understand, the difference between conspiracy and larceny. No blame can be attached to the judge for not saying what might have been said, and what, no doubt, would have been said if it had occurred to the mind of anybody that the jury would find or could find the appellants Guilty of conspiracy but Not Guilty of doing the things which they found them Guilty of conspiring to do.

The powers of this court are confined. We have power to quash any verdict of Guilty which is unsatisfactory. We cannot deal with any acquittal by a jury on the ground that, in view of the evidence, it is wrong or unsatisfactory. Therefore, we are bound to accept the verdict of Not Guilty on counts 2 to 9. In our view, it is impossible for us to say, those being verdicts which the jury were entitled to return, that there remained any evidence on which the jury could in law return a verdict of Guilty on the charge of conspiracy.

There is one other matter. The presiding judges in this court, from the very first year in which the court came into existence and throughout that long time, have said over and over again that in order to do justice in certain cases, not often but occasionally, it is essential that the court should have power to order a new trial. That power has never been given to the court. Whether it ever will be, we do not know. In this case it would be the most satisfactory solution of this difficult position. The jury have said by their verdict that they are satisfied that the two appellants are rogues and unfit to be police officers. They have also said something which is so inconsistent with that finding that we find it necessary to quash these convictions.* That is not a satisfactory state of affairs. Another jury hearing this evidence might—and it might be hoped would—come to some conclusion, either of Guilty or Not Guilty, on these perfectly simple charges which would be satisfactory as enabling everyone to know what was the real view of the jury about the conduct of the appellants. As it is, all we can say is that the appellants have made out that which they set out to prove, namely, that the verdict was so unreasonable that it cannot stand, and, therefore, I quote the exact words of s. 4, “that the verdict of the jury should be set aside on the ground that it is unreasonable [and] cannot be supported having regard to the evidence.” *i.e.*, the evidence as found by the jury and stated by them in the form of Not Guilty on counts 2 to 9. The convictions are, therefore, quashed.

Solicitors: *Philip Conway, Thomas & Co.* (for the defendant, Compton); *T. J. Robinson & Son* (for the defendant, Cooper); *Director of Public Prosecutions* (for the Crown).

[*Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.*]

* The appellants were subsequently reinstated in the police force.

MARSHALL v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), November 10, 1947.]

Royal Forces—Pension—Attributability—Test—War service a cause of disease—Hernia—Conditions of service producing cough leading to rupture.

Observations on the relevant considerations in deciding whether a disease is attributable to war service or only aggravated by it. The essential matter to justify a finding of attributability is that war service should be one of the causes of the disease, and it matters not that there may be other more powerful causes operating to which the disease is also attributable.

M., who had served in the Royal Air Force from Sept., 1939, until Aug., 1945, claimed a pension for hernia. He had been specially released under "Class A" which precluded any compelling presumption in his favour, but there was no onus on him. The left hernia was brought on by an accident before his war service and was not attributable to service, but the right hernia arose after war service. The Minister of Pensions rejected the claim, being of the opinion that hernia is "an anatomical condition which arises in consequence of a developmental weakness of the musculature of the abdominal wall and inguinal. Whilst it is accepted that service conditions played their part in the worsening of the disability, the foregoing evidence makes it quite clear that the disability cannot be attributed to new war service." The Pensions Appeal Tribunal affirmed the decision of the Minister, observing that the hernia was preceded by a cough which M. had while in the Air Force, and was not attributable to war service.

HELD: while one cause and, it might be, a predominant cause, of the right hernia was a weakness in the abdominal wall, nevertheless, another cause was the conditions in service which produced a cough and thereby led to the rupture of the stomach wall, and, therefore, hernia was attributable to war service.

[AS TO WAR PENSIONS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 779-780, paras. 1098, 1099; and FOR CASES, see DIGEST, Supp., title Royal Forces.]

Cases referred to:

- (1) *Huddersfield Police Authority v. Watson*, [1947] 2 All E.R. 193; [1947] K.B. 842; 177 L.T. 114.
- (2) *Hughes v. Lancaster Steam Coal Collieries, Ltd.*, [1947] 2 All E.R. 556; 177 L.T. 313.
- (3) *Minister of Pensions v. Chennell*, [1946] 2 All E.R. 719; [1947] K.B. 250; 176 L.T. 164; [1947] L.J.R. 700.
- (4) *Lander v. British United Shoe Machinery Co., Ltd.*, (1933), 102 L.J.K.B. 768; 149 L.T. 395; 26 B.W.C.C. 411; Digest Supp.
- (5) *Wicks v. Dowell & Co., Ltd.*, [1905] 2 K.B. 225; *sub nom.*, *Wilkes v. Dowell & Co.*, 74 L.J.K.B. 572; 92 L.T. 677; 34 Digest 266, 2265.
- (6) *Wilson v. Chatterton*, [1946] 1 All E.R. 431; [1946] K.B. 360; 115 L.J.K.B. 381; 175 L.T. 325; Digest Supp.

APPEAL by the claimant from a decision of a pensions appeal tribunal dismissing his claim for a pension. DENNING, J., held that, as the claimant's war service was one of the causes of his injury, he was entitled to a pension. The facts appear in his judgment.

Crispin for the claimant.
H. L. Parker for the Minister of Pensions.

DENNING, J.: In this case George Victor Marshall served for six years, from Sept., 1939, to Aug., 1945. He was discharged in a Class A release, so there is no compelling presumption in his favour, but there is no onus on him. He claims a pension now for hernia. As to the left inguinal hernia, it is plain on the evidence that that was brought on by an accident which occurred in July, 1939, before his war service. It is not, therefore, attributable to war service. The right hernia arose after war service, but the Minister of Pensions Medical Services Division rejected the claim and that was affirmed by the tribunal. Apparently, the Medical Services Division based its opinion on this, that hernia is:

... an anatomical condition which arises in consequence of a developmental weakness of the musculature of the abdominal wall and inguinal. Whilst it is accepted that service conditions played their part in the worsening of the disability, the foregoing evidence makes it quite clear that the disability cannot be attributed to new war service.

The tribunal said that the right hernia was preceded by a cough which the claimant had while in the Royal Air Force, and was not attributable to war service.

A This case raises the question which is repeatedly arising at the present day —whether the disease was attributable to war service or only aggravated by it. I think it right to set out the relevant legal considerations. The issue is important, not because it affects the amount of the pension, but because it may affect its duration. The amount of the pension does not depend on whether the disease is “attributable to” or “aggravated by” war service. It is the same amount in either case, because the amount depends only on the degree of disablement by the disease. The duration may, however, be affected, because, if the disease existed before war service and is only “aggravated by” it, then, the pension continues only so long as the disease “remains aggravated thereby.” If the aggravation passes away so that the man is no worse than he would have been apart from war service, the pension ceases even though some disablement may remain, because that disablement is not due to war service. In cases where the disease is “attributable to” war service, however, the pension continues so long as any disablement continues from the disease.

B On this issue there are two questions which must be answered: (i) When did the disease arise? (ii) What were the causes of its arising? If the disease existed before the war service, it cannot be attributable to war service, but may be aggravated by it. If it arose during war service, if war service was one of the causes of it arising, then, it is attributable to war service. But, if war service was not a cause of its arising, it cannot be attributable to war service, but may be aggravated by it.

C On the first question, it is often difficult to say when a disease arises, especially in those diseases which are insidious in onset, such as osteo arthritis, or those which exist before symptoms appear, such as infectious diseases, or those which may lie dormant, such as duodenal ulcer. The usual question is whether the disease arose before war service. If the Minister asserts that it did, the burden is on him to prove it, but he may do so by inferences by X-rays or from pre-war symptoms or the like. He must, however, prove that the disease existed before war service as distinct from a susceptibility or predisposition to it. The distinction between the two is this. A disease is an injurious process (including an injurious condition or deformity) which will in its natural progress (unless resisted or cured) operate to cause illness or incapacity even though no other cause may operate, whereas a susceptibility or predisposition contains only the potentiality of an injurious process and may never become injurious unless some other cause operates. Take an analogy. Iron is susceptible to rust, but the “disease” of rust only arises when, on exposure to damp, oxidation sets in. So, also, certain persons may be predisposed to duodenal ulcer, but the disease starts only when on exposure to stress or strain inflammation sets in which is the injurious process leading to ulceration.

E If the injurious process exists before war service, the only question is one of aggravation, and that depends on whether the injurious process is accelerated or intensified by war service. If the injurious process arises during war service, the question of attributability depends on whether war service was one of the causes of its arising. Much confusion surrounded this question before the cases on causation. The medical men advising the Minister used to divide cases into two classes, on the one hand, predominant causes, and, on the other hand, contributory causes. They used them to say that the disease was “attributable to” the predominant cause and “aggravated by” the contributory cause. This method of approach was especially noticeable in the predisposition cases. For instance, in hernia, when the predominant cause is the inherent weakness of the wall of the stomach and a contributory cause may be an injury in war service, they used to hold that the hernia was not attributable to war service, but was aggravated by it. The cases in the Court of Session and in this court have amply shown that that approach is wrong. The task of the Minister and of the tribunal is to ascertain what are the causes of the disease arising, not to assess their relative potency. If one of the causes is war service, the disease is attributable to war service, even though there may be other causes and, it may be, more powerful causes, operating, to which it is also attributable.

H There are parallels to be found in other branches of the law. Take man-

slaughter. I tried a case the other day of a man who hit another on the nose. The blow was not such as to do harm to an ordinary individual, but, unknown to all concerned, this injured man had a septic antrum. He might have gone on for quite a long time—years—without it causing him much trouble, but the effect of the blow was to release the poison from the antrum into his system so that he died within a few days. One cause of his death, perhaps the most potent cause, was the septic antrum, but another cause was the unlawful blow. The man who struck him was found guilty of manslaughter because he caused the death. So, also, in the case of duodenal ulcer or hernia (in each of which inherent weakness or predisposition is a powerful cause) it has been held that conditions of employment may also be a cause entitling the man to pension or compensation as the case may be: see *Huddersfield Corporation v. Watson* (1) (duodenal ulcer) and *Hughes v. Lancaster Steam Coal Collieries, Ltd.* (2) (hernia).

The essential matter, therefore, to justify a finding of attributability is that war service should be one of the causes of the disease. As I explained in *Minister of Pensions v. Chennell* (3), however, it must be a cause as distinct from being part of the circumstances in or on which the cause operates. Cases often occur when the disease would have arisen in any event, war service or no war service. In such cases it is not attributable to war service. They can be best illustrated by a metaphor. If a rope is weak and on that account breaks when it is carrying a normal load or a load less than a normal load, the cause of the break is not the load but the weakness of the rope. If, however, the rope is weak and breaks when carrying an abnormal load when it might have stood a normal load, there are two causes, one the weakness of the rope and the other the abnormally heavy load. The schizophrenia cases afford a good illustration. If schizophrenia arises in war service without any special stress or strain, it is not attributable to war service, but, if there is severe war stress or strain immediately preceding the onset of symptoms, then it is. There are parallels in workmen's compensation cases such as death in an epileptic fit in normal conditions: *Lander v. British United Shoe Machinery Co., Ltd.* (4); and in abnormal conditions, *Wicks v. Dowell & Co., Ltd.* (5) and *Wilson v. Chatterton* (6).

If war service is a cause of the disease arising, in the sense I have mentioned, the disease is attributable to war service, but, if it is not a cause of its arising, the only remaining question is one of aggravation, which depends on whether the injurious process is accelerated or intensified by war service. On all these questions, of course, the burden is on the Minister to negative, first, attributability, and, secondly, aggravation. Applying what I have said to the present case, it seems to me plain that, while one cause, and, it may be, a predominant cause, of this right hernia was a weakness in the abdominal wall, nevertheless, another cause was the conditions in service which produced a cough and thereby led to the rupture of the stomach wall. This right hernia is, therefore, attributable to war service, and the appeal is allowed accordingly.

Appeal allowed.

Solicitors: *Culross & Trelawny* (for the claimant); the *Treasury Solicitor* (for the Minister of Pensions).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*]

Applied. Re *BIRKEN* (decd.). [1949]
1 All E.R. 1045.

Re SMITH, deceased, VEASEY v. SMITH AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), October 24, 1947.]

Wills—Construction—Omission—Necessary implication of intention—Provision for disposition “in event of husband predeceasing me or surviving for less than one month”—No disposition in event of husband’s survival for more than one month—Declaration that surviving husband entitled absolutely.

Where it is clear on the face of the will that the testator has not accurately or completely expressed his meaning by the words he has used and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention as collected from the context.

By her will dated Sept. 11, 1939, a testatrix, who died on July 16, 1945, appointed her husband and another to be her executors and trustees, and after, *inter alia*, bequeathing part of her movable chattels to her husband, provided that “in the event of my husband predeceasing me or if surviving

my death dying within one calendar month of the date of my death the following clauses of this my will shall operate." By the succeeding clauses she purported to dispose of the residue of her estate, devising and bequeathing the major part thereof to her trustees to sell for the benefit of certain persons related to her husband and charities. The will made no provision for a disposition of the residue of her property in the event which happened of her husband surviving her for more than one calendar month.

A HELD: there was an obvious omission from the will and as a matter of necessary implication the court was entitled to find that what had been omitted was an absolute gift of the whole residue to the testatrix's husband in the event of his surviving the testatrix for more than one calendar month.

[As to CONSTRUCTION OF WILLS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 187-204, paras. 240-257; and FOR CASES, see DIGEST, Vol. 44, pp. 536-556, Nos. 3528-3724.]

B Cases referred to:

- (1) *Wilkinson v. Adam*, (1813), 1 Ves. & B. 422; 35 E.R. 163; 44 Digest 1251, 10786.
- (2) *Coryton v. Helyar*, (1745), 2 Cox. Eq. Cas. 340; 30 E.R. 156; Digest Supp.
- (3) *Towns v. Wentworth*, (1858), 11 Moo. P.C.C. 526; 31 L.T.O.S. 274; 6 W.R. 397; 14 E.R. 794; 44 Digest 553, 3706.
- (4) *Walter v. Drew*, (1723), 1 Com. 372; 92 E.R. 1117; 44 Digest 1280, 11075.
- (5) *Re Ridge's Trusts*, (1872), 7 Ch. App. 665; 41 L.J.Ch. 787; 27 L.T. 141; 44 Digest 1287, 11147.
- (6) *Mellor v. Daintree*, (1886), 33 Ch.D. 198; 56 L.J.Ch. 33; 55 L.T. 175; 44 Digest 1184, 10244.
- (7) *Sweeting v. Prideaux*, (1876), 2 Ch.D. 413; 45 L.J.Ch. 378; 34 L.T. 240; 44 Digest 1258, 10864.
- (8) *Key v. Key*, (1853), 4 De G.M. & G. 73; 1 Eq. Rep. 82; 22 L.J.Ch. 641; 22 L.T.O.S. 67; 44 Digest 1279, 11070.

D ADJOURNED SUMMONS to determine the construction of a will. VAISEY, J., held that it was evident on the face of the will that words had been omitted, and, as it was clear what those words were, it was the duty of the court to supply them. The facts appear in the judgment.

Wilfrid Hunt for the plaintiff (the executor and trustee).

J. V. Nesbitt for the first defendant (the husband of the testatrix).

E *Peter Foster* for the second defendant (representing a class interested on an intestacy).

VAISEY, J.: In this case the testatrix, Maud Smith, wife of Arthur Smith, made her will on Sept. 11, 1939. She died on July 16, 1945, leaving her husband, Arthur Smith, her surviving. She had no issue by her marriage to Arthur Smith. By her will, so far as is material, she appointed her husband and the present plaintiff, William Edward Veasey, the executors and trustees of her will. She bequeathed her movable chattels as to part to a certain charitable institution, and as to the residue to her husband. By cl. 6 of her will she says:

In the event of my husband predeceasing me or if surviving my death dying within one calendar month of the date of my death the following clauses of this my will shall operate.

G By the succeeding clauses the testatrix disposes of the residue of her estate to people other than her husband, devising and bequeathing the major part to her trustees upon trust for sale, and the ultimate beneficiaries are a number of persons related in various degrees to her husband and not to herself except through him. Besides those persons there are several charitable institutions named as beneficiaries. It will be observed from what I have said that, apart from a few pecuniary legacies and the bequest of chattels, there is not, on the face of the will, any disposition of the lady's property in the event which has happened of her husband surviving her for more than one calendar month.

H The defendants to these proceedings are, first, the husband, Arthur Smith, and, secondly, a person who is alleged to be one of a large number of persons who would be entitled to any property in respect of which the deceased testatrix died intestate, and the question which I have to decide is whether, reading the will as a whole, I am entitled or bound to imply in it an alternative gift of her estate in the event which has happened in favour of her husband absolutely.

It is, in my judgment, surprising that a lady who appoints her husband to be an executor and trustee of her will and bequeaths to him a large part of her personal chattels, that is to say, no doubt, anything which possessed for her a sentimental value, and who was evidently on the best of terms with his relations as is shown from the alternative gifts to which I have referred, should leave no disposition of her estate either to him or to his relations in the event which happened of his surviving her for more than one calendar month. I am bound to say that, if I had read this will in draft and had been asked whether I saw anything the matter with it, it would, I think, have leapt to the eye that there was an omission of a provision operating in the alternative. The question is whether, having come to that conclusion, I am able to say as a matter of necessity, that is to say, "not natural necessity," or necessity in a definite and adequate sense, but because of "so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed." I quote those words from *Wilkinson v. Adam* (1) which is referred to in *HAWKINS ON WILLS*, 3rd ed., p. 8.

Looking at this will again and being asked, as I am asked, to consider, not only the question whether there has been an omission, but also the question whether I can guess with reasonable certainty, as a matter of necessary implication, what the omission was, I feel reasonably sure that the omission was not of a very large number of words, but probably of quite a few words, and I should certainly come to the conclusion that what the lady meant was that, if her husband survived her sufficiently long to take charge of her estate, he was to have it. I refer again to *HAWKINS ON WILLS*, p. 8, to the report of *Coryton v. Helyar* (2), where these words are quoted :

There is hardly any case where an implication is of necessity, but it is called "necessary" because the court finds it so to answer the intention of the devisor.

Here I find without question an obvious omission, and I think I am entitled, as a matter of necessary implication, in the sense in which those words are used in the quotation to which I have referred, to find that what has been omitted is a gift to the testatrix's husband.

Having come to that conclusion, I now see whether the authorities justify me in giving effect to what I will not describe as speculation, but rather as a compelling conviction, that such was the nature of the error which has occurred. In *Towns v. Wentworth* (3) *Mr. Pemberton Leigh* (who afterwards became Lord Kingsdown) used expressions which I think are very helpful in this connection. He says (11 Moo. P.C.C. 543) :

... if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will, sufficiently declared.

In *JARMAN ON WILLS*, 7th ed., vol. 1, p. 556, the matter is expressed thus :

Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context.

I have not been informed whether that paragraph is part of the original text of *JARMAN ON WILLS*, but I venture to think it is an accurate statement of the law and of the principles which it is my duty to apply.

Three cases were cited to me as examples of the kind of case in which the court may do what I think I am entitled in this case to do. In *Walter v. Drew* (4) the facts are sufficiently indicated in the headnote (1 Com. 372) :

A devise, that if William the eldest son of the testator should happen to die without issue, that then, and not otherwise, after William's death, he devised it over to his son Richard and his heirs : held that William took an estate-tail by implication.

That was an action for ejectment, which was heard more than 200 years ago, and the conclusions there will be observed (*ibid.*, p. 374) :

But here William took by the will, for it is a necessary implication, that he shall have it to him and his heirs of his body, for the heir shall take by the will, though he is not expressly named, or there be no devise to him by express words.

In *Re Ridge's Trusts* (5) SIR WILLIAM JAMES, L.J., implied certain cross limitations which had been omitted from the will and which he thought the general scheme of the will required to be inserted. In his judgment, he says (7 Ch. App. 668) :

A It is a case in which we are authorised and bound to fill in the will, and to supply the gaps by judicial implication of the testator's meaning . . . the court is not striking out a single word ; it is not contradicting anything in the will, but it is giving to every sentence its plain, grammatical, and ordinary meaning. If any of the events provided for happen, then the will takes effect according to its letter. The implication only applies to events for which the testator has not in terms provided, but as to which no person applying merely common sense to the will can have any doubt what he intended.

B I am inclined to think in the present case that counsel have given me credit for what the LORD JUSTICE calls "common sense" and I am entitled to hold that in the light of common sense I am justified, and, indeed, bound, to imply a gift to the husband in the event which has happened.

In *Mellor v. Daintree* (6) the facts were not very like the facts in the present case, but the judgment of NORTH, J., contains enunciations of the appropriate principle. He says (33 Ch.D. 205) :

C I decline altogether to decide the case on any mere conjecture of what the testator intended. It is unnecessary for me to refer to any authorities other than two [*Sweeting v. Prideaux* (7) and *Towns v. Wentworth* (3)]. In the former case HALL, V.-C., quoted the words of KNIGHT-BRUCE, L.J., in *Key v. Key* (8) :] "In common with all men I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter ; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced

D is authorised and bound to construe the writing accordingly."

E I am prepared to make a declaration that the testatrix's husband, Arthur Smith, is beneficially entitled to an absolute interest in the residuary real and personal estate of the said testatrix. I think that in the circumstances I should appoint the second defendant to represent the persons other than the husband who would be entitled to have an interest in the testatrix's estate in the event of her not having disposed of it.

Declaration accordingly.

Solicitors : *Burton, Yeates & Hart*, agents for *Edge & Ellison*, Birmingham (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

F

BEER v. BEER (NEILSON cited). BEER v. BEER AND NEILSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), October 27, 30, 1947.]

G Divorce—Desertion—Defence—Reasonable belief in deserted spouse's adultery—Belief induced by conduct or extraneous circumstances—Evidence—Burden of proof of sufficiency of belief.

H Where a husband's belief that his wife has committed adultery is induced by actual conduct on her part of a suspicious or incriminating nature, it is sufficient—provided it is *bona fide* held, and in the absence of a reasonable explanation—to furnish the husband with a good excuse for absenting himself from cohabitation and to provide him with a good defence to a charge of desertion, but where the belief is induced, not by actual conduct of the wife, but by extraneous circumstances, the result is different even though the belief be *bona fide* held.

Glenister v. Glenister ([1945] P. 30), *Wood v. Wood* ([1947] 2 All E.R. 95), and *Gaskill v. Gaskill* ([1921] P. 425) compared.

Where a *prima facie* case of desertion has been made out, the burden of proof is on the deserting spouse to satisfy the court that his belief in the guilt of the other spouse is sufficient to absolve him.

[AS TO WHAT CONSTITUTES DESERTION, AND REASONABLE EXCUSE THEREFOR, see HALSBURY, Hailsham Edn., Vol. 10, pp. 835-838, para. 1338; and FOR CASES, see DIGEST, Vol. 27, pp. 307-310, Nos. 2840-2880, and p. 322, Nos. 3000-3013.]

Cases referred to :

- (1) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; Digest Supp.
- (2) *Wood v. Wood*, [1947] 2 All E.R. 95.
- (3) *Gaskill v. Gaskill*, [1921] P. 425; 90 L.J.P. 339; 126 L.T. 115; 27 Digest 298, 2753.

PETITION by the wife for dissolution of her marriage on the ground of desertion by the husband, and CROSS PETITION by the husband for dissolution on the ground of the wife's adultery. WILLMER, J., found the alleged adultery not proved, and also that the husband's belief in the wife's guilt was not sufficient to absolve him from the charge of desertion. The facts appear in the judgment.

C. H. Duveen for the wife.

Neligan for the husband.

Cur. adv. vult.

Oct. 30. WILLMER, J., read the following judgment. In this case I had before me cross-petitions by husband and wife for dissolution of their marriage contracted on Dec. 31, 1933. The wife alleges that the husband deserted her on Mar. 16, 1941. The husband denies that he is guilty of desertion. He denies that when he left the matrimonial home in Mar., 1941, he did so with any intention of absenting himself permanently. According to him it was only later—in August of the same year—that he finally left his wife, and he says that he did so then because he had discovered that his wife had committed adultery. By his cross-petition he accuses his wife of adultery with Mr. Neilson, which he alleges took place at a boarding house in Blackpool during the Whitsun week-end of 1941 and again on various occasions in the matrimonial home at Kenton down to Mar., 1942.

[HIS LORDSHIP examined the evidence and continued :—] There is no doubt in my mind that the discoveries made by the husband were such as to raise good grounds for suspicion in the mind of any ordinary husband and to call for some explanation. Mere suspicion, however, is not sufficient to justify a finding of adultery. An allegation of such gravity must be proved to the satisfaction of the court. Where the evidence pointing to guilt is entirely circumstantial, as it is in this case, it seems to me that it is quite impossible for the court to draw the inference of guilt, unless clearly satisfied that the facts relied on are not reasonably capable of any other explanation. In this case, having heard the evidence of the parties, I am far from being so satisfied. In my judgment, the charge of adultery has not been made out, and it follows that the husband's cross-petition must fail.

Is the wife then entitled to succeed on her petition for desertion? It is argued that, even if the charge of adultery has not been proved to the satisfaction of the court, the husband still has a good defence to proceedings based on desertion if the conduct of the wife has been such as to create in his mind a reasonable belief that she has been guilty of adultery. In *Glenister v. Glenister* (1), in which a husband surprised his wife in circumstances of a most compromising character, it was held by the Divisional Court that, although the husband's charge of adultery was not made out, he was entitled to succeed in his defence to his wife's charge of desertion on the basis that the circumstances were such as to induce in his mind a *bona fide* and reasonable belief in his wife's guilt. This decision was distinguished in *Wood v. Wood* (2), where the only evidence of adultery was the birth of a child 346 days after the last date on which the parties were proved, by admissible evidence, to have cohabited. The Divisional Court, following *Gaskill v. Gaskill* (3), declined to hold that the evidence was sufficient to convict the wife of adultery. They further held that, since the husband's belief in his wife's guilt was not induced by such conduct on her part as would lead a reasonable person to believe her guilty of adultery, but was induced only by the apparently unusual period of gestation, no sufficient excuse for absenting himself from cohabitation had been made out to absolve him from a charge of desertion. In both these cases, it will be observed, the husband

failed to make good his charge of adultery against the wife, but in the one his belief in her guilt was held to be sufficient to absolve him from a charge of desertion, whereas in the other it was not. I apprehend that the distinction between the two cases is that where the husband's belief is induced by actual conduct on the part of the wife of a suspicious or incriminating nature, it is sufficient—provided it is *bona fide* held, and in the absence of explanation (which must, of course, be a reasonable explanation)—to furnish the husband with a good excuse for absenting himself, but where the belief is induced, not by actual conduct of the wife, but by extraneous circumstances, the result is different, even though the belief be *bona fide* held. To which class of case, then, does the present one belong?

Where, as here, a *prima facie* case of desertion has been made out, the burden of proof is, in my judgment, on the husband to satisfy the court that his belief in his wife's guilt is sufficient to absolve him. I will assume, in favour of the husband, that his belief in his wife's guilt is and was *bona fide* entertained. The husband adduced no evidence, apart from his suspicious discoveries, of any association between his wife and Mr. Neilson. Nor has there been a word in the evidence to suggest that the wife was ever in the habit of associating with other men. Having made his incriminating discoveries, the husband does not seem to have paused to consider whether there might not be an innocent explanation. The rapidity with which he jumped to his conclusion lends some support to the wife's case that he had already made up his mind to desert and was only seeking a plausible excuse. This, moreover, is not a case in which the wife has offered no explanation. On the contrary, she has put forward an explanation which, as I have already said, is sufficiently reasonable to make it impossible for me to say that adultery has been proved against her to my satisfaction. If the husband's evidence is right—namely, that there had been no final break before August, 1941—one is prompted to ask the question why the wife, if she were really guilty, was so careless as to leave so much incriminating evidence about for the husband to find whenever he might come on leave—perhaps unexpectedly. Bearing all these considerations in mind, the conclusion to which I have come is that the husband has not discharged the burden of proving that his belief in his wife's guilt was sufficient to absolve him from the charge of desertion. I, therefore, find in favour of the wife's petition, and there will be a decree accordingly.

Decree nisi to the wife.

Solicitors: *P. B. Topham* (for the wife); *Edgar H. Hiscocks* (for the husband).

[*Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.*]

WARD v. WARD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Wallington, J., October 16, 1947.)]

Husband and Wife—Maintenance—Amount of—One-third joint income standard—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5 (c).

In assessing the amount of a maintenance award made under the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (c), the duty of a court of summary jurisdiction is to award such a sum not exceeding the statutory minimum as, having regard to the means of both the husband and the wife, the court considers reasonable in the circumstances of the case. The dictum of LORD MERRIVALE, P., in *Jones (A.) v. Jones (D. L.)* (142 L.T. 167, 168), that “the conventional standard in the Divorce Court derived from the old jurisdiction of the ecclesiastical courts, by which a wife is not likely to get more than one-third of the joint income, is very difficult to apply to a man earning wages and a woman able to earn money,” applies with even greater force in existing conditions.

[AS TO MAINTENANCE ORDERS BY JUSTICES, see HALSBURY, Hailsham Edn., Vol. 10, p. 840, para. 1342; and FOR CASES, see DIGEST, Vol. 27, pp. 558, 559, No. 6134-6150.]

Cases referred to :

- (1) *Cobb v. Cobb*, [1900] P. 294 ; 69 L.J.P. 125 ; 83 L.T. 716 ; 27 Digest 558, 6135.
- (2) *Jones (A.) v. Jones (D. L.)*, (1929), 142 L.T. 167 ; 94 J.P. 30 ; Digest Supp.
- (3) *Dent v. Dent*, (Apr. 15, 1942) (unreported).
- (4) *Chichester v. Chichester*, [1936] 1 All E.R. 271 ; [1936] P. 129 ; 105 L.J.P. 38 ; 154 L.T. 375 ; Digest Supp.
- (5) *Stephenson v. Stephenson*, (1925), 41 T.L.R. 550 ; Digest Supp.
- (6) *Underwood v. Underwood*, [1945] 2 All E.R. 561 ; [1946] P. 84 ; 115 L.J.P. 49 ; 173 L.T. 274 ; 109 J.P. 248 ; Digest Supp.

APPEAL by the husband from an order made by the justices of the petty sessional division of Bridport refusing to vary an order for maintenance of the wife whom he had deserted. The facts appear in the judgment of LORD MERRIMAN, P. The appeal was dismissed.

H. J. Phillimore for the husband.

Baskerville for the wife.

LORD MERRIMAN, P. : This is an appeal by a husband from an order made by the justices for the petty sessional division of Bridport, rejecting an application made on July 22, 1947, to vary in the husband's favour an order made on July 8 directing him to pay 35s. a week for his wife's maintenance. The latter order had been made on the basis that the husband had been guilty of desertion.

The parties are childless and both are working. The husband was, in fact, rather better off as regards wages on the figures produced at the hearing of the application for revision than he was when the original order was made. Putting it shortly, the position is that, taking the worst aspect of the case from the husband's point of view, when all expenses, living, travelling, laundry, board and lodging, etc., have been taken off on both sides, he is left with a clear sum of 45s. and the wife is left with a clear sum of 30s. to spend or save as they respectively choose. If, on the other hand, what is stated to be a closer average of the husband's wages is taken, he is left with 33s. 6d. clear as against the wife's 30s. Another calculation has been put forward showing that, taking the view most unfavourable to the wife and most favourable to the husband, it is possible that the wife may have 6s. more to spend than the husband, but I emphasise that these are figures after every possible deduction has been made, with, possibly, these exceptions. I do not know whether included in his tax deductions (made, I strongly suspect, under a "code" which has no relation to an order made only shortly before) the husband has yet had the relief to which he is entitled in respect of this order for maintenance. Maybe he got some other relief in respect of his wife. Equally, I doubt whether the wife has been subjected to taxation, if any is exigible, for any addition to her wages in respect of the amount received under this order, but with those possible exceptions, to which no attention has hitherto been paid, the results are as I have stated.

It is said that this is a wholly unreasonable position. It is admitted that every case must be decided on its own merits, but *Cobb v. Cobb* (1), was cited as an authority, in spite of the fact that as long ago as 1929 LORD MERRIVALE, P., said in *Jones v. Jones* (2), (142 L.T. 168) :

The conventional standard in the Divorce Court derived from the old jurisdiction of the ecclesiastical courts, by which a wife is not likely to get more than one-third of the joint income, is very difficult to apply to a man earning wages and a woman able to earn money.

I have ventured to say the same thing in even stronger terms in unreported cases, but *Cobb v. Cobb* (1), is still set up as the standard by which justices must act. I hope editors of text books will take note of the fact that it has been repeatedly laid down in years more recent than 1929 that it is absurd to apply automatically to working-class people a standard which was applicable in the days when income tax was 1s. in the pound, a rent-roll might be £10,000 a year, and pin-money was £2,000 or £3,000 a year. The justices have to discover what is a reasonable award in the circumstances of the particular case. They are, of course, under a statutory duty to have regard to the means of the parties. The Summary Jurisdiction (Married Women) Act, 1895, s. 5 (c), empowers the justices to order such a weekly sum not exceeding £2, as the

court shall, having regard to the means both of the husband and the wife, consider reasonable, but the Act does not say that that is the only thing they have to consider, nor does it say that they are to exclude all other considerations than the means of the parties.

A I called attention to this, as well as to the other considerations I have mentioned, in the unreported case of *Dent v. Dent* (3). With the so-called "one-third rule," when concerned with people in circumstances which can be likened to those in which it came into existence, I dealt in *Chichester v. Chichester* (4), but I am not suggesting that that case should be taken as a standard for the guidance of justices in these matters, in the class of case which comes before them.

B It really is not necessary to dilate on the matter. In the present case the justices might well think that the wife, having been deserted by her husband and been obliged to go out to work instead of being maintained by him in a comfortable home, was entitled at least to feel that her exertions were not made purely for the husband's benefit, and she was not obliged, in her own interests, to put money by against the day when possibly the husband re-marries or incurs other commitments. The only general observation which I think it is necessary to make is that *Stephenson v. Stephenson* (5) and *Jones v. Jones* (2) were both decided before the Money Payments (Justices Procedure) Act, 1935, was passed. The effect of that Act on s. 7 of the Summary Jurisdiction (Married Women's) Act, 1895, and s. 30 of the Criminal Justice Administration Act, 1914, is discussed and explained in *Underwood v. Underwood* (6). The point to which I am alluding is that, whereas in 1930, when *Jones v. Jones* (2), was decided, this court and the justices had to consider these money awards with the knowledge that any decision they made was fettered so far as regards the possibility of revision or revocation by the interpretation which had been put on the words "upon fresh evidence," since the passing of the Act of 1935 no such considerations apply. I am not suggesting that this should make justices careless as to the figure they award, but, coupled as it is with the power under the same Act to wipe out arrears when any question of revision and the like comes before the justices, it should at least ensure that no permanent hardship be done even if the justices make a mistake. The point is that every word that was said by LORD MERRIVALE, P., in *Jones v. Jones* (2), applies, in my opinion, with even greater force under existing conditions.

E The question in this case is: Was there anything so unreasonable in the justices' order as to entitle us to interfere with their decision? My answer is that I cannot see anything unreasonable in the amount the justices awarded in the circumstances of the case. In my opinion, this appeal must be dismissed.

F WALLINGTON, J.: I agree. I desire to deal only with one matter raised by counsel for the husband, and that is a suggestion that there is or, if not, there ought to be, some standard upon which justices must act in arriving at their decision as to maintenance in these cases. For myself, I should very strongly deprecate any such standard. I do not believe it exists and I believe that it would inevitably lead to injustice in a number of cases if anybody tried to set a standard. The words of s. 5 (c) of the Act of 1895 seem to me to exclude the possibility of any standard. The duty of the justices is to award certain sums not exceeding £2 as the court shall, having regard both to the means of the husband and of the wife, consider reasonable.

G In this case there is, in my view, no ground upon which anybody can suggest that the justices have done anything that differs from their duty. In my opinion, it is impossible for this court to consider shillings here or there or to imagine that it can apply any different kind of considerations from those the justices in fact applied when they were considering what they should do.

H For these reasons I am of the opinion that there is no ground for interfering with this decision and that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Hatchett Jones & Co.* (for the husband); *Lovell, Son & Pitfield* (for the wife).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

Re JONES, WILLIAMS v. ROWLANDS AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), November 5, 6, 1947.]

Wills—Condition—Condition subsequent—Trust to provide village hall—Site to be purchased by will trustees and conveyed to institute trustees—Institute trustees responsible for building hall—If hall not completed within specified time, site to be sold and gift to lapse—Gift over—Inability of will trustees to purchase site.

By her will the testatrix gave her residuary estate to her trustees on trust to provide a village hall or institute for the people of a certain village and she declared that "in the application of such moneys my trustees shall have regard to my following wishes." According to these "wishes" (which, it was admitted, were to be treated as binding trusts) the trustees were to purchase a freehold site for the purpose of the hall and to convey it to the holders of certain offices who were to be the institute trustees. The residue of the residuary estate was to be invested and the income thereof accumulated for 5 years from the death of the testatrix or until the village hall was completed, when the investments were to be sold and the proceeds of sale and the accumulated income paid to the institute trustees. The will trustees were to be under no obligation in regard to the building of the hall. Clause 4 of the will was as follows: "Provided always that in the event of the said institute trustees having failed to complete the said village hall . . . within 5 years from my death then the bequest herein contained shall lapse and the said site shall be sold" and there was a gift over of the proceeds of sale and the residue of the residuary estate. On the death of the testatrix on Jan. 12, 1940, the only assets available for the trusts of her residuary estate were some freehold and leasehold properties which, owing to war conditions, were unsaleable for more than 5 years. The trustees, therefore, were unable to purchase a site for the village hall, with the result that it was not built within the specified time. The question was whether the condition subsequent in cl. 4 of the will took effect:—

HELD: on the true construction of the will, the condition subsequent was subject to an implied overriding condition that the will trustees had performed their imperative trust and that the site had been purchased and conveyed to the institute trustees, and, therefore, in the event that had happened, the condition subsequent did not take effect. Alternatively, the institute trustees could not be said to have failed to complete the hall as they had never been allowed to begin to build it.

Yates v. University College, London, (1875), L.R. 7 H.L. 438, applied.

[AS TO CONDITIONS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 103, 104, paras. 138, 139, and pp. 111, 112, para. 146; and FOR CASES, see DIGEST, Vol. 44, pp. 434, 435, Nos. 2608-2619, and p. 477, Nos. 2949-2956, and g.-k.]

Cases referred to:

- (1) *Lechmere v. Carlisle (Earl)*, (1733), 3 P. Wms. 211; *affd. sub nom. Lechmere v. Lechmere (Lady)* (1735), Cas. temp. Talb. 80; 20 Digest 349, 878.
- (2) *Scudamore v. Scudamore*, (1720), Prec. Ch. 543; 2 Eq. Cas. Abr. 375; 20 Digest 371, 1085.
- (3) *Yates v. University College, London*, (1875), L.R. 7 H.L. 438; 45 L.J. Ch. 137; 32 L.T. 43; 44 Digest 440, 2662.

ADJOURNED SUMMONS to determine whether, in the events that had happened, a condition subsequent attached to a gift under the will of the testatrix took effect.

The testatrix, who died on Jan. 12, 1940, gave her residuary estate to her trustees on trust to provide a village hall. The site for the hall was to be purchased by the trustees under the will and conveyed to the institute trustees who were to build the hall. If they failed to complete it within 5 years of the death of the testatrix, the gift was to lapse and there was a gift over. Owing to lack of funds, the will trustees were unable to purchase a site within 5 years of the testatrix's death, and, therefore, the hall could not be built within the time specified. ROXBURGH, J., held that, in the events that had happened, the condition subsequent did not take effect and the trust was valid and effective. The facts and the relevant clauses of the will appear in the judgment.

R. Gwyn Rees for the plaintiffs, the trustees of the will.

Richmount for the institute trustees.

H. E. Francis for Mrs. Cameron.

Thomas Dawson for the London Association of the Blind.

McMullen for the National Institute for the Blind.

Danckwerts for the Attorney-General.

ROXBURGH, J.: By her will Mary Elizabeth Margaretta Jones, commonly known as Griffiths Jones, after making sundry testamentary dispositions not material to be stated here, gave, devised and bequeathed the residue of her estate, both real and personal, unto her trustees upon trust for sale :

... and to stand possessed of the proceeds of such sale upon trust that the same shall be applied by my trustees for the purpose of providing a village hall or institute for the use of all persons resident in or about Llanarthney aforesaid regardless of whatever sect or religious denomination they may profess to belong to. I declare that in the application of such moneys my trustees shall have regard to my following wishes. A freehold site approved of by my trustees shall be purchased by them for the above purpose at Llanarthney and such site after purchase shall be vested and conveyed into the joint names of the persons (hereinafter called the institute trustees) who may at that time hold [four offices named]. (2) My trustees shall thereafter invest the residue (if any) of my residuary estate in or upon any investments for the time being authorised by law for the investment of trust funds (with power from time to time at their discretion to vary such investments for others of a similar character) and shall accumulate the annual income thereof for a period of 5 years from my death or until such time as the institute trustees shall have completed the said village hall or institute according to plans and specifications previously approved of by my trustees and on production of the certificate of the architect or of the local authority that the said village hall or institute has been completed fit for occupation and use my trustees shall sell the said investments representing the residue of my estate and shall pay the proceeds of sale and the accumulated income thereof to the institute trustees. (3) My said trustees shall not be under any obligation to take steps themselves as to the building of the said hall nor be under any obligation if the said hall shall not be completed. The trustees for the time being of the said hall shall be the persons who shall hold the aforesaid offices from time to time and the control of such hall shall remain in their hands. (4) Provided always that in the event of the said institute trustees having failed to complete the said village hall or institute within 5 years from my death then the bequest herein contained shall lapse and the said site shall be sold and the proceeds of such sale and the residue of my residuary estate and the investments for the time being representing the same and the accumulated income thereof shall be paid and transferred as to one third share thereof to my said cousin Louie Cameron and as to the remaining two third shares thereof to the [National] Institute for the Blind to be applied by them so far as practicable to provide wireless and reading help for the blind.

The facts which give rise to the question are to be found stated in the affidavit filed in support of the summons. Paragraph 3 says :

The estate of the testatrix consisted of investments, cash and furniture worth approximately £1,300, the leasehold property known as 8, Radnor Road, Folkestone, and the freehold property known as 14, Clifton Terrace, Folkestone. The plaintiffs realised the said investments and the furniture, and out of the net proceeds of sale and the said cash paid the testatrix's funeral and testamentary expenses (including death duties) and debts, and made a payment on account to each of the pecuniary legatees. The available moneys were thereby exhausted, and the only assets remaining available for the payment of the balance of the pecuniary legacies and for the purposes of the trusts declared by the said will in respect of the testatrix's residuary estate were the said leasehold and freehold properties. These properties were at the death of the testatrix quite unsaleable owing to war conditions, and remained unsaleable for upwards of 5 years after the death of the testatrix. In the month of May, 1945, the said leasehold property was sold for a sum of £750 [less certain charges] and the respective balances of the pecuniary legacies ... were paid. A sum of approximately £400 then became available for the purposes of the trusts aforesaid. As to the freehold property known as No. 14 Clifton Terrace, Folkestone, which was at the date of the death of the testatrix subject to a lease and which shortly after the outbreak of war was requisitioned, an offer to purchase for £1,000 was made verbally on behalf of the lessee shortly after the death of the testatrix. The plaintiffs declined to accept. This offer was in March increased to £1,400. The plaintiffs still considered the price inadequate and advertised the property for sale, but received no further offer until the autumn of 1945, when they received an offer of £2,000. The plaintiffs have made an offer to sell for £2,500. Conditions are now improving in Folkestone. The plaintiffs

were unable to purchase a site for the village hall referred to in the said trusts within 5 years of the testatrix's death because they were unable to find a suitable site, and because they had no available moneys out of which the purchase price of a site could be paid. The plaintiffs informed the persons referred to in the will of the testatrix as the institute trustees of the position. The institute trustees took the view that without the land and with no money they could do nothing, and they thought that, in any event, no building permit would be granted to them so long as the war continued. For these reasons no village hall was erected within the period specified by the testatrix.

Counsel for parties interested in the residuary estate of the testatrix have submitted that by reason of the undoubted fact that no village hall was erected within 5 years of the death of the testatrix, the condition subsequent contained in cl. 4 of the will took effect. Counsel for the institute trustees and counsel for the Attorney-General, who addressed me for my assistance, he not wishing to take sides in the matter, have submitted that in the circumstances the gift over has not taken effect. I regard the point as difficult. It raises a question of principle on which there seems to be little or no direct authority. Certain things have been admitted which facilitate my task. First, it has been admitted that the trust to provide the village hall or institute is a valid charitable trust. Secondly, it has been admitted that what the testatrix described as her "wishes" are to be treated as binding trusts. If they are to be treated as binding trusts, I think it is important to determine which of the binding trusts are to be deemed as included in the word "wishes." Looking at this will, it seems to me that the wishes go right down to the end of cl. 4—in other words, that cl. 4, which contains the condition subsequent, is, as a matter of construction, one of the wishes in question. I think that is not without importance.

It will be observed that, it being admitted that the wishes constitute binding trusts, the trustees of the will have failed to perform an imperative trust. It is not a question whether they were wise or not wise. I do not think anybody could doubt that, in the events which happened, they could not have acted otherwise, but here is an imperative trust which, in fact, they did not perform. At the outset of this case I am faced with the question whether that circumstance ought to influence me in my approach to the condition subsequent. It is on that point that any direct authority appears to be lacking. The nearest that anybody has been able to get to it is the passage to which counsel for the Attorney-General referred me in LEWIN ON TRUSTS, 14th ed., p. 799:

Besides the several rights and remedies which have just been the subject of discussion, the court, with the view of keeping the trust estate in its regular channel, and sustaining its proper character, whether of realty or personalty, against the laches or other misbehaviour of the trustee, has found it necessary to establish two maxims which we now proceed to examine: *viz.*, First, What ought to be done shall be considered as done; and, Secondly, The act of the trustee shall not alter the nature of the *cestui que trust's* estate.

A little later (*ibid.*, 799, 800), the following appears:

"The forbearance of the trustees," said SIR J. JEKYLL [in *Lechmere v. Earl of Carlisle* (1)], "in not doing what it was their office to have done, shall in no sort prejudice the *cestuis que trust*, since at that rate it would be in the power of trustees, either by doing or delaying to do their duty, to affect the right of other persons; which can never be maintained. Wherefore the rule in such cases is, that what ought to have been done shall be taken as done and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money." LORD MACCLESFIELD, in the case of a bequest to a trustee for purchasing lands [*Scudamore v. Scudamore* (2)] observed: "If the purchase had been made it must have gone to the heir, but if the trustee, by delaying the purchase, may alter the right, and give it to the executors, this would be to make it the will of the trustee, and not the will of the testator, which would be very unreasonable and inconvenient."

It is, of course, plain, as counsel for the Attorney-General pointed out to me, that that passage is directed to a different subject-matter from the equitable doctrine of conversion, and it has no direct bearing on what I am now considering, but I think the principle indicated in that passage is so fundamental to the outlook of equity that, in approaching a defeasance clause like the condition subsequent which I have to construe in this will, I should approach it with the impression that the testatrix did not intend, unless she has said so in words plain beyond peradventure, to allow the omission of the trustees to do what she has told them to do to prejudice one beneficiary in favour of another.

Moreover, I think that I ought to apply another principle which I believe to be well established, namely, to construe a condition subsequent with strictness. I feel encouraged to do that by *Yates v. University College, London* (3), where the facts were as follows. A testator left certain specified personalty to his wife for life, and after her death provided as follows :

A I give and bequeath the same . . . unto University College, London, for the purpose of founding in it a new professorship in archaeology, for the regulation of which professorship I purpose preparing a code of rules and regulations, which I intend to authenticate under my hand.

B As soon as convenient after his decease, the fact of his bequest and a copy of the rules were to be communicated to the college, and the college was, within 12 months afterwards, to signify in writing by the president, etc., the acceptance of the rules. If the college should decline or refuse to accept the rules, or should not within 12 months signify acceptance thereof, the bequest of the stock and shares was to be wholly null and void, and the stock and shares were to sink into and form part of the residuary estate. The testator died without making any rules. LORD CAIRNS, L.C., at the close of his speech, said (L.R. 7 H.L. 445) :

C Now, my lords, it appears to me that the effect of that whole *catena* of directions [*i.e.*, the directions with regard to rules] depends upon the meaning which your Lordships give to the two words "said rules"; the whole hangs upon those two words. If "said rules" mean, as I think they clearly must mean, "rules to be prepared by me," and if those rules are not prepared by the testator, then there can be no refusal, no declining, no failure to accept that which has no existence.

D Counsel for Mrs. Cameron has very properly and naturally challenged this line of approach. He says that, if the trustees of the will omitted to carry out their imperative trust, the institute trustees could have applied to the court to enforce the trust, or made an application to the Charity Commissioners, or taken some other steps to compel the will trustees to carry out their trust. He says that, that being so, no point can be made that the trustees did not carry out their imperative trust, but he has not cited any case which supports that submission, and I hardly think that it can prevail, because, if it were to prevail in the present case, I cannot see why it should not have prevailed in a number of cases, admittedly relating to a different subject-matter, in which it did not prevail.

E So approaching the will, I propose to try and construe it. The paramount purpose, undoubtedly, was the provision of a village hall or institute. The wishes, or, in other words, the trusts—because they are admittedly trusts—are primarily, at any rate, the machinery for carrying out the terms of the trust though it is true, and must not be forgotten, that within those trusts is a condition subsequent which could not possibly be so described. The first clause is : "A freehold site approved of by my trustees shall be purchased"—nothing could be more imperative—"and such site after purchase shall be vested and conveyed into the joint names" of the institute trustees. There again, nothing could be more imperative. On the footing of that having been done and on no other footing direction No. 2 comes into operation : "My trustees shall thereafter—

F which I understand to mean after they have purchased the site—invest the residue (if any) of my residuary estate . . . and shall accumulate the annual income thereof for a period of 5 years from my death or until such time as the institute trustees shall have completed the said village hall or institute . . ." The use of the word "completed" involves the supposition that the site has at this time been purchased. Then comes cl. 3, and the vital proviso in cl. 4 :

G Provided always that in the event of the said institute trustees having failed to complete the said village hall or institute within 5 years from my death then the bequest herein contained shall lapse and the said site shall be sold and the proceeds of such sale and the residue of my residuary estate . . .

H shall be dealt with as already indicated. As to that, counsel for Mrs. Cameron says that the testatrix means "the said site (if any) shall be sold." I do not think she does. I think the framework of this bequest shows plainly that the testatrix did not contemplate the possibility of the site not being purchased. I think the clause means exactly what it says—"the site shall be sold"—and that implies that the site had been purchased because it could not be sold

unless it had been purchased. I get the same impression from the use of the word "complete." That, I think, presupposes that the site has been bought because the trustees could not complete the village hall until the site had been bought. On that I think I get assistance from *Yates v. University College, London* (3).

If I have correctly estimated those indications to which I have just referred, it seems to me that I ought to decide in favour of the institute trustees on one or other of two alternative grounds. Either I am entitled to say that, approaching the will in the manner which I have mentioned and looking at the whole of the contents of this charitable trust, I must read the condition subsequent as subject to an implied overriding condition that the trustees have performed their imperative trust and that the site has been purchased, or, alternatively, I am entitled for the reasons that I have given to construe this condition subsequent narrowly, perhaps even pedantically, and say that the institute trustees have not failed to complete the village hall because they cannot fail to complete a thing which they have not been allowed to begin. In this case it was not for the institute trustees to purchase the site. They were not, under the terms of this will, allowed to begin to build the village hall until the trustees had purchased the site. As the site has never been purchased they have never been allowed to begin, and, therefore, they have never failed to complete. I admit that this is putting a narrow construction on the words, but there is some resemblance between this case and *Yates v. University College, London* (3), though it is not very close. I think, having regard to the circumstances that I have indicated, it is my duty so to construe this condition, but I still regard the case as one of difficulty. I declare that the trust is a valid and effective charitable trust. The matter will, therefore, be referred to chambers for the settlement of a scheme.

Declaration accordingly. Costs as between solicitor and client in due course of administration.

Solicitors: *Helder, Roberts, Giles & Co.*, agents for *Walters & Williams*, Carmarthen (for the trustees of the will); and agents for *W. H. Rogers*, Carmarthen (for the institute trustees); *T. D. Jones & Co.* (for Mrs. Cameron); *Geo. W. Bower & Son* (for London Association of the Blind); *Bird & Bird* (for National Institute for the Blind); *Treasury Solicitor* (for the Attorney-General).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Affirmed. H.L. [1948] 2 All E.R. 898.

LONDON COUNTY COUNCIL v. SHELLEY. HARCOURT v. LONDON COUNTY COUNCIL.

[COURT OF APPEAL (Lord Greene, M.R., Bucknill and Somervell, L.JJ.), November 14, 17, 18, 1947.]

Public Health—Housing—Accommodation of working classes—Recovery of possession—Right of local authority—Exclusion of Rent Restrictions Acts—Small Tenements Recovery Act, 1838 (c. 74), s. 1—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), ss. 5 (2) (4)—Housing Act, 1936 (c. 51), ss. 82 (1), 156 (1) (a).

In the case of dwellings for the working classes provided by a local authority, the right of management, including the right to terminate a tenancy by notice, is a power which is expressly given to the authority by the Housing Act, 1936, s. 83, and it is, therefore, a power under an "enactment relating to the housing of the working classes" within the meaning of s. 156 (1) (a) of the Act, so as to exclude the operation of the Rent Restrictions Acts where the authority is seeking to recover possession at the termination of a tenancy.

R. v. Snell, Ex p. Marylebone Borough Council ([1942] 1 All E.R. 612, at p. 614) criticised.

The power to stay or suspend execution of an order for possession under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (2), is a power which affects the right to possession and is among the provisions of the Rent Restrictions Acts excluded by s. 156 (1) of the Housing Act, 1936.

Semble : section 5 (4) of the Act of 1920 does not give the county court judge power to postpone the operation of an order for possession but merely extends the life of a warrant for delivery of possession so as to cover the period of suspension given by s. 5 (2) of the Act.

Semble : the language of the Small Tenements Recovery Act, 1838, s. 1, whereby justices are given power to make an order for possession if the tenant fails to show "reasonable cause why possession should not be given under the provisions of this Act," refers not to the substance of a claim for possession but to the procedure, and merely entitles a tenant to ask that the case shall not be dealt with by the justices where he can satisfy them that summary procedure is not suitable, and it does not entitle the justices to refuse to make an order, *e.g.*, on the ground of hardship.

Decision of the Divisional Court (ante, p. 320) affirmed.

[AS TO RECOVERY OF POSSESSION OF CONTROLLED HOUSES, see HALSBURY, Halsbury's Laws, Vol. 26, pp. 581, 582, para. 1233; and FOR CASE, see DIGEST, Vol. 38, p. 216, No. 505, and Supplement, Vol. 38, Public Health, No. 509e.]

Cases referred to :

- (1) *R. v. Snell, Ex p. Marylebone Borough Council*, [1942] 1 All E.R. 612; [1942] 2 K.B. 137; 111 L.J.K.B. 530; 167 L.T. 13; 106 J.P. 160; Digest Supp.
- (2) *Parry v. Harding*, [1925] 1 K.B. 111; 94 L.J.K.B. 37; 132 L.T. 390; 88 J.P. 194; 38 Digest 216, 505.

APPEALS by the tenants from orders of the Divisional Court (LORD GODDARD, C.J., MACNAGHTEN and LYNSKEY, JJ.), dated July 11, 1947, and reported *ante*, p. 320.

In *London County Council v. Shelley* a complaint was preferred before the Tower Bridge magistrate by the landlords, the London County Council, under the Small Tenements Recovery Act, 1838, s. 1, against the tenant, Shelley, for neglecting to deliver up possession of a tenement, notwithstanding the determination of her tenancy by notice to quit and service on her by the council of a notice in writing under s. 1 of the Act of their intention to apply for the issue of a warrant to recover possession. The magistrate (Miss Campbell) issued a warrant for possession of the premises, but she directed that it should remain in force for 3 months (as provided by s. 5 (4) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920), and should not be executed until the last day of the period, and she further informed Shelley that she could apply before the expiration of that time for an extension of the period. The council appealed against the direction and the granting of liberty to apply for an extension of the period, and the appeal was allowed by the Divisional Court. The tenant, Shelley, now appealed to the Court of Appeal. The appeal was dismissed.

In *Harcourt v. London County Council* a similar complaint under the Small Tenements Recovery Act, 1838, s. 1, was preferred by the landlords before the Clerkenwell magistrate. In this case the magistrate issued a warrant for delivery of possession within 30 days, the limit prescribed by s. 1 of the Act of 1838. The tenant, Harcourt, appealed to the Divisional Court, and the appeal was dismissed. His appeal to the Court of Appeal was now dismissed.

Ackner for the tenant, Shelley.

Holroyd Pearce, K.C., and *H. Newman* for the tenant Harcourt.

Sir Valentine Holmes, K.C., and *Lloyd-Jones* for the London County Council.

LORD GREENE, M.R. : We have been assisted by very able and exhaustive arguments by counsel on both sides and we are very much indebted for having had the opportunity of reviewing the whole situation with that assistance, but, as a result of it, I am bound to say that, speaking for myself, I do not share the difficulties which the Divisional Court appear to have felt.

These two appeals are similar in these respects. In each case the county council gave notice to quit to a tenant who clearly falls within the description of a member of the working classes. In each case the council was minded, as one might suppose, to fill the vacant premises by letting in another tenant of the same description. In the one case, no such tenant was definitely ascertained, although quite clearly, in present circumstances, there must be a long waiting list. In the other case, I think there is an ascertained tenant, but it does not matter. In the one case the tenant had committed a breach of a provision in the tenancy agreement relating to the keeping of a dog. In the other case

no reason is put forward for wishing to terminate the tenancy of the tenant, but I do not think that these differences affect the principles on which these cases should be decided.

The short point is this. In the case of dwellings for the working classes provided by a local authority, is the local authority entitled to turn out a tenant—or, perhaps, that is rather too harsh a word to use—to recover possession at the termination of a tenancy without having to run the gauntlet of the provisions of the Rent Restrictions Acts? The Divisional Court in the two decisions which we have to consider were, I think, very much affected in their approach to the problem by the idea that the tenants of local authorities under the Acts for the housing of the working classes ought, in fairness or in common sense or whatever one likes to call it, to be entitled to precisely the same type of protection under the Rent Acts as is conferred on the tenants of ordinary landlords. Actuated by that idea, the Divisional Court in *R. v. Snell, Ex parte Marylebone Borough Council* (1) attached importance to a provision in one of the Rent Acts which they thought gave the magistrate or judge a discretion to postpone the right to recover possession, and, in view of what they thought was a protective provision which was applicable, they found less difficulty in interpreting the Housing Act, 1936, as not giving the tenants of local authority houses the same protection as ordinary tenants have. In the present case the Divisional Court took the view that they were bound by *Snell's* case (1), but indicated that, if it had not been for that, they would probably have come to a different conclusion and would have held that the Rent Acts applied to working class houses belonging to a local authority.

I think, with respect, that there is a radical difference between the two types of houses. The object of the Rent Restrictions Acts was to protect the poorer class of tenant from either being ejected from his house or being compelled to pay a higher rent by reason of the housing shortage and the general economic situation. The ordinary landlord might be expected to take advantage of the economic situation by trying to get a higher rent for his houses. The Rent Restrictions Acts prevented that. Local authorities, however, and particularly in the case of working class dwellings provided by them (which is the only type of dwelling with which we are concerned), stand in a totally different position. They are, socially, much more responsible landlords. They are subject to criticism by members of their own body and by ratepayers outside. They are entrusted by Parliament with the specific duty of providing housing accommodation for the very class to which the Rent Restrictions Acts principally apply. They may be trusted, one would have thought, to exercise their powers in a public-spirited and fair way in the general public interest, and without any flavour of what, without offence, I may call profiteering. It is worth referring in that connection to some provisions of the Housing Act, 1936, which seem to me to support that idea. Section 83 (1) provides, in the latter part :

... the authority may make such reasonable charges for the tenancy or occupation of the houses as they may determine.

Section 85 (5) enacts :

In fixing rents the authority shall take into consideration the rents ordinarily payable by persons of the working classes in the locality, but may grant to any tenant such rebates from rent, subject to such terms and conditions, as they may think fit.

I find nothing unreasonable or anomalous in Parliament deciding to free local authorities, into whose hands it places the charge of taking steps to provide working class accommodation, from the operation of the Rent Acts. I see nothing unreasonable or anomalous in their being trusted by Parliament to avoid committing the sort of social or economic crime, or whatever one likes to call it, that the ordinary landlord was expected to commit, but, of course, considerations of that kind do not afford an answer by themselves to the question which we have to determine. They merely affect the approach to the problem, but they do also affect the question, which is always of importance, although not conclusive, in the construction of a statute, namely, the reasonableness or unreasonableness involved in a particular construction of it. I find here nothing unreasonable in the construction to which I have referred, and which the Divisional Court, albeit reluctantly, placed on the relevant provisions.

Section 156 (1) of the Housing Act, 1936, contains the crucial provision

excluding in the cases there covered the operation of the Rent and Mortgage Interest Restrictions Acts within certain limits. It provides :

Nothing in the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, as amended by any subsequent enactment shall be deemed to affect the provisions of this Act relating to the obtaining possession of a house with respect to which a demolition order or a clearance order has been made, or to prevent possession being obtained (a) of any house possession of which is required for the purpose of enabling a local authority to exercise their powers under any enactment relating to the housing of the working classes . . .

It is to be observed that the provision that nothing in the Acts is to prevent possession being obtained is not limited to cases where the authority itself is seeking to obtain possession, but includes cases where an outside landlord is endeavouring to recover possession for any of the purposes mentioned in s. 156.

We have been informed by counsel on both sides—subject to one small point of difference which I do not think is important—as to the particular sections of the Act to which paras. (b), (c), (d) and (e) relate, and it is argued by counsel for the London County Council, that when those are eliminated a search for “powers” (which is the word mentioned in para. (a)) results in the discovery of, at most, three powers to which para. (a) will apply. As to two of those powers, he doubts whether they are covered, but assuming that they are, the word “powers” would include them. I do not think I need refer to the powers in

question, except to say that two of them are in ss. 72 and 73 respectively and the other is in s. 83, the important one, for the purpose of counsel for the county council, being in s. 83. No other powers beyond those three have been suggested to us as being the “powers” referred to in s. 156 (1).

Just let me look at those three sections. Sections 72 and 73, which I can take together, are powers connected with the provision of housing accommodation

for the working classes, and under those powers, in so far as possession of a house is required to enable a local authority to exercise them—and one can think of many cases where it would be—the operation of the Rent Restrictions Acts in respect of possession is prohibited by s. 156 (1). But I do not think that that helps the county council in the present case. Those powers relate to the provision of housing accommodation for the working classes. In the present case what the county council has done does not seem to me to fall within those words at all. It has provided housing accommodation for the working classes, and, having done that, it now sets about substituting one tenant for another.

That may be providing housing accommodation for a member of the working classes, but it does not seem to me to be the sort of thing that the powers in s. 72 are concerned with. As soon as the housing accommodation for the working classes has been provided in any of the manners indicated, that stage, so to speak, in the proceedings comes to an end. The alleged power under which the

county council, it is argued, acted in the present case, was s. 83, and it is said that, to enable the county council to exercise its powers under s. 83, possession was necessary against these tenants. Section 83 deals with a stage in the activities of the council when the housing accommodation for the working classes has been provided, and with what may be done in connection with the running, so to speak, of the accommodation so provided. The relevant part of the section is as follows :

(1) The general management, regulation, and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority. . .

The county council says : “When we change a tenancy, we are exercising a power of management. The word ‘management’ is wide enough to cover such an operation.” It is, they say, a power, and a power under an enactment relating to the housing of the working classes, namely, the Housing Act, 1936. The result, therefore, if that argument be right, is that under s. 156 (1) (a), nothing in the Rent Acts is to prevent possession being obtained for that purpose.

The question, therefore, comes down to two narrow points. Is the giving of notice to one tenant in order to remove that tenant and to provide room for another one an operation which can be called the exercise of a power? Is the right of management given in s. 83 (1) a power at all within the meaning of s. 156 (1) (a)? In my opinion, it clearly is. It is true that the word “power” does not appear. It is true that the group of sections beginning with s. 71 is headed “General powers and duties of local authorities,” whereas the heading

of the group of sections commencing with s. 83 says nothing about power, but describes the subject-matter of the succeeding sections as "Management, etc. of local authority's houses," but that appears to me to be not of the slightest importance. It seems to me impossible to argue that the right of management—I use the word "right" for the moment—under s. 83 (1) is not a power. What is the council doing when it terminates the tenancy of a tenant by notice? Is it doing something which is *ultra vires*, or is it doing something which is within its competence? In the latter case it is exercising a power, and I should have thought that that particular point did not really admit of argument.

Then it is said that the power is one which the council do not get under the Act at all, but is one which they have at common law merely because they own the houses. They are exercising, in other words, not a power under an enactment relating to the housing of the working classes, but a power which they possess at common law as owners of the freehold. If that argument be right, a draftsman who deliberately set himself out to confuse local authorities on this matter could scarcely have used language more calculated to achieve his object than that which he has used in s. 156 (1) (a), because, on the face of it, s. 83 (1) confers a power. If it is a power, it must be under an enactment, otherwise why did he include it? The answer, I should have thought, was clear—that the draftsman was a careful draftsman and he included that power expressly to avoid any possible confusion, and when he came to s. 156 (1) (a) and referred to "powers under any enactment," he was referring to that power among others.

If that be the right view, the question, in my opinion, is answered. The contrary view appears to me to be open to conclusive objections, not merely as a matter of the narrow interpretation of the sections, but also on the broad question of the whole scope and policy of the Housing Acts. As I have said, these Acts, in so far as they deal with the housing of the working classes, provide, under the direction of Parliament, that local authorities should have these important duties given to them to provide housing accommodation and to manage that accommodation when they have provided it. The contrary argument put forward by the tenant would have the result that the management of these properties—I use that expression in the widest possible sense, as I think it is meant to be used—on a working class estate belonging to the county council would be shared, in effect, between the county council and the county court judge, because, if the Rent Acts applied to the management of such an estate and in the course of management the county council found it desirable to remove a tenant and put in another one, it could only do that subject to the Rent Restrictions Acts which either prohibit a county court judge from making the order or impose certain discretionary delays and so forth—prohibitions which, if used, might have the effect of interfering with the management and execution by the local authority of its statutory duties to provide and manage housing accommodation for the working classes. That seems to me to be a position which was not contemplated by the Act. If we had been construing an Act dealing, not with responsible bodies like local authorities, but merely with thousands of private owners all over the country, that consideration might not have any effect, but when one realises the important and responsible duties which Parliament is handing to local authorities by this Act, I cannot believe that its intention was other than that the carrying out of those duties should be left to the responsible authority and not shared between it and the county court judge. The matter comes down to the true interpretation of the language of the Act, and s. 156 (1) (a) has, in my opinion, the meaning which I have given to it.

There are one or two subsidiary points which I should mention. The application which gave rise to this litigation was under the Small Tenements Recovery Act, 1838. That Act, which had a pecuniary limit for the jurisdiction of magistrates, is referred to in the Housing Act, 1936, s. 156 (2), which extends the summary jurisdiction to property of any value or rent, but only in cases where possession is required for the purpose of exercising a power under any enactment relating to the housing of the working classes. If, therefore, I have correctly construed the relevant provisions relating to those powers, it follows that the extended jurisdiction in the matter of rent and value provided by s. 156 (2) of the Act of 1936 exists, and no objection can be raised—nor,

indeed, is it raised—on the ground of excess of jurisdiction in that respect. It is, however, said that the Small Tenements Recovery Act, 1838, has limited it. The power there given to justices is to make an order for possession only if the tenant fails to show reasonable cause why possession should not be given. Here, says counsel for the tenant Shelley, there is a reasonable cause why possession should not be given, namely, hardship on the tenant, and it was, therefore, competent for the magistrate to refuse to make the order. In
 A Shelley's case the magistrate did make the order, but the argument is, I think, based on a misapprehension as to what the Act says. Section 1 of the Act of 1838 says, not merely "reasonable cause why possession should not be given," but :

...reasonable cause why possession should not be given under the provisions of this Act.

- B The provisions of the Act substitute a summary procedure for the ordinary procedure for recovery of possession, and it appears to me that the language I have quoted refers, not to the substance of a claim for possession, but to the procedure, and what it really means is that, a tenant who can satisfy a magistrate that there is some reasonable cause why the summary procedure under the Act should not be followed is entitled to ask the magistrate not to deal with the case. That, indeed, is perfectly sensible in that these questions
 C of title, the question of the validity of the notice, and questions of all sorts relating to the relationship of landlord and tenant may all be questions of great complication and difficulty and most unsuitable for decision summarily before a bench of magistrates. It does not, in my opinion, introduce the idea—which in 1838 would have been a very novel one—that a court of law, to whose satisfaction the right to possession is established, would be entitled, nevertheless,
 D to refuse the legal remedy of an order for possession merely on the ground of hardship on the tenant. That was a much more modern idea and one which, I venture to think, was not present to the mind of the legislature in 1838.

The last point I need mention relates to the so-called discretion which, it is said, the county court judge possesses under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5. Before I consider in terms those provisions, I should refer back to s. 156 (1) of the Housing Act, 1936.

- E It is said that that paragraph only excludes the operation of the Rent Acts in the cases mentioned to a limited extent, and that, in so far as the Rent Acts prevent possession being obtained, they are not to operate, but in other respects they are to operate. Taking the view that the limitation on the operation of the Rent Acts provided by s. 156 (1) is drawn by reference to the obtaining of possession, counsel for the tenants argue that the power of a county court judge under s. 5 (2) and (4) of the Act of 1920 is not a power
 F to prevent possession being obtained or a power which has the effect of interfering with the obtaining of possession. In my opinion, that argument will not bear examination. Under s. 5 (2) of the Rent Act of 1920, power is given to stay or suspend execution of an order for possession. I cannot myself accept the view that a power of that kind does not affect the right to possession, and, in the case of a local authority, it would be most serious if,
 G when they required possession (*e.g.*, for the general purpose of providing working class accommodation under s. 73 of the Act of 1936), they found that their attempt to recover possession was delayed by orders of the county court judge refusing possession for 6 or 12 months, or whatever it might be, and from time to time extending that period. The very nature of the functions of a local authority appears to me to make it unreasonable that such a power of delay in its operations should be entrusted to the county court judge under
 H the Rent Acts, and that confirms me in the construction which I put on s. 156 (1) of the Housing Act, 1936, which I read as comprising in the excluded provisions of the Rent Acts those delaying and postponing provisions provided for by s. 5 of the Act of 1920.

The other sub-section, which was referred to by the Divisional Court ([1942] 1 All E.R. 614) in *Snell's* case (1), is s. 5 (4) of the Rent Act, 1920. With all respect to the Divisional Court who tried *Snell's* case (1), I cannot help thinking that they did not appreciate the object and meaning of that paragraph. I do not read it as expressly or impliedly giving to the county

court judge a power to postpone the operation of an order for possession. That is dealt with by sub-s. (2). Sub-section (4) merely deals with a consequential matter, namely, it extends the life of a warrant for delivery, the object, I dare say, being to provide that, where an order suspending the operation of a possession order is made, the life of the warrant may be extended so as to cover any such period of suspension. If that was not provided for, the warrant would expire before the period of suspension had come to an end, and the landlord would have to come back to the county court judge to get a fresh warrant. It was in order to avoid the delay and expense of such an application that s. 5 (4) was inserted. In my opinion, both appeals fail. A

BUCKNILL, L.J. : I agree. The appeals must be dismissed for the reasons given by my Lord.

SOMERVELL, L.J. : I agree, and I only want to add a very few words with regard to the historical side of the argument that was addressed to us. As I understand the matter, when the original Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, was passed, its terms applied to all houses owned by local authorities. By 1919 it was realised that inconvenience might arise and local authorities be unduly hampered in the carrying out of their duties if that position was left unaltered, and by the Housing, Town Planning, etc., Act, 1919, s. 35, it was provided : B

Nothing in the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, or in the enactments amending that Act, shall be deemed to . . . prevent a local authority from obtaining possession of any house the possession of which is required by them for the purpose of exercising their powers under the Housing Acts or under any scheme made under those Acts. C

When the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was passed, there was a specific reference to cases in which the landlord was a local authority or statutory undertaking. The application was general and was not confined to cases in which possession was required in connection with powers under the Housing Acts, and, under the provisions of s. 5 (1) (e), an order could be made if alternative accommodation was shown to be available. The question of the relationship between those two sections came before a Divisional Court in *Parry v. Harding* (2), and it was held that there was no inconsistency and that s. 35 of the Act of 1919 remained in full effect in respect of whatever matter or matters were covered by its words. The express reference to local authorities in s. 5 (1) (e) of the Act of 1920 was repeated in a somewhat different form in the Rent and Mortgage Interest (Restrictions) Act, 1923, s. 4, but it disappeared in the Act of 1933. The only other provision of the Rent Acts to which it is necessary to refer is in the Rent and Mortgage Interest (Restrictions) Act, 1939, which brought under the general scope of these Acts a very large number of houses, including all those within the limits of value that had been built since Apr. 2, 1919. Section 3 (2) of that Act provides as follows : D

The principal Acts shall not, by virtue of this section, apply . . . (c) to any dwelling-house being, or forming part of, a house or dwelling in respect of which a local authority for the purposes of pt. V of the Housing Act, 1936, are required by s. 128 of that Act to keep a housing revenue account, other than a house or dwelling to which s. 129 (3) of that Act applies. E

It is unnecessary for me to seek to state the actual detailed effect of that section. It is sufficient to say that it applies to, or covers, a very large number of local authority houses which, but for its existence there, would have come under the Rent Restrictions Acts by virtue of the Act of 1939. F

It seems to me that that short recital of the statutory history shows that Parliament over a very considerable field thought that tenants of local authorities did not require the protection of the Rent Restrictions Acts and (put in the inverse way) that local authorities would be impeded to a substantial extent unless they were able to get possession irrespective of the provisions of those Acts. That being the general background, one must approach s. 156 of the Housing Act, 1936, with a somewhat different general outlook from that which was taken by the Divisional Court in the two cases which have been referred to. Against that background, it seems to me plain that the words which have already been considered by the MASTER OF THE ROLLS, namely, the words "powers under any enactment," must G H

be construed as covering the express power of management which is conferred by s. 83 of the Act, and I do not wish to add anything to what he has already said on that part of the case. I agree that the appeals must be dismissed.

Appeals dismissed.

Solicitors: *E. Lawrence Thackray* (for the tenant Shelley); *Geoffrey B. Gush & Co.* (for the tenant Harcourt and others); *J. H. Pawlyn* (for the London County Council).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

MULLINS v. WESSEX MOTORS, LTD.

[COURT OF APPEAL (Scott, Asquith and Evershed, L.JJ.), October 31, November 4, 5, 18, 1947.]

Landlord and Tenant—Compensation for goodwill—Value of premises enhanced for similar business—Landlord requiring premises for own purposes—Landlord and Tenant Act, 1927 (c. 36), ss. 4, 5.

On an application by a tenant, under s. 4 of the Landlord and Tenant Act, 1927, for compensation in respect of adherent goodwill, if the tenant proves that, by reason of the business carried on by him, the letting value of the premises for the purposes of a similar business had been enhanced, and if the landlord does not intend to use the premises for a more profitable purpose, the fact that the landlord proposes to use the premises for his own purposes, and, therefore, not to avail himself of the added letting value which the tenant has created does not, of itself, defeat the tenant's right to compensation.

[AS TO RIGHT TO COMPENSATION FOR GOODWILL, see HALSBURY, Hailsham Edn., Vol. 20, p. 294, para. 333; and FOR CASES, see DIGEST Supp.]

Case referred to:

(1) *Whiteman Smith Motor Co., Ltd. v. Chaplin*, [1934] 2 K.B. 35; 103 L.J.K.B. 328; 150 L.T. 354; Digest Supp.

APPEAL by the landlords from an order of His Honour JUDGE A. H. ARMSTRONG, made at Yeovil County Court and dated Jan. 2, 1947, awarding compensation to the tenant for goodwill under s. 4 of the Landlord and Tenant Act, 1927. The appeal was allowed. The facts appear in the judgment of the court read by EVERSLED, L.J.

Heathcote-Williams and *Avgherinos* for the landlords.

Lloyd-Jones for the tenant.

Cur. adv. vult.

Nov. 18. EVERSLED, L.J., read the following judgment of the court. In this case the tenant claimed compensation under ss. 4 and 5 of the Landlord and Tenant Act, 1927. He is an antique dealer who carried on that business in succession to his father and grandfather in Salisbury (subject to what is said hereafter in reference to the war period) for many years before 1925. The premises in question are two adjoining premises together known as The Hall, in New Street, Salisbury. In 1925 the tenant acquired a lease of these premises from the predecessors in title of the landlords, the term of the lease being 21 years expiring on Dec. 25, 1946. By 1930 he had moved the whole of his business from High Street to The Hall, a portion of which he occupied as his personal residence. The outbreak of the war in 1939 dealt a serious blow to the business, and in May, 1940, he sublet a substantial portion of the premises to the Navy, Army and Air Force Institute for a term ending one day before the expiry of his own lease and at a rent of £200 per annum. As a result of further sub-leases, all supplemental to the first, from March, 1942, until a date after the hearing by the county court judge of the claim in the present case, about 9/10ths of the whole premises were occupied by the N.A.A.F.I. for the purposes of that institute at a total rent of £565 per annum, together with the obligation to pay rates in respect of the part so occupied. During that period the tenant used a substantial part of what he retained for his personal habitation, his shrunken business activities being confined to a very small part of the whole premises. Certain figures were proved on the tenant's behalf which showed that during the war

years the average annual profit earned by the business was no more than £123, without making any allowance for any salary to the tenant as the manager of the business. Even in the three pre-war years of 1935 to 1938, the annual profits earned by the tenant, again without any allowance for salary to himself, did not exceed £656. It should be added that the N.A.A.F.I. remained in occupation till May, 1947, and that the tenant himself, as respects the small part which he retained, at first resisted the landlord's claim for possession by asserting the protection of the Rent Restrictions Acts on the ground that the part so retained by him constituted his "dwelling-house," and, consequently, fell within the scope of those Acts. On the view we take it is unnecessary to refer further to that aspect of the matter.

In accordance with the usual practice under the Act of 1927, the claim was referred to a referee, to consider the claim and report to the tribunal, *i.e.*, the county court. In his report, which dealt fully with the evidence and arguments put before him, the referee expressed the opinion that the tenant had failed to establish the existence of any such goodwill adherent to the premises in question as would, by the terms of s. 4 (1) of the Act of 1927, entitle him to any compensation from the landlords. The county court judge, on the other hand, reached the conclusion that such a claim had been made out to the extent of an added letting value of £97 per annum, which, on the basis of five years' purchase, he quantified at the figure of £485, and for this sum he gave judgment in favour of the tenant. [His LORDSHIP examined the report and notes of judgment, and said that the whole argument presented on behalf of the landlords, both before the referee and before the county court judge, was that, because the landlords required the premises for their own business purposes, the goodwill of an antique dealer adherent to the premises (if such there was, in fact) was of no value to the landlords, with the legal consequence that the tenant had failed to satisfy the conditions of s. 4 (1) of the Act of 1927, and continued]: The county court judge, unlike the referee, rejected, and, in our view, rightly rejected, the argument. In our view, it is not a sufficient answer to a claim by the tenant in respect of adherent goodwill for the landlord merely to say: "I require these premises for my own business purposes, whether those purposes are or are not more profitable within the meaning of the section. Therefore, the goodwill adherent to the premises, if they continue to be used for the business formerly carried on by the tenant, is of no use or value to me." In our judgment, it is sufficient to say that, if a tenant proves that, by reason of the business carried on by him, the letting value of the premises for the purposes of a similar business has been enhanced, and if (as was found in this case) the landlord does not intend to use the premises for a more profitable purpose, then the fact that the landlord proposes to use the premises for his own purposes, and, therefore, not to avail himself of the added letting value which the tenant has created, does not, of itself, defeat the tenant's right to compensation.

So far, then, the argument of counsel for the tenant prevails. In our judgment, however, the argument does not suffice to take him all the way. There is no doubt of the rule that, if there is evidence on which a county court judge can properly reach his conclusion, this court will not interfere with his judgment, however strongly the court may feel out of sympathy with it, and this rule does not cease to apply in such a case as the present where the county court judge does not himself hear the witnesses but draws his inferences from the report of a referee. The question, however, whether "goodwill" has been established within the meaning of the Landlord and Tenant Act, 1927, s. 4 (1), is one involving considerations both of law, that is, of the proper interpretation and application of the statute, and of fact. In the present case the county court judge based himself (i) on the evidence given by the surveyor that "cat" goodwill to the extent of the difference between a rent of £350-£400 per annum (if the premises were offered to an antique dealer) and £208 per annum representing the rent paid by the tenant plus 80 per cent. for general increase in rent values, and (ii) on the evidence of Mr. Dibben, an antique dealer, who said he would be willing to pay £400 per annum for the premises for his own business. The judge rejected as wholly irrelevant the evidence of the N.A.A.F.I. occupation and made no reference to the evidence as to profits. It is, no doubt, true, as counsel for the tenant submitted, that the evidence of the surveyor and Mr. Dibben was some evidence of adherent goodwill on which a judge could act,

but, in our view, as we read the county court judge's judgment, he did not, in weighing that evidence, properly apply himself to the test which the Act requires and misdirected himself in his express rejection of the N.A.A.F.I. evidence and his disregard of the evidence of profits.

A In our judgment, the phrase "cat" goodwill is one which, if we understand its meaning aright, is apt to be misleading. We agree with the criticisms of the expression made by MAUGHAM, L.J., in *Whiteman Smith Motor Co., Ltd. v. Chaplin* (1) ([1934] 2 K.B. 49, 50), and, if it is true that a cat has nine lives, we express the hope that in relation to the Landlord and Tenant Act it has lived the last of them and may now be decently interred. For "cat" goodwill includes the so-called *animus revertendi* which is part of the goodwill attributable to the site as distinct from the tenant's own business carried on on the site. Neither the evidence of the surveyor nor the evidence of Mr. Dibben proved how much of the alleged goodwill was adherent goodwill within the meaning of s. 4 (1) of the Act as distinct from goodwill attached to the site as such. B Moreover, as we have already indicated, the county court judge was, in our opinion, wrong in his disregard of the N.A.A.F.I. and profit evidence. In the case of the N.A.A.F.I., it was of the utmost significance that at the date of the application and of the hearing the institute was in possession of by far the greater part of the premises—and have been in occupation for close on five years—and were paying a rent of £565 which, when reduced, in accordance with the C surveyor's evidence, to allow for the fact of their having taken the premises piecemeal, is still as great as the figure taken by the county court judge as the enhanced letting value for the business of an antique dealer. We need not further refer to the details of the evidence as to profits earned. It is sufficient to say that, in our judgment, the conclusion of the county court judge—ignoring the difficulties in the way of the tenant's claim which the referee observed—D ought not to stand.

It is, then, a question whether we should order a new trial. In this case such a procedure does not seem to us satisfactory or desirable. The referee has made his report and the question is one of drawing the proper inference of fact from that report. Once it is decided that the judgment of the county court judge is unsatisfactory for the reasons we have given it is, we think, open to this court to draw its own inferences from the same material. These E inferences point, in our judgment, all one way. For a period of nearly five years before his application was heard the tenant had occupied only about one-tenth of the whole premises in question, and of the part so occupied the larger part was used by him, not for his business, but as a personal residence. The rest had been let to, and was at all material times occupied by the N.A.A.F.I., F paying to him a rent which, after allowing for the generally increased rentals and other adjustments, was as great as that which the premises would, according to the evidence, fetch from an antique dealer. Moreover, the evidence showed that the profits received by the business during the period covered by that evidence were of an extremely meagre character, even though no allowance was made for any salary to the tenant himself or for the substantial rates for which the premises would make the occupier liable. After considering all the material and paying due regard to the expert view of the surveyor and the G support given to him by Mr. Dibben, we are unable to resist the conclusion that there is really no evidence at all to establish the existence of any adherent goodwill for the purposes of s. 4 (1) of the Act of 1927. In our judgment, accordingly, the appeal should be allowed, and the tenant's claim for compensation refused.

Appeal allowed.

H Solicitors: *Field, Roscoe & Co.*, agents for *Pye-Smith, Hulbert & Kildahl*, Salisbury (for the landlords); *Leslie A. Fawke* (for the tenant).

[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

CRESSWELL v. SIRL.

[COURT OF APPEAL (Scott, Asquith and Evershed, L.JJ.), October 21, November 18, 1947.]

Animals—Dog—Chasing cattle or sheep—Right to kill—Onus of proof.

Chasing by dogs which causes any real and present danger of serious harm to the animals chased constitutes an "attack" which entitles the owner of the animals to take effective measures of prevention. The onus of proof is on the owner to justify the preventive measure of shooting an attacking dog, and he has by proof to establish two propositions—(1) that, at the time of shooting, the dog was either (a) actually (in the above sense) attacking the animals in question, or (b) if left at large, would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented; and (2) that either (a) there was, in fact, no practicable means, other than shooting, of stopping the present attack or preventing such renewal, or (b) that the owner, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack.

[AS TO KILLING TRESPASSING DOGS, see HALSBURY, Hailsham Edn., Vol. 1, p. 566, para. 973; and FOR CASES, see DIGEST, Vol. 2, pp. 214-216, Nos. 95-103, 112-116.]

Cases referred to:

- (1) *Janson v. Brown*, (1807), 1 Camp. 41; 2 Digest 214, 100.
- (2) *Morris v. Nugent*, (1836), 7 C. & P. 572; 2 Digest 214, 93.
- (3) *Kirk v. Gregory*, (1876), 1 Ex. D. 55; 45 L.J.Q.B. 186; 34 L.T. 488; 43 Digest 428, 527.
- (4) *Protheroe v. Mathews*, (1833), 5 C. & P. 581; 2 Digest 214, 99.
- (5) *Cope v. Sharpe* (No. 2), [1912] 1 K.B. 496; 81 L.J.K.B. 346; 106 L.T. 56; 43 Digest 413, 361.
- (6) *Aldrich v. Wright*, (1873), 53 N.H. 398; 16 Am. Rep. 339.
- (7) *Miles v. Hutchings*, [1903] 2 K.B. 714; 72 L.J.K.B. 775; 89 L.T. 420; 2 Digest 216, 116.
- (8) *Cotterill v. Penn*, [1936] 1 K.B. 53; 105 L.J.K.B. 1; 153 L.T. 377; 99 J.P. 276; Digest Supp.
- (9) *Gott v. Measures*, [1947] 2 All E.R. 609.

APPEAL by the defendant from an order of His Honour JUDGE ARMSTRONG made at Yeovil County Court on Dec. 12, 1946, awarding damages to the plaintiff whose dog he had shot. The Court of Appeal held that the learned judge's interpretation of the law was too narrow and referred the case back to him for further consideration in the light of the law as formulated by them. The facts appear in the judgment of the court read by SCOTT, L.J.

L. MacLaren for the defendant.

Crispin for the plaintiff.

Cur. adv. vult.

Nov. 18. SCOTT, L.J., read the following judgment of the court. This appeal is from a judgment of His Honour JUDGE ARMSTRONG sitting at Yeovil County Court giving the plaintiff 30 guineas damages because the defendant shot her dog. The case is of interest since it has involved a consideration by the court—after an interval of more than 100 years—of the law relating to the justification for the shooting of another's dog. It is also, we think, of no little public importance. To shoot a dog is hateful to anyone fond of animals. On the other hand, those who keep dogs in the country or take dogs to the country are under a real and serious obligation not to allow their dogs to chase sheep or cattle. Even if the sheep or cattle are not physically attacked, serious injury may be done to them if they are frightened and chased, particularly when (as in the present case) the ewes are in lamb or the cattle in calf. For these reasons, and because it has seemed to us necessary to formulate the law to be applied, it is, we think, desirable to state fully the facts of the case which we have extracted from the full notes of the judge with which we have been supplied, quoting those notes where necessary. In view of the course which we propose to take, we are most anxious in no way to prejudge any matter of fact which the judge who tried the case and saw

the witnesses must determine. If, therefore, we have incorrectly drawn any inference, the judge will correct it.

The incident took place at Vale Farm, Halstock, in the county of Dorset. The farmer was Charles Sirl. John Sirl, the defendant, his son, lived at a cottage nearby with his wife. His brother-in-law, Albert Fowler, lived at the farmhouse with Charles Sirl. The scene of the attack is sometimes referred to as "a field," sometimes as "the orchard." It may have been a grass orchard.

- A At about midnight on the moonless night of Aug. 12/13, 1946, John's wife heard dogs barking in the orchard and woke John up. There was a flock of ewe sheep in lamb in the orchard or fields adjoining it, and there was also a pig-stye with one or more sows in pig. John looked out of the window. Presumably he could see nothing, but he heard dogs barking "very loud" in the orchard. The barking got worse, so John got up and went to the orchard. There he found two dogs barking violently at a number of sheep penned up by them
- B by and in the pig-stye. He shouted at them, and they stopped barking momentarily, but in a couple of minutes began again. He then left the orchard and went to the farmhouse to inform his father. He called up his brother-in-law first, got let in, and then asked his father what he should do. His father told him to "take the gun"—apparently his father's—and "to shoot the dogs if he could not get them away in any other way." One or other of them put cartridges in both barrels and John and his brother-in-law went off.
- C The father's evidence was that he had already heard "loud barking, although 300 yds. away and against the wind." When they got to the "orchard" they found the sheep again all penned up in a corner "by the gate" and the dogs barking at them, but that corner was not the same corner as the one by the pig-stye where they had been when John first went out to see what was happening. The brother-in-law shone the torch towards the dogs when they were some 70 yds. away and the dogs started to come towards them.
- D When they were about 40 yds. away, John said he "thought the dogs had got their blood up and seemed fierce and wild," and that he "did not think it safe to catch hold of them." At that moment the position, in fact, was that the dogs had been chasing the sheep and barking at them for about an hour to the serious hurt of the sheep which "were all heavy in lamb." As a result some of the sheep and also a sow afterwards aborted, in respect of which loss
- E the farmer recovered damages in other proceedings against the present plaintiff. John thereupon fired and killed the black bull-terrier, though he aimed at the light coloured dog. The brother-in-law did not remember any shouting at the dogs, but corroborated that they were "barking very loudly and chasing up and down." John also stated that on a previous occasion he had found the plaintiff's bitch chasing his father's sheep, and had then driven her off and told the plaintiff's son.

- F The note of the learned judge's judgment is, so far as material, as follows :

John Sirl's admission, *prima facie*, entitled Mrs. Cresswell to succeed in her action. His defence is that shooting was the only practical method of protecting his father's sheep. It is common ground that the bull terrier bitch, in company with another dog, probably Mrs. Cresswell's dog, was worrying them but not actually biting them on the night in question, Aug. 12, and that it had been going on for some considerable time. The attack could not have been particularly savage because, as we now know,

G there were no signs of the sheep having been bitten at all. The law says you are entitled to shoot a dog attacking your property if at the time of shooting there is no other method. On the night in question it was dark, there was no moon, they heard but could not see the dogs, but could see the sheep penned up at one end of the field. The dogs came away from the sheep towards the men. I have little doubt that was not an attack on John Sirl and his brother-in-law, although the dogs barked as they came running. John Sirl decided to shoot. The obvious thing to do was to catch the dog and shut it up. I do not think Sirl shot because they were in personal peril, but because they thought the dogs could not be captured. He shot at one dog and hit the other, the light affecting his aim. One dog ran home which indicates it was not in a very savage mood and was quite easily frightened away. Was Sirl justified? His view is reasonable. It is laid down through the ages that to justify the killing of a dog the shooting must be done while the attack is taking place. Personally, I think the dog was not resenting the presence of human beings. It is annoying to a farmer, or stock owner, for a dog to attack his property, but the law holds he is not entitled to shoot it except if it is actually engaged in an attack on the stock. I think the defence fails here.

H

As appears from the terms of the judgment, the learned county court judge, whose attention was, apparently, directed only to certain older cases (presently referred to), treated as a conclusive test of the defendant's liability the question whether at the moment of shooting the plaintiff's dogs were actually attacking the sheep, and since, at that moment, the dogs had admittedly left the sheep and were approaching the defendant and his brother-in-law, he found, on the application of this test, in favour of the plaintiff. The learned judge derived his test from *Janson v. Brown* (1), before LORD ELLENBOROUGH, C.J., in 1807, to which case he had been referred in argument. According to the very brief report, in that case LORD ELLENBOROUGH (1 Camp. 42) directed the jury that, for the defendant to succeed, the plaintiff's dog must have been "in the very act of killing the fowls" and could not otherwise be prevented from so doing. On this direction, which, in terms, closely followed the defendant's plea, the verdict was for the plaintiff, and it is clear that it was on the first branch of the direction that the defendant failed. In none of the old cases to which the county court judge's attention was directed—including the last of them, *Morris v. Nugent* (2), where the defendant's plea and the direction given by LORD DENMAN, C.J., (7 C. & P. 573), closely followed the plea and the direction of LORD ELLENBOROUGH in *Janson v. Brown* (1)—did the issue turn on the second requisite for justifying the shooting, viz., its necessity to prevent loss or damage to the animals under attack. There is, however, no doubt that in each of the old cases both limbs of the formula for justification had to be satisfied, viz., (a) proof of actual attack at the moment of shooting, (b) proof that the shooting was necessary to bring the attack to an end. There appears to be no case in the books relating to the justification in an action for tort of the shooting of a dog since *Morris v. Nugent* (2) in 1836, but since that date, and particularly since *Kirk v. Gregory* (3) in 1876, the law generally relating to the justification of acts of trespass has been appreciably developed and defined. For the rule that the property in question must be actually under attack has been substituted the more generous rule that it must be in real or imminent danger, and for the absolute criterion that the act of trespass must be shown—in the light of subsequent events—to have been necessary for the preservation of the property has been substituted the more relative standard of reasonable necessity, viz., that any reasonable man would, in the circumstances of the case, have concluded that there was no alternative to the act of trespass if the property endangered was to be preserved.

The first of these qualified standards, is, indeed, foreshadowed in one of the older cases themselves, viz., *Protheroe v. Mathews* (4) (5 C. & P. 586), where TAUNTON, J., laid it down in his instructions to the jury that it was not essential that the dog should, at the time of the shooting, be actually engaged in attacking the animals, but that it was sufficient if the chasing of the animals and the shooting of the dog were all "one and the same transaction." The whole matter fell to be considered by this court in *Cope v. Sharpe* (No. 2) (5). In that case the question was whether the defendant was justified in doing certain acts of trespass on the plaintiff's land to prevent the spread of heath fire and consequent loss and damage to the property of the defendant's master. It was shown that the fire never, in fact, damaged the property of the defendant's master and would not have done so even if the preventive measures adopted by the defendant had not been taken. The risk and danger to the property in question had, however, been "real and imminent," and the steps taken by the defendant, trespassing for the purpose on the plaintiff's land, were held by the jury to have been unnecessary in fact, but, nevertheless, to have been reasonably necessary. On these findings this court held that the defendant had made out his plea of justification. BUCKLEY, L.J., said ([1912] 1 K.B. 504):

The test, I think, is whether . . . there was such real and imminent danger to his [i.e., the defendant's master's] property that he was entitled to act and whether his acts were reasonably necessary in the sense of acts which a reasonable man would properly do to meet a real danger.

KENNEDY, L.J., said (*ibid.*, 510), that danger had been found by the jury to have been

. . . so far imminent that any reasonable person in the circumstances of the

defendant would act reasonably in treating it as necessary to adopt the method for the preservation of the property in jeopardy which the defendant adopted.

In our view, the principle underlying the judgment of this court in *Cope v. Sharpe* (No. 2) (5), is one of general application to justification of acts of trespass and we do not think that *Janson v. Brown* (1) and the other older cases cited to the county court judge should be regarded as laying down any special rules appropriate to the case of shooting dogs. We add that the passing of the Dogs Act, 1906, which, by s. 1 (1), abolished the old common law rule of *scienter* in the case of damage to "cattle" by dogs, is, in our judgment, consistent with the application to the destruction of mischievous dogs of the ordinary rules of the law applicable to trespass to property. The subject is dealt with in *POLLOCK ON TORTS*, 14th ed., p. 135, where it is stated:

Cases have arisen on the killing of animals in defence of one's property. Here, as elsewhere, the test is whether the party's act was such as he might reasonably, in the circumstances, think necessary for the prevention of harm which he was not bound to suffer. Within our own time the subject was elaborately discussed in New Hampshire, and all or nearly all the authorities, English and American, reviewed.

The language quoted has the authority of Sir Frederick himself, for the passage appears, *totidem verbis*, in editions edited by himself: see, e.g., the 8th ed. (1908), p. 174. The American case is *Aldrich v. Wright* (6), where the question arose of the justification for the shooting, in the close season, of minks which were pursuing the defendant's geese. The old English cases of *Janson v. Brown* (1), etc., were discussed in the judgment of DOE, J., (16 Am. Rep. 355 *et seq.*) where the learned judge draws attention to the relation between the language of LORD ELLENBOROUGH, C.J., and LORD DENMAN, C.J., and the terms of the pleas of the defendants in the respective cases of *Janson v. Brown* (1), and *Morris v. Nugent* (2). Reference is also made in the notes to *POLLOCK ON TORTS* (*ibid.*) to the English case, *Miles v. Hutchings* (7), which was a prosecution of a gamekeeper (who had shot another's dog in alleged defence of his master's pheasants) for "unlawfully and maliciously killing" the dog under s. 41 of the Malicious Damage Act, 1861: see, also, *Cotterill v. Penn* (8), a case under the Larceny Act, 1861, of the shooting of homing pigeons. Since this judgment was written *Gott v. Measures* (9), another case of the shooting of a dog brought under the Malicious Damage Act, 1861, has been before the Divisional Court (LORD GODDARD, C.J., and HUMPHREYS and CROOM-JOHNSON, JJ). We have read, and have in mind, the observations of the LORD CHIEF JUSTICE, in that case ([1947] 2 All E.R. 610).

After a consideration of all the authorities above mentioned (to many of which, as already stated, the attention of the court below was not directed), we come to the conclusion that the law applicable to the facts of the present case is less narrow than the county court judge holds in his judgment. Chasing by dogs which causes any real and present danger of serious harm to the animals chased constitutes an "attack" which entitles the owner to take effective measures of prevention. We think the relevant rules of law may be thus stated: (1) The onus of proof is on the defendant to justify the preventive measure of shooting the attacking dogs. (2) He has by proof to establish two propositions, but each proposition may be established in either of two ways: *Proposition No. 1*: That at the time of shooting, the dog was either (a) actually (in the above sense) attacking the animals in question, or (b) if left at large, would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented. *Proposition No. 2*: That either (a) there was, in fact, no practicable means, other than shooting, of stopping the present attack or preventing such renewal, or (b) that the defendant, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack.

In the course of the argument, the attention of the court was drawn to the statement of the law found in *HALSBURY'S LAWS OF ENGLAND*, Hailsham Ed., vol. 1, p. 566, para. 973, where it is stated:

In order legally to justify such an act [the shooting or injuring another's dog] it must be proved that it was done under necessity for the purpose of protecting the person, or saving property in peril at the moment of the act.

This formulation is founded on the old cases (including *Janson v. Brown* (1)) to which we have referred. For the reasons which we have given and in the light of more modern authority, we think the formulation to be too narrow and that that which we have attempted above should be substituted for it.

It is clear that, if we have correctly stated the law which is applicable, the learned county court judge did not apply to the facts proved before him the proper tests. As we read his judgment, he regarded (on the authority of the cases cited to him) as conclusive in the plaintiff's favour his finding that at the moment of shooting no actual attack was in progress, and he has not applied himself to the question whether or no, at the time of shooting, the ewes were still in real and imminent peril. Nor are we clear from the terms of his judgment whether he intended to find that, whether or not the shooting was, in fact, necessary, the defendant acted reasonably in so thinking. It is true that his notes contain the sentence "His" [i.e., the defendant's] "view is reasonable," but, having regard to the use of the present tense—"is"—and the context in which the phrase appears, including the earlier sentence—"the obvious thing to do was to catch the dog and shut it up"—we cannot, as it seems to us, safely or properly say whether the learned judge intended to find as a fact that the defendant acted reasonably within the terms of the propositions we have formulated above or intended merely to refer to the argument put forward on the defendant's behalf. In the circumstances, and having stated the law applicable in the form of the two alternative propositions given above, we think that the proper course, and that least likely to involve the parties in further substantial costs, is to refer the matter back to the learned judge with the following directions. If the learned judge finds that the defendant has established both propositions in either of the alternative ways open to him, he should enter judgment for the defendant, but if he finds that the defendant has not so established both propositions, the plaintiff will sustain her judgment. We hope that the county court judge's recollection of the case when it was before him will be sufficiently fresh to enable him to answer the directions, but, in case this is not so, there should be liberty to either party to apply to him to recall any of the witnesses. The costs of the appeal, of the original trial, and of the reference back will follow the event.

Case remitted.

Solicitors: *Savery, Stevens & Nutt*, agents for *Proctor & Horden*, Crewkerne (for the defendant); *Lovell, Son & Pitfield*, agents for *Roper & Roper*, Bridport (for the plaintiff).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

EASTERN COUNTIES BUILDING SOCIETY v. RUSSELL.

[COURT OF APPEAL (Lord Goddard, C.J., Tucker and Cohen, L.JJ.), November 11, 12, 1947.]

Guarantee—Mortgage—Surety—Building society—Proviso that surety's liability should cease if "amount owing in respect of the advance" reduced below certain amount—Inclusion of bonus, interest and fines in "amount."

Under a building society mortgage deed the mortgagor was entitled to "an advance . . . of £775" by purchasing $7\frac{3}{4}$ £100 shares of the society at an aggregate bonus for the $7\frac{3}{4}$ shares of £38 15s. (i.e., at £5 a share), credit being given to her for this bonus. The deed provided that the bonus should be paid by the mortgagor together with the monthly sums which had to be paid in respect of the repayment of principal and the payment of interest, and if further provided for payment of insurance premiums, fines for late payment of interest, and various other charges. Clause 3 of the deed provided that, on failure of the mortgagor to pay "any of the said instalments fines interest or other moneys payable" under the deed or the rules of the society, "the entire sum of money" secured by the deed should become immediately payable, and the mortgagor's covenant (in cl. 4 (a)) was to the same effect. A person was a party to the deed as surety, and by a proviso to the surety's covenant (cl. 5), the liability of the surety was to cease if "the amount owing . . . in respect of the advance" was reduced below the sum of £700. In an action by

the building society against the surety for payment of the amount due under the mortgage deed and unpaid by the mortgagor, the amount claimed included money owing for bonus, interest and fines, but of the actual advance of £775, less than £700 was still owing. The surety contended that his liability had already ceased before the action was brought because the words "the amount owing . . . in respect of the advance" in the proviso discharging him from liability referred solely to the £775 advance to the mortgagor and did not include the bonus, interest and fines :—

HELD : on the true construction of the mortgage deed, the words "the amount owing . . . in respect of the advance" in the proviso to the surety's covenant meant the balance of the advance still remaining unpaid (*i.e.*, the amount still due in respect of the £775), and not the entire sum due under the deed, nor even the balance of the principal *plus* such other moneys as could properly be said to be payable in respect of the advance (*e.g.*, the bonus and interest). In any case, if there were an ambiguity in the meaning of the words, on the principle of *contra proferentes* the ambiguity must be resolved in favour of the surety, since the deed was prepared by the society, and the surety was, therefore, discharged from liability.

Decision of HILBERY, J., ([1947] 1 All E.R. 500) affirmed.

[AS TO EXTENT OF SURETY'S LIABILITY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 59-63, paras. 52-55, and pp. 71-73, paras. 62, 63 ; and FOR CASES, see DIGEST, Vol. 26, pp. 79-81, Nos. 561-572.]

APPEAL by the plaintiffs from a judgment of HILBERY, J., dated Feb. 25, 1947, and reported [1947] 1 All E.R. 500, in an action by a building society against a surety for payment of an amount due under a mortgage deed and unpaid by the mortgagor. By a proviso to the surety's covenant, the surety was to be discharged from liability if the "amount owing in respect of the advance" was reduced below a certain amount. HILBERY, J. held that, on the true construction of the deed, the words did not include the entire amount due under the deed, but only the amount still due in respect of the capital sum advanced. The Court of Appeal now upheld his judgment. The facts and the relevant clauses of the mortgage deed appear in the judgment of LORD GODDARD, C.J.

Andrew Clark, K.C., and R. W. Goff for the building society.
Neville Gray, K.C., and Scott Cairns, K.C., for the surety.

LORD GODDARD, C.J. : The action out of which this appeal arises was brought by a building society, who are mortgagees of certain premises, against a surety joined in the deed on behalf of the mortgagor. The mortgage is dated Jan. 6, 1937, and it was made between the mortgagor, two men who were referred to as trustees of the Eastern Counties Permanent Benefit Building Society, which, although registered as a building society, at that time was not incorporated, and the surety. The building society has since been incorporated and it is agreed that the incorporated society are now the proper plaintiffs in the action.

The question that is raised is a short point of construction, the surety contending that, on the true construction of cl. 5 of the deed, he has been released from his surety. HILBERY, J., so held and entered judgment for him, and, in my opinion, the judge was plainly right in the conclusion to which he came. Few facts need be mentioned before one turns to the deed itself. Rule 14 of the building society provides :

Subscription shares shall be of the ultimate value of £100 each, and shall (subject to the provisions hereof) be realised by monthly payments of not less than 15s. per share.

It is also provided :

The directors shall have power to issue shares of the nominal value of £100 either fully paid up or realisable in such periods of years, or in consideration of such single or periodic payments or subscriptions, as they from time to time may determine.

Rule 22 provides :

Whenever the money in hand shall, in the opinion of the directors, be sufficient for the purpose, it shall be employed in making advances to members at such bonus as the directors may from time to time determine.

A provision follows for security by mortgage being given by the member who receives an advance. It seems that the shares referred to are notional shares and they would become of importance only if there was a liquidation and winding-up of the society. What, apparently, happens is that, when a person applies for an advance, the directors calculate how many shares of £100 each will be required. The amount required in this case was £775, and they gave $7\frac{3}{4}$ shares to the member. It is provided in the mortgage deed that the member must pay a bonus, which is really a premium, of £5 per share, so the amount in this case was an advance of £775 for which a premium of £38 15s. had to be paid for obtaining the loan. Credit is given for that premium. It is provided in the mortgage deed that the sums to be paid back to the society include principal and interest. Interest fines for late payment of interest, and fire insurance have also to be paid.

The point which arises is this. It is provided in the mortgage :

... whenever the amount owing to the society in respect of the advance hereby made shall be reduced below the sum of £700 then and in such case the liability of the surety his executors and administrators under the covenant hereinbefore contained shall absolutely cease and determine.

It is contended by the building society that the words, "in respect of" in the phrase "owing to the society in respect of the advance" cover not only the amount owing in respect of the actual advance, but also those other sums of money to which I have referred, and, more especially, the bonus, as being money which is paid in connection with the advance—in other words that the phrase, "whenever the amount owing to the society in respect of the advance hereby made shall be reduced below £700," is equivalent to saying: "Whenever the total amount which is owing to the society and is secured by this deed shall be reduced below the sum of £700 . . ."

The question we have to consider is whether the words "in respect of the advance" have the meaning for which the society contends, or whether they mean "in respect of the capital sum advanced," which is what the surety contends. I say at once that, if that clause stood by itself in this deed, independent of the matters which I am now about to consider, there would be a good deal of force in the argument of counsel for the building society. I think it could be said that the words "in respect of" could be read as meaning "in connection with," but when I turn to the deed I find that throughout it a sharp distinction is drawn between the capital sum which was advanced and the other matters which I have mentioned. If the society wishes to recover those sums of money, they should see that their mortgage deeds are put in such a form that there can be no question about it. Putting it at the highest in favour of the society, I think that the words could, perhaps, be construed in one way or the other, but, since this is a deed which the society itself prepared, the well-known doctrine of *contra proferentes* applies and the construction least favourable to the society must be applied.

The mortgage contains four recitals. The first is immaterial. The second provides :

(b) The mortgagor being a shareholder in the society hath by purchasing at a bonus at the rate of £5 per share become entitled to an advance from the funds thereof of seven shares and three quarters of another share of £100 per share amounting in all to £775 on his giving the security hereinafter contained.

There the advance to which the mortgagor has become entitled is £775, and she is entitled to that advance because she has agreed to pay a premium of £5 per share. The next recital is:

(c) It has been agreed that the said sum of £775 and the said bonus together with interest for the same or such part thereof as shall from time to time remain unpaid shall be repaid by monthly instalments of £7 0s. 10d. each [on certain dates until the whole of the £775 and the bonus and the interest shall be repaid.]

In that recital a clear distinction is drawn between the advance and the bonus and the interest. The advance is the capital sum, and nothing else. It is true that it is recited that an agreement has been made to repay all this money—in respect of the bonus and interest it would be more accurate to say "pay" this money because neither the bonus nor the interest have ever been lent or advanced and one cannot repay money unless that money has been paid to one.

Considering, however, the obvious intention of the clause, it seems to me that it means that the advance of £775 together with the bonus and interest, which are treated as separate things, shall be repaid or paid to the society by monthly instalments. The recitals go on :

(d) It has been further agreed that this deed shall contain the provisions in default of payment of any instalment interest or other moneys or any fines payable by the rules of the society now in force hereinafter contained.

A That recital deals with interest, other moneys, or any fines, but the advance is not mentioned.

In the operative part of the agreement, it is provided (by cl. 1) that, in consideration of the sum of £775 to the mortgagor now paid out of the funds of the society, the mortgagor demises the property by way of mortgage. Clause 2 provides :

B Provided always that if the mortgagor shall pay to the trustees all the instalments fines interest and other moneys payable by virtue of the hereinbefore recited agreements or the rules of the society at the times and in the manner thereby provided and shall observe and perform all the rules of the society now in force and the covenants herein contained [the trustees will re-convey.]

Clause 3 seems to be of considerable importance :

C Provided that in case the mortgagor shall neglect or refuse to pay any of the said instalments fines interest or other moneys payable by virtue of the aforesaid agreements or the rules of the society at the times and in manner aforesaid or shall fail to comply with the said rules or to observe the said covenants (of which neglect or refusal the production of the certificate of the manager for the time being of the society shall be conclusive evidence) then the entire sum of money which according to this deed and the rules of the society shall for the time being be secured by this deed shall be and become immediately payable . . .

D There is no question what this clause is dealing with. It is the entire sum of money, including the capital advanced and the other matters to which I have referred.

We then come to the mortgagor's covenants (cl. 4), and the first is :

E (a) That the mortgagor will during the continuance of this security punctually pay to the trustees all the aforesaid instalments fines interest and other moneys payable by virtue of the hereinbefore recited agreements at the times and in manner aforesaid and in default of the payment of any sum or sums so to be paid as aforesaid will immediately pay the entire sum of money which according to the said rules and this deed shall for the time being be secured by this deed together with interest thereon from the time of such default until payment at the rate of £6 per centum per annum.

F There, again, it is clear what is meant. The entire sum of money is to be immediately payable, and that would include the bonus, interest, and other matters. There is a provision for insurance, and the mortgagor undertakes to pay the insurance premium.

Clause 5 thus deals with the liability of the surety :

G And whereas it was a condition upon the making of the hereinbefore mentioned advance that the surety should enter into the covenant hereinafter contained Now in pursuance of such condition and in consideration of the premises the surety doth hereby covenant with the trustees that if the mortgagor shall neglect to make any of the several payments which ought to be made pursuant to any covenant on the part of the mortgagor hereinbefore contained or shall fail to comply with any of the regulations prescribed or to be prescribed by the rules of the said society or any of them in respect of the hereinbefore mentioned advance which on the part of the mortgagor ought to be complied with then and in such case the surety his executors or administrators will from time to time and at all times when thereunto required make the several payments and comply with the several rules and regulations . . . and in case the property hereby expressed to be assured shall be sold under the statutory power of sale will on demand pay any deficiency which may arise by reason of the proceeds of such sale being insufficient to liquidate the sums then due by virtue of this deed . . .

H Again there is no question what the parties mean. The deficiency referred to there is not a deficiency in respect of the sums advanced, but in respect of any moneys which become payable under the deed. There is a covenant by the surety to pay all loss occasioned by the default and a provision that his liability is not affected by reason of the society giving time to the mortgagor. Then come the words which we have to construe in this case :

Provided always that if and whenever the amount owing to the society in respect of the advance hereby made shall be reduced below the sum of £700 then and in such case the liability of the surety his executors and administrators under the covenant hereinbefore contained shall absolutely cease and determine.

It is admitted that, if the bonus is not to be taken into account in construing that clause, the amount has been reduced below £700 and the surety is not liable. I confess I cannot see how the words "in respect of the advance" in that proviso can be read in any different sense from that in which the same words are read in the earlier part of the clause. As I have already pointed out, once before in that clause is "the advance" mentioned and once the words "in respect of the hereinbefore mentioned advance," and each time it is clear that those words refer to the capital sum only. It seems to me to follow that, according to any sound principle of construction, each time the same words appear in the same clause they must be given the same construction, and, therefore, in my opinion, the judge was right in construing this in the way for which the surety contends, and, I think, his judgment should be upheld.

TUCKER, L.J. : I agree that this appeal fails. The words we have particularly to construe are the words of the proviso to cl. 5 :

Provided always that if and whenever the amount owing to the society in respect of the advance hereby made shall be reduced below the sum of £700 then and in such case the liability of the surety his executors and administrators under the covenant hereinbefore contained shall absolutely cease and determine.

It is said that the words "amount owing to the society in respect of the advance" are not suitable to describe the amount of the advance remaining unpaid for the time being. I disagree. I think that those words standing by themselves apart from the rest of the deed are quite apt to describe, and are synonymous with, the "amount of the advance remaining unpaid." I think that, if a solicitor was writing a letter to collect money, it would be most natural to describe a balance remaining unpaid of an advance as an "amount owing in respect of the advance." It is true that other words which make the matter beyond dispute might be used, but the words used here seem to me quite natural words to describe what the surety says they describe. It is clear that the words, in their context in this particular deed, cannot mean the entire sum due under the deed at any given time because of the wording (to which my Lord has already referred) in cl. 2, 3 and 4 of the deed where the draftsman uses very different language when he wants to describe the total sum due at any time under the deed. Take cl. 3. He says :

... then the entire sum of money which according to this deed and the rules of the society shall for the time being be secured by this deed shall be and become immediately payable ...

Similar language is used in the other clauses. Therefore, I think it becomes impossible for counsel for the society to argue that the words "amount owing to the society in respect of the advance" would be apt in this particular case to cover the total indebtedness under the deed. Indeed, he does not so argue, because he feels faced with the difficulty of the contrasting words in other clauses. Therefore, he says that, these words not being apt to describe the balance remaining unpaid of the money advanced, and as, in the circumstances of this deed, they may not refer to the total indebtedness, there is a half-way line, that is to say, there are certain sums such as interest, bonus and fines which are included in the words "in respect of," and those words, therefore, apply to something beyond the advance. One has, he says, to look at the whole circumstances of the case and the deed and see what those other sums are. I think that that is an unnatural and strained interpretation to put on the words. I think it would require a good deal of investigation and difficulty in interpretation to see exactly to what sums they could refer, if they are not to be taken as referring to the total indebtedness. The more natural meaning to give the words is that contended for by the surety, namely, that they simply refer to the balance of the advance remaining unpaid. However, it is not necessary to come to a final conclusion on that matter, because, if there is any reasonable ambiguity as between the two meanings, it is clear, as was stated very clearly by HILBERY, J., that the words must be construed most

favourably to the surety. Therefore, assuming ambiguity, I think that the surety should be given the benefit of any doubt and the judge came to a right conclusion when he held that the moneys owing in respect of the bonus were not moneys owing in respect of the advance. Counsel for the society concedes that, if he is wrong with regard to the bonus, he must be wrong with regard to the other moneys, such as fines, solicitors' costs and so forth, and, therefore, in my view, our decision with regard to the bonus disposes of this appeal.

A COHEN, L.J. : I agree. Counsel for the building society suggested that there were three possible constructions of the material words in the proviso to cl. 5. He said that the words "the amount owing to the society in respect of the advance hereby made" might mean one of three things. First, it might mean the unpaid balance of the principal sum of £775; secondly, it might mean the unpaid balance of the amount owing on the security of the deed; B and, thirdly, it might mean the unpaid balance of the principal *plus* such other moneys as could properly be said to be payable in respect of the advance. He admitted that, having regard to the provisions in cl. 2, 3 and 4, and, indeed, in cl. 5 itself, as regards the total sum secured by the deed, the second possible construction was excluded in the present case, but he invited us to take the view that, on the true construction of the deed, the third was the right C construction because, he said, the first alternative, namely, construing the words as meaning only the unpaid balance of the principal, was to give no meaning to the words "in respect of."

Speaking for myself, I agree with TUCKER, L.J., that the more natural meaning of those words without any context would be "the balance of the amount unpaid." He said they were words which might well have been used by a solicitor in a letter if he had wished to refer to the unpaid balance of the principal. Be that as it may, I think that, in the context of the deed as a whole, that *prima facie* meaning is rendered more probable by the other clauses, and I do not propose to go through them as they have been reviewed by my Brothers. I would also say that I agree with my Brothers that, if there is an ambiguity, on the principle of *contra proferentes* we are bound to resolve that ambiguity in favour of the surety.

E There is only one other matter which I wish to mention. Counsel for the building society said that, even if he was right on the bonus, it did not entitle him to succeed unless he was also right on the question of the fines. He said that, unless they were moneys which could properly be said to be payable in respect of the advance, the surety would still be entitled to relief because on June 22, 1940, without the fines the amount of the indebtedness would have fallen below £700. I find it difficult, speaking for myself, to reconcile F the admission which counsel for the society made as regards the solicitors' costs and the insurance premiums with his arguments on this question of fines. He said he had to exclude the solicitors' costs and the fire insurance premium because the right to them only arose by reason of default and not by reason of the advance. It seems to me that the fines also arose by reason of default. True it is that the default in this case may be default in the payment of a sum (an instalment) which was payable in respect of the advance, but, none the G less, it does not seem to me that fines themselves are in any sense of the word properly payable in respect of the advance. For these reasons also if it was necessary to decide the point, I should have agreed with my Brothers that the plaintiffs have failed to establish their case, and I agree that the appeal fails and should be dismissed.

H Solicitors: *Bell, Brodrick & Gray*, agents for *Turner, Martin & Symes*, Ipswich (for the building society); *Cooper, Bake, Fettes, Roche & Wade* (for the surety).

Appeal dismissed with costs.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

WHEELER v. EVANS.

[COURT OF APPEAL (Scott, Asquith and Evershed, L.JJ.), November 11, 1947.]

Landlord and Tenant—Rent restriction—Recovery of possession—Dwelling-house required by landlord for own occupation—"Greater hardship"—Future hardship—Possession postponed for 4 months—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, para. (h), proviso. A

Where a landlord claims possession of a dwelling-house for his own occupation under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) and sched. I, para. (h), the consideration of the question of hardship under the proviso to para. (h) must, to some extent, include the future as well as the present. To what extent the judge may consider the future must depend on the facts of the particular case. B

The question of comparative hardship must depend on what sort of order for possession is involved, and, where the order for possession is suspended for 4 months, the question for the judge is whether the tenant has satisfied the *onus* of proving that an order for possession in 4 months' time will cause to him greater hardship than will be caused to the landlord by not granting that order. It is not necessary for the judge to consider the question on the hypothesis that he is granting an order for immediate possession and then, having regard to the order which he intends granting, to consider proleptic evidence of what may happen in the further period. C

[AS TO POSSESSION REQUIRED BY LANDLORD FOR HIS OWN OCCUPATION, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 396; and FOR CASES, see DIGEST, Vol. 31, p. 580, Nos. 7233-7291, and Supplement.] D

APPEAL by the tenant from an order of His Honour JUDGE SIR GERALD HURST, K.C., made at Tonbridge County Court, and dated Jan. 30, 1947.

The landlord claimed possession of a house under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) and sched. I, para. (h). The house, which had a garage, was let on a monthly tenancy to a married man with no children, and the landlord, a commercial traveller, said that he required the garage for his car. The judge held that, if he made an order, not for immediate possession, but for possession after 4 months, the tenant would not be caused greater hardship than the landlord would suffer through not getting possession. The tenant appealed, but the Court of Appeal now dismissed his appeal. E

T. H. K. Berry for the tenant.

J. Lawrence for the landlord. F

SCOTT, L.J. [after reviewing the facts]: It is obvious that consideration of the question of hardship must, to some extent, include the future as well as the present. How far a judge may consider the future must depend on the facts of the particular case. There is no evidence here which could satisfy the court that the judge went wrong. It was contended by counsel for the tenant that the judge had no evidence before him from which he could assume that the balance of hardship in four months' time would be in favour of the landlord, but he has no material on which he can justify that submission. That being so, it is impossible for this court to interfere. It is the intention of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, that the county court judge should use his discretion, and in this case we cannot say that he has done so without evidence or that he has misdirected himself. The appeal must be dismissed with costs. G

ASQUITH, L.J. : I agree. The proviso in sched. I, para. (h), to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, bids the court pay regard to "all the circumstances of the case" and then to ask itself whether the tenant has established (for the burden is on him) that greater hardship would be caused by granting the order than by withholding it. The answer to that question must depend, it seems to me, in part on what sort of order for possession is involved. An order for immediate possession H

may cause greater hardship to the tenant than its refusal would to the landlord, but there may be circumstances in which, if the order were suspended for four months, it would cause less hardship to the tenant than its refusal would to the landlord. The question is whether there was any evidence on which the judge could find that an order for possession to operate after four months' grace would cause less hardship to the tenant than its refusal would to the landlord, or, to put the matter slightly more accurately, whether he could properly find that the tenant had not discharged the burden which was on him of showing that an order for possession to take effect, not immediately, but in four months' time, would cause greater hardship to the tenant. I think he could properly so find, and that his finding cannot be disturbed.

EVERSHED, L.J.: The question that the judge had to put to himself was: Had the tenant satisfied the *onus* of proving that an order for possession in four months' time would cause to him greater hardship than would be caused to the landlord by not granting that order? The judge answered that question negatively, and, in my judgment, there was evidence on which he could so find. It does not seem to me that it is necessary that the judge should consider the question of comparative hardship on the hypothesis that the order he is going to grant is an order for immediate possession, and then, having regard to the order which he contemplates granting, to consider proleptic evidence of what would happen within the further period. It seems to me that that is an unnecessary process and I think he was entitled to put the question that he did and, acting on the evidence before him, to answer it in the way that he did.

Appeal dismissed with costs.

Solicitors: *Seaton Taylor & Co.* (for the tenant); *J. D. Langton & Passmore*, agents for *Walker, Temple & Thomson*, Tonbridge (for the landlord).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

SMITH v. SMITH.

[COURT OF APPEAL (Tucker and Bucknill, L.JJ. and Pilcher, J.), October 27, 1947.]

Divorce—Nullity—Pregnancy before marriage by person other than husband—Discovery of existence of grounds for decree—Belief of husband—Matrimonial Causes Act, 1937 (c. 57), s. 7 (1) (d), proviso (iii).

By s. 7 (1) (d) and proviso (iii) of the Matrimonial Causes Act, 1937, a marriage is voidable on the ground that the wife was, at the time of the marriage, pregnant by some person other than the husband, provided that marital intercourse has not taken place since the discovery by the husband of the existence of the grounds for a decree.

Belief by the husband that at the time of the marriage the wife was pregnant by another man is not a condition precedent to the operation of the proviso. If the facts discovered by the husband are such that any reasonable person would draw the conclusion that at the relevant time the wife was pregnant by some person other than himself, and, nevertheless, with the knowledge of those facts, he has marital intercourse with the wife, he is barred from relief by the proviso.

[FOR THE MATRIMONIAL CAUSES ACT, 1937, s. 7 (1) (d), PROVISOR (iii), see HALSBURY'S STATUTES, Vol. 30, p. 340.]

APPEAL by the husband from an order of His Honour JUDGE FORBES, sitting as a commissioner in the Divorce Division of the High Court, dated Feb. 28, 1947, refusing a decree of nullity under the Matrimonial Causes Act, 1937, s. 7 (1) (d), on the ground that the husband had marital intercourse with the wife after he had discovered the existence of the grounds on which he relied for his decree, and was, therefore, barred from relief by proviso (iii) to that subsection. The Court of Appeal now affirmed the decision of the commissioner. The facts appear in the judgment of BUCKNILL, L.J.

Marshall, K.C., for the husband.

Laskey for the wife.

TUCKER, L.J.: I will ask **BUCKNILL, L.J.**, to deliver the first judgment in this case.

BUCKNILL, L.J.: This is an appeal from the judgment of His Honour **JUDGE FORBES** dismissing a petition by a husband on the ground of his wife's pregnancy before marriage. The material section is s. 7 of the Matrimonial Causes Act, 1937, and the material words in that section are these:

(1) In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground . . . (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner: Provided that, in the cases specified in paras. (b) (c) and (d) of this subsection, the court shall not grant a decree unless it is satisfied —(i) that the petitioner was at the time of the marriage ignorant of the facts alleged; (ii) that proceedings were instituted within a year from the date of the marriage; and (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

The parties were married on July 7, 1945, and they were then 26 years old. From Sept. 13, 1944, to July 7, 1945, the husband had been serving in His Majesty's forces in Europe. On July 16, 1945, the marriage having been duly consummated, the husband returned to Germany. In Sept., 1945, the husband received a letter from his wife telling him of her pregnancy. This was the first intimation that he had received, he was satisfied that he was the father, and expressed delight at the prospect. On Oct. 21, 1945, he came home and spent some time with his wife. On Jan. 13, 1946, he was demobilised and on Feb. 3, 1946, went to live with his wife. He learned then that the booking of the nursing home, for the birth of the child had been fixed for Mar. 24, 1946. On Feb. 7 his wife visited the clinic and then told her husband that all was going well. That night she started her labour and at 2.30 a.m. on Feb. 8 the child was born, *i.e.*, exactly seven months after the marriage. On Feb. 15 the husband saw his father and was shown an anonymous letter written to the husband's mother in which there was a statement that the child was a full-time child. The husband then went to see the midwife who had delivered the child and her evidence is of great importance. The husband stated that he went to find out whether the child was actually his, whether it was a full-time child, and the nurse, in answer to that question, said that it was a full-time child. The husband said that he still believed that the child was his. He enquired the weight of the child and was told that it weighed 8½ lbs. at birth. On Feb. 21 he went to consult the doctor who had not been present at the birth but who had been in charge of the pre-natal clinic. The doctor's evidence was that the husband was obviously very worried; that he told him the weight of the baby, 8½ lbs.; and that the husband asked him if it was possible for it to be a premature baby, to which he replied that it was rather unusual and advised the husband not to speak to the wife about it for a while until she had recovered from her confinement, and then to consult a solicitor. The husband had already had a consultation with his parents who had assured him that, if the child was a full-time child, it must have been conceived before the marriage. I am satisfied that the husband knew that, if the child was a full-time child, it had been conceived about nine months before its birth. In spite of that, the husband, instead of restraining himself until he had asked his wife whether the child was his, a question which he could have put quite well if he had waited for a few days, on Feb. 25 had intercourse with her. It was not until Mar. 7 that he put the question point-blank to his wife whether the baby was his, and the wife then confessed that it was not and told him that she had been seduced by a man in May, 1945, when she was intoxicated. On Mar. 9 the husband consulted his lawyer and started these proceedings.

Those being the material facts, the learned judge came to certain conclusions and the two important conclusions are these:

I do not find that he [the husband] was positively convinced of it because he was struggling against the belief. He was, as a young man in love with his wife may very well be, in a state of mind in which he would not believe it if he could possibly help it. Nevertheless, in my view, he had before him facts and opinions which made it abundantly clear to him that in all probability this was not his child. I say made it abundantly clear to him in this sense. There was proof, if he would give it its proper weight, even if he was, may be as a result of affection for the mother, may be as

counsel suggests, in a frame of mind which is in some respects admirable, in a frame of mind which was so loyal to his wife that he would not accept the truth if it was put before him and he could possibly avoid it.

The learned judge came to the conclusion that the case was caught by proviso (iii) in s. 7 (1), and that, although the wife was pregnant by another man at the date of the marriage, the husband had marital intercourse with his wife after he had discovered the existence of the ground on which he relied for his decree, and he, accordingly, dismissed the petition.

- A On behalf of the husband it has been argued that there was a finding by the learned judge that the husband was not positively convinced that his wife was pregnant by another man when he had intercourse with her on Feb. 25, and, as I understood the argument, counsel for the husband said that in this particular case it was essential that the husband should believe that his wife was pregnant in that way before the proviso came into operation. While thinking that such belief must play its part in considering whether the husband had discovered the existence of the grounds for a decree, I do not myself think it is a condition precedent for the operation of the proviso. It might very well be that the husband refused to believe in the teeth of overwhelming evidence. It is an old saying: "None so blind as those who won't see," and, if the belief in those circumstances is essential for the proviso to come into operation, I think a grave injustice would be done to the wife because one must take into account her position also. It may be that she was to blame in the first instance, but she must be allowed to say that, if the husband knew or ought to have known that she was pregnant at the time of the marriage, and, notwithstanding that, chose to have connection with her, she is entitled to relief under the proviso and to say that the husband is debarred from obtaining a decree of nullity. In my view, the learned judge was right in his finding that the facts laid before the husband would have made abundantly clear to any reasonable man that the child was not his. I think that that is the proper test when interpreting this proviso. One cannot read the mind of a man, one can only consider what inference a reasonable man would draw from the facts laid before him. In my view, the facts laid before the husband were such that any reasonable man would have drawn the conclusion that his wife was pregnant by some man other than himself, and, having those facts in his mind, he chose to have intercourse with his wife without asking her whether his suspicions were correct. Having done that, I think he has put himself outside the relief given by s. 7 (1), and the petition should be dismissed.

- TUCKER, L.J.: I agree. I have felt some doubt in the course of the arguments what our decision, which is of considerable importance, should be. In construing this sub-section, we have to bear in mind that the proviso applies, not only to petitions on the ground of the respondent's pregnancy by some other person at the time of the marriage, but also to petitions founded on allegations that the other spouse was, at the time of the marriage, of unsound mind or a mental defective within the meaning of the Mental Deficiency Acts, or was subject to recurrent fits of insanity or epilepsy, or was suffering from venereal disease in a communicable form. One has to take those provisions into account when one is considering whether or not the belief of the petitioner in the grounds discovered is an essential ingredient if he is to be barred from obtaining relief from the court in cases where he has had intercourse with the respondent after the discovery. I have come to the conclusion that belief is not essential in these cases, and that it would not be right to construe such a requirement into the words of the proviso. In the present case the husband, who had been serving overseas from September, 1944, till July 7th, 1945, when he had connection with his wife on Feb. 25, had discovered that the child had been born on Feb. 8, 1946; that it then weighed 8½ lbs.; and that it was a full-time child, which means that it was born nine months from the time of intercourse. In my opinion, if those facts were brought before a court of law with no contrary evidence or explanation and with no denial by the wife, they would be bound to lead the court to the conclusion that the wife was pregnant by some man other than the husband. Can it be said, when the husband knows those facts, that he has not discovered the existence of grounds for a decree because he is unwilling to draw the obvious inference from those facts? I think his belief is immaterial. Testing the effect of his discovery by the way

in which a court would react to the proof of those facts, I hope I am merely expressing what would be the reaction of a reasonable man to them. For those reasons, this appeal should be dismissed.

PILCHER, J. : I agree.

Appeal dismissed.

Solicitors : *Browne & Wells*, Northampton (for the husband) ; *Sharpe, Pritchard & Co.*, agents for *Porrett, Fawcett & Renwick*, Sheffield (for the wife).
[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

HASTING v. HASTING.

[COURT OF APPEAL (Tucker, Bucknill and Cohen, L.JJ.), October 13, 14, 1947.]

Husband and Wife—Maintenance—Application later than one month after final decree—Leave given by judge—Matters for consideration of judge dealing with merits of application—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (2)—Matrimonial Causes Rules, 1944, r. 44 (1).

On May 1, 1936, the wife obtained a decree *nisi* for divorce against her husband, that decree being made absolute on Nov. 9, 1936. From 1937 to 1946 the husband voluntarily made payments to the wife for her maintenance of sums which varied from time to time. On the cessation of the payments in 1946 the wife applied under the Matrimonial Causes Rules, 1944, r. 44 (1), for leave to file an application for maintenance under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2), more than one month after the date of the final decree and WALLINGTON, J., granted the application.

HELD : leave to apply having been granted, the judge of the Divorce Division who had to deal with the application on its merits could only decide whether, in all the circumstances of the case, he would exercise his discretion in favour of the wife, one of the matters which he would have to take into consideration being whether the delay of the wife in making the application had so prejudiced the husband as either to make it undesirable for the judge to exercise his discretion in the wife's favour or to affect the quantum of the maintenance.

Fisher v. Fisher, ([1942] 1 All E.R. 438) applied.

[AS TO PROVISION OF PERMANENT MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 785-787, paras. 1244, 1245 ; and FOR CASES, see DIGEST, Vol. 27, p. 510, Nos. 5481-5487.]

Cases referred to :

(1) *Fisher v. Fisher*, [1942] 1 All E.R. 438 ; [1942] P. 101 ; 111 L.J.P. 28 ; 168 L.T. 225 ; Digest Supp.

(2) *Scott v. Scott*, [1921] P. 107 ; 90 L.J.P. 171 ; 124 L.T. 619 ; 27 Digest 510, 5486.

APPEAL by the husband from order of JONES, J., dated June 11, 1947.

The husband and the wife were married in 1911. They separated in 1927, and the husband then paid the wife £25 a month and, later, £3 a month for a child of the marriage and his school fees. In 1935 the wife filed a petition for divorce in which she asked the court to exercise its discretion in her favour. The petition was undefended. In Nov., 1936, a decree absolute was made, the court having exercised its discretion in the wife's favour. In 1937 the husband paid her £3 a week, and thereafter, until Mar., 1946, he continuously made contribution to her maintenance. The amount was raised in 1939 to £4 a week, but in Sept., 1939, it was reduced to £3, and at a later stage to £2, a week and £8 a month. In Mar., 1946, it ceased altogether. There was evidence that the variations in the amounts had some relation to the earnings and the position for the time being of the wife. In the autumn of 1946, the wife applied under r. 44, sub-r. 1, of the Matrimonial Causes Rules, 1944, for leave to file an application for maintenance under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925.

By s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925 :

(1) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable, and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument, to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed. (2) In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under sub-s. 1 of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable . . .

By r. 44, sub-r. 1, of the Matrimonial Causes Rules, 1944 :

An application for maintenance, a secured provision, variation of marriage settlements, or settlement of a wife's property, in the case of proceedings for divorce, may be made by the petitioner at any time after the time for entering an appearance to the petition has expired and by a respondent spouse at any time after entering an appearance to the petition, but no application shall be made later than one month after final decree except by leave of a judge.

WALLINGTON, J., granted leave to apply, and the application came before the registrar who stated in his report that the lapse of time between the decree and the application deprived him of jurisdiction to entertain the latter. He said that he would have awarded 30s. a week maintenance if he had had jurisdiction. When the report came before JONES, J., he made an order for maintenance at 30s. a week. The husband now appealed. The Court of Appeal dismissed the appeal.

Beyfus, K.C., and *Moylan* for the husband.

Laskey for the wife.

TUCKER, L.J. : It is to be observed that the jurisdiction of the court under s. 190 (1), to make an order "on any decree." Questions have arisen from time to time as to what period of time must, or may, elapse so as to render it impossible for the court to say that it is making an order "on" the decree. As a great deal more than one month had elapsed from the making of the decree in the present case, it was necessary to obtain the leave of the judge before the application by the wife for maintenance could be made, and, accordingly, application was made to WALLINGTON, J. Under the rules, these applications are not *ex parte*, but are considered in the presence of both parties. WALLINGTON, J., having considered the affidavits filed by both sides, gave leave to make the application. The result of that, in my view, was that he decided that, in the circumstances of the particular case, the application could be considered as being made on the making of the decree, and thereafter it would be for the judge who had to deal with the application on its merits, after considering the report made by the registrar, to decide whether or not an order for maintenance should or should not be made.

The position of the court in connection with these matters was considered recently by the Court of Appeal in *Fisher v. Fisher* (1). The wife there obtained a decree *nisi* of divorce in Mar., 1934, which was made absolute in the following October. No application was made for permanent maintenance, but an order for alimony *pendente lite* had been made, and the husband continued to make payments at the same rate until May, 1940. He then fell into arrear, and no payment at all was made after May, 1941. Protracted negotiations for the settlement of property on the wife took place while the husband was making the payments to her, but they were never concluded. The wife applied 7½ years after the decree absolute for leave to file a petition for maintenance. HENN COLLINS, J., refused, but in the Court of Appeal it was held that in the circumstances the wife ought to be given leave to apply to the court for an order for permanent maintenance, GODDARD, L.J., *dubitante*. In discussing the position of the court under s. 190 of the Act of 1925 and r. 44 of the Rules of 1944, LORD GREENE, M.R., said ([1942] P. 103) :

The question whether or not, in the circumstances of this case, the court would have under s. 190, sub-s. 1, jurisdiction to order permanent maintenance is the principal matter which has been discussed before us. Before I examine that problem it must

be borne in mind that, if the court is minded to allow this appeal, all that it will be doing will be giving permission to the making of an application for permanent maintenance. It will not be dealing in any way with the merits of such an application, nor will it be tying the hands of the judge before whom the application comes. He will consider whether it is right and proper that any order should be made, and, if so, what that order should be. The husband, therefore, will have every opportunity of putting his case on the merits before the court.

LORD GREENE, M.R., went on to consider the circumstances of that case and came to the conclusion that the application was made within a reasonable time so as to enable the court to regard it as being made on the making of the decree. GODDARD, L.J., while not dissenting, expressed considerable doubt whether leave should have been granted, but he added ([1942] P. 107):

The fact that we are giving leave to make this application still leaves the judge before whom it comes an entirely free hand as to what order, if any, he makes on it. I will add no more, because I do not want to say anything which would indicate to him a view on a matter which is eminently one for his discretion.

In my view, the position after WALLINGTON, J., had made the order giving leave to make the application in the present case was exactly the same as in *Fisher v. Fisher* (1) after the judgment of the Court of Appeal, although in that case, no doubt, the court had considered the matter in much greater detail and had expressed their views on the circumstances which caused the delay in that case. The position was clarified by WALLINGTON, J.'s decision after it was for the judge of the Divorce Division who had to deal with the application on the registrar's report to decide whether or not, in all the circumstances of the case, he would exercise his discretion in favour of the wife. One of the matters which it would be open to him, and, in fact, would be his duty, to take into consideration would be the delay, because, notwithstanding that it had been decided that the delay was not such as to preclude the wife from making the application, none the less it might have prejudiced the husband, financially or otherwise, in such a way as either to make it undesirable to exercise the discretion in the wife's favour or to affect the *quantum* of the maintenance.

In my view, that is the proper approach to cases of this kind, and, having regard to the decision in *Fisher v. Fisher* (1), I do not think that the registrar did approach this matter in the right way. Having the parties before him, he heard their evidence, considered the affidavits, and evidently went into the matter very carefully. On the question of delay he said, at the beginning of his report:

The application for maintenance was not filed until ten years after the decree, i.e., on Nov. 21, 1946, and the wife relies on the decision in *Fisher v. Fisher* (1), in asking the court to regard this application as being "within a reasonable time of the decree."

Having discussed the facts and the financial position of the husband, he says:

This is an unhappy case in which I should have been glad if I had a completely unfettered discretion to ignore the ten years' delay and to make a small order of 30s. a week maintenance. Unfortunately, however, it is quite clearly laid down by the Court of Appeal that there is no such general discretion, but that the court can make an order only if it is able to say that in all the circumstances of the case the application is being made within a reasonable time after the decree absolute, and can, therefore, be deemed to be made "on the decree absolute" as the statute provides. Although the length of the delay is by no means the only consideration it has to be observed that so long a time as ten years after decree absolute has never yet been regarded as a reasonable time.

He compares *Scott v. Scott* (2) and *Fisher v. Fisher* (1), and continues:

In the present case the husband varied the amounts on several occasions, clearly indicating that they were voluntary payments and no amount had ever been fixed by order . . . The factors that finally decided the Lords Justices in *Fisher v. Fisher* (1), are not present in this case . . . Moreover, the Court of Appeal was careful to emphasise that even in *Fisher v. Fisher* (1) it was deciding only that it should be considered by the proper tribunal whether any order should be made and that the case should not be stopped *in limine* as automatically barred by the effluxion of time . . . I submit that this application cannot be held to be made within a reasonable time after the decree absolute and that the maintenance application should be dismissed.

The registrar, after considering *Fisher v. Fisher* (1) and *Scott v. Scott* (2), is clearly deciding there that he has no jurisdiction to entertain the matter because as a matter of law the application cannot be considered as having been made on the making of the decree. I think that he was wrong in taking that view. That matter had, in my opinion, been decided by WALLINGTON, J. It was for the registrar to consider, not whether as a matter of law a reasonable time had elapsed, but whether the delay was such that, in the exercise of his discretion, he ought either to refuse an order or to come to the conclusion that the delay might affect the *quantum* that he would otherwise have seen proper to order.

On appeal, JONES, J., held that the registrar had taken an erroneous view of the matter. He, therefore, varied the report, but adopted the suggestion that 30s. a week would be the proper figure on the merits if there were jurisdiction to make the order and if, in the exercise of its discretion, the court thought that an order ought to be made notwithstanding the delay. We have been supplied with a rough note taken by one of the counsel who appeared before JONES, J., on the hearing of the application, which at one time led me to think that the judge had approached the matter from a wrong angle. The note is very shortly as follows :

I feel WALLINGTON, J., had to consider whether the application was within a reasonable time. Bound by his order. Registrar no jurisdiction after that to re-decide the point and it is not open to me.

At one time I was inclined to think that that rough note indicated that JONES, J., had not applied his mind to the question whether or not the delay was a matter which should be taken into consideration before he exercised his discretion, for, after all, it was his discretion which was being exercised and the registrar had merely prepared material to enable him to exercise that discretion. On further consideration, however, I think it fairly clear that all that JONES, J., was doing was to reject the reasoning of the registrar on much the same grounds as those on which I have rejected it. There is nothing to indicate to me that JONES, J., did not properly apply his mind to the considerations which should present themselves to the judge who is considering these matters. He has rejected the registrar's view of absence of jurisdiction, he has had all the affidavits before him, including those before WALLINGTON, J., and he has decided on the facts to make an order of 30s. a week. Junior counsel for the husband stated that he submitted to JONES, J., that the registrar had come to the proper decision on that matter, and that, in any event, the matter of delay should have been taken into consideration by the judge so as to cause him to reject the application altogether. Apart from that, however, counsel said, he would not be disposed to quarrel with the figure of 30s. a week which had been provisionally suggested by the registrar. It has not been established to my satisfaction that JONES, J., in any way failed to exercise his discretion in a proper and judicial way, and, therefore, this appeal fails.

BUCKNILL, L.J. : I agree.

COHEN, L.J. : I agree. At the end of his argument counsel for the husband said that the application had to surmount two hurdles, first, the procedural hurdle under r. 44, and, secondly, the statutory hurdle under s. 190. He said that WALLINGTON, J., had, no doubt, successfully got the applicant over the first hurdle, but that it was still open to JONES, J., on the hearing of the wife's application, to reject it on the ground that he had no jurisdiction to make an order. I agree with my brethren in rejecting this argument, and the only point which I wish to make is that, even if it had been well-founded, I am by no means satisfied on the facts that the result would have been any different. Indeed, I think, bearing in mind the passage in the judgment of LORD GREENE, M.R., in *Fisher v. Fisher* (1) which was cited by TUCKER, L.J., that had it been open to us to treat the matter as not decided by WALLINGTON, J., we might still have come to the same conclusion. LORD GREENE, M.R., also said ([1942] P. 105) :

It may, of course, be said that the wife should have broken off negotiations and taken the step of applying to the court at a much earlier stage. It is

true that she might have done that, but I always feel that the court in domestic matters should be slow to take any course which would discourage the parties from negotiating and discussing matters in a friendly way, instead of rushing into litigation with one another. Even if they have been divorced, it is not desirable that they should always be having recourse to the courts if there is a reasonable chance of their being able to compose matters outside. That applies more particularly if there is, as there was in the present case, an infant child of the marriage.

In *Fisher v. Fisher* (1) the Court of Appeal came to the conclusion that there were facts which justified delay and left them free to find that the application was made within a reasonable time. Though the cases are not identical, I think that I might well have come to the same conclusion on the facts of this case as did the Court of Appeal in *Fisher v. Fisher* (1). For this reason, in addition to those given by my Lord, I agree that this appeal fails.

Appeal dismissed with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the husband); *Ramsden & Co.* (for the wife).

Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.

sed. C.A. [1948] 2 All E.R. 610.

JOBBS v. MIDDLESEX COUNTY COUNCIL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Croom-Johnson, JJ.), October 28, 29, November 10, 1947.]

Local Government — Superannuation — Amount of allowance — Area public assistance officer acting also as interim superintendent registrar of births and deaths — Inclusion of fees as registrar in calculation of average remuneration — Local Government Superannuation Act, 1937 (c. 68), s. 8 (2) (5); s. 40 (3).

From Apr. 30, 1938, to June 30, 1940, an area public assistance officer of a county council was also an interim superintendent registrar of births and deaths. He was a contributory employee in respect of his post as an area officer, and as such bound to contribute to, and entitled to participate in, the council's superannuation fund, and it was accepted that he was also a contributory employee of the council in respect of his office as interim superintendent registrar. On Nov. 2, 1943, he retired from the post of area officer and became entitled, under the Local Government Superannuation Act, 1937, to a superannuation allowance. He claimed that for the purpose of computing his average remuneration during the 5 years immediately preceding his retirement in 1943, on which computation the amount of the superannuation allowance depended, his remuneration in respect of his office as interim superintendent registrar should be taken into account.

HELD: the officer was an employee holding "under a local authority two . . . separate employments of such a nature that he could cease to hold one without ceasing to hold the other" and by s. 40 (3) of the Act of 1937 that Act was to be applied "as respects him in relation to each of those separate employments as if the other . . . were an employment held by him under another authority," and, therefore, his remuneration as interim superintendent registrar should not be included in the assessment of the allowance to which he became entitled on ceasing to be employed as area officer.

[FOR SS. 6, 8, 35 AND 40 OF THE LOCAL GOVERNMENT ACT, 1937, see HALSBURY'S STATUTES, Vol. 30, pp. 392, 394, 414 and 415-8.]

Case referred to:

(1) *Algar v. Middlesex County Council*, [1945] 2 All E.R. 243; 173 L.T. 143; 109 J.P. 213; Digest Supp.

SPECIAL CASE stated by the Minister of Health under s. 35 of the Local Government Superannuation Act, 1937.

The applicant, being dissatisfied with a decision of the Middlesex County Council that, in calculating the amount of the superannuation allowance payable to him under the Local Government Superannuation Act, 1937, on his ceasing to be employed by the council as area public assistance officer, no account could be taken of any fees received by him in respect of his office as interim superintendent registrar of births and deaths for the district of Willesden, referred

the matter to the Minister of Health who stated a Case. The Divisional Court confirmed the decision of the county council. The facts appear in the judgment of the court.

R. W. Goff for the applicant.

Harold Williams, K.C., and *J. R. Willis* for the council.

Cur. adv. vult.

A Nov. 10. **CROOM-JOHNSON, J.**, read the following judgment of the court. This is a Case stated by the Minister of Health for the opinion of the court under s. 35 of the Local Government Superannuation Act, 1937. Two questions are submitted. The first is whether, for the purpose of calculating under s. 8 (2) of that Act the amount of the superannuation allowance payable to the applicant on his ceasing to be employed by the Middlesex County Council as area officer, it is incumbent on the council to include in his average remuneration as defined by s. 8 (5) certain fees received by him as interim superintendent registrar of births and deaths in so far as such fees are remuneration as defined by s. 40 of the Act. If the answer to that question is in the negative, the second question does not arise.

The agreed facts as set out in the case are :

C (a) The applicant was, immediately before the coming into operation of the Local Government Act, 1929, (hereinafter called "the Act of 1929") employed by the Willesden Board of Guardians as their deputy clerk and as such officer he was required to make contributions for superannuation purposes under the Poor Law Officers' Superannuation Act, 1896, (hereinafter called "the Act of 1896"). (b) Under the operation of s. 119 of the Act of 1929 the applicant was on Apr. 1, 1930, transferred to and became an officer of the council. (c) The applicant exercised the option given to him by s. 124 of the Act of 1929 of remaining subject to the provisions of the Act of 1896. (d) The applicant was employed by the council from the date of his transfer to them as aforesaid until Mar. 31, 1935, as local public assistance officer. He was then notified by the council that he had been appointed area officer with additional duties of a general county nature as from Apr. 1, 1935, and he continued to be employed in that capacity until Nov. 2, 1943. On the last-mentioned date the applicant retired from his appointment as area officer, having attained the age of 60 years on the previous day, and has not since held any office or employment under the council. (e) In addition to his employment as deputy clerk under the Willesden Board of Guardians, and subsequently under the council first as local public assistance officer and subsequently as area officer, the applicant held the office of deputy superintendent registrar of births and deaths for the Willesden Registration District, to which he was appointed and in which he was paid by the superintendent registrar, from Jan. 1, 1914, to Apr. 30, 1938. In respect of that office, however, the applicant was not subject to the provisions of the Act of 1896, nor was he transferred to the service of the council under the Act of 1929. (f) On Apr. 30, 1938, the superintendent registrar of births and deaths for the Willesden Registration District died, whereupon the applicant became interim superintendent registrar of births and deaths for the said district by virtue of the provisions of the Births and Deaths Registration Act, 1874, s. 25, and was accordingly required by law to perform all the duties and to be subject to all the obligations, including the obligation to appoint a deputy, of a superintendent registrar of births and deaths. The applicant continued to hold that appointment, in which he was remunerated by fees, until June 30, 1940, when another person was appointed superintendent registrar of births and deaths. (g) On the applicant becoming interim superintendent registrar as aforesaid he submitted that he was a superintendent registrar within the definition of "officer" in the Act of 1896 and claimed that contributions should be made by him under that Act in respect of the fees received as interim superintendent registrar. The council, after consideration, having finally come to the conclusion that this contention was incorrect, notified the applicant accordingly and in these circumstances contributions which had been made by the applicant under the Act of 1896 in respect of his appointment as interim superintendent registrar were returned to him in May, 1939. (h) On Apr. 1, 1939, the Local Government Superannuation Act, 1937, came into operation and applied as from that date to the council. The Act of 1896 ceased to apply to the applicant by virtue of s. 32 of the Act of 1937, under ss. 3 (1) and 3 (2) (a) of which the applicant became a contributory employee of the council in respect of his office as area officer. The council did not regard the applicant as a contributory employee in respect of his appointment as interim superintendent registrar of births and deaths and contributions were accordingly not made by the applicant in respect of that appointment. In view, however, of the subsequent decision given by the court in June, 1945, in the case of *Algar v. Middlesex County Council* (1), the applicant should, as from Apr. 1, 1939, have been treated as a contributory employee under ss. 3 (1) and 3 (2) (d) of the Act of

1937 in respect of his said appointment. (i) On Nov. 2, 1943, the applicant, having attained the age of 60 years, ceased to be employed by the council as area officer, and the council thereupon proceeded to assess the amount of the superannuation allowance payable to him under the Act of 1937.

The applicant contended that the fees paid to him under s. 27 of the Act of 1874 in respect of services rendered as such interim superintendent registrar should be taken into account for the purpose of calculating his average remuneration. The council decided that they should not be taken into account and the applicant, being dissatisfied with their decision, referred the matter to the Minister of Health for his determination and requested him to state this Case. The matter falls to be decided under the terms of the Local Government Superannuation Act, 1937, under s. 1 of which the council were obliged to maintain a superannuation fund. The applicant was a contributory employee and as such entitled to participate in the fund and bound to contribute to it under s. 3 in respect of his office as an area officer, and must, we think, be treated as a contributory employee also in respect of his appointment as an interim superintendent registrar. On the applicant's attaining the age of 60 years and completing forty years' service and ceasing to be employed by the council (which he did on Nov. 2, 1943) he became entitled to receive a superannuation allowance payable out of the superannuation fund on the following scale, that is to say, in respect of every completed year of contributory service one sixtieth of his average remuneration: s. 8 (1) and (2). It was not disputed before us that the post or posts in which the applicant served the council might be material to the calculation of his length of service. Section 3 provides:

(3) A person who becomes a contributory employee under a local authority shall continue to be a contributory employee so long as he continues without any break of service in the employment of that authority, whether in the same post or in some other post.

The position with regard to the calculation of his average remuneration, it is suggested, is different. Average remuneration means the annual average of the remuneration received by the applicant in respect of service rendered during the five years immediately preceding the day on which he ceased to hold his employment, *i.e.*, five years preceding Nov. 2, 1943. The only question arising, therefore, is whether, in calculating that average, the applicant's remuneration by fees in respect of his office as interim superintendent registrar until June 30, 1940, must be included. He had paid superannuation contributions under an earlier Act in respect of some part of that remuneration, but those contributions were returned to him in May, 1939. If he had continued to pay such contributions up to the time when he ceased to be interim superintendent registrar, June 30, 1940, he would have been entitled upon such cesser to the return of such contributions with compound interest as provided by s. 10 (1).

As superintendent registrar the applicant is to be deemed to be an officer in the employment of the council; see s. 27 and definition of registration officer in s. 40 (1). Under s. 25 of the Registration of Births and Deaths Act, 1874, on the death of the superintendent registrar the applicant became interim superintendent registrar and had to act as superintendent registrar and had all the powers and had to perform all the duties and was subject to all the obligations of a superintendent registrar until another was appointed. It is apparent, therefore, that the applicant, during the period in dispute and up to June 30, 1940, notionally held two separate employments under the council of such a nature that he could cease (as, in fact, he did) to hold one without ceasing to hold the other. The Local Government Superannuation Act, 1937, s. 40 provides, however, that he is nevertheless to be regarded as if the other of each of those employments were held by him under another authority. It reads:

(3) Where an employee holds under a local authority two or more separate employments of such a nature that he can cease to hold one without ceasing to hold the other or others, the provisions of this Act shall, unless the context otherwise requires, apply as respects him in relation to each of those separate employments as if the other or others were an employment or employments held by him under another authority.

If there is any inconsistency between the provisions of that sub-section and those of s. 27 (1), although we do not think there is, then by the ordinary rule of construction of a statute we must give effect to the latter one.

Without more, it would appear, therefore, that, when assessing the applicant's compensation or superannuation as area officer under the council, the remuneration payable to him by fees in respect of his employment as interim superintendent registrar notionally by another employer ought not to be taken into account. It was argued, however, that, having regard to the definition of the word "service" in s. 40 (1), s. 40 (3) does not apply. Inasmuch as that definition says that the word "service" does not include service in any employment if the person in question has already become entitled in respect of that service in that employment to a superannuation allowance and because the applicant has not become so entitled in respect of his service as an interim superintendent registrar, then it follows that such service must be taken into account. Without expressing any opinion on the apparently forced construction suggested, we cannot think that, in any event, that argument or construction is sufficient to override the express language of s. 40 (3) or prevent its application. It seems to us that that sub-section is a complete answer on the facts and, in the circumstances of this case, to the applicant's claim. It was not suggested in argument that it made any difference that the applicant did not continue to pay contributions after May, 1939, in respect of his remuneration as interim superintendent registrar when he ought to have been allowed to do so, and that, therefore, there were no more contributions to be returned to him in June, 1940, under s. 10 (1). In our opinion, the answer to the first question submitted to the court is "No." The remaining question does not, therefore, arise.

Order accordingly.

Solicitors: *Foss, Bilbrough, Plaskitt & Co.* (for the applicant); *C. W. Radcliffe*, solicitor for Middlesex County Council (for the respondents).

[*Reported by F. A. AMES, Esq., Barrister-at-Law.*]

NELSON AND OTHERS v. LARHOLT.

[KING'S BENCH DIVISION (Denning, J.), November 19, 20, 1947.]

Trusts and Trustees—Constructive trust—Cheque fraudulently drawn by executor on executor's account—Recovery from payee—Cheque taken for value and in good faith—Constructive notice of want of authority.

The payee of certain cheques, fraudulently drawn by an executor on the executor's account, paid the executor cash for them without receiving an explanation which would satisfy a reasonable man,

HELD: he must be deemed to have notice of the executor's want of authority to draw the cheques and was liable to refund the amount thereof, although he had received the cheques for value and in good faith.

[AS TO ACQUISITION OF TRUST PROPERTY WITH NOTICE OF TRUST, see HALSBURY, Hailsham Edn., Vol. 33, pp. 189, 190, paras. 341, 342; and FOR CASES, see DIGEST, Vol. 43, pp. 708-711, Nos. 1474-1499.]

Case referred to:

(1) *Reckitt v. Barnett, Pembroke & Slater, Ltd.*, [1929] A.C. 176; 98 L.J.K.B. 136; 140 L.T. 208; Digest Supp.

ACTION to recover money paid by cheque out of an executor's account without authority. The defence was that the payee received the money in good faith and for value and without notice of the want of authority. **DENNING, J.**, held that the payee was liable because, on the facts, he should have known of the want of authority. The facts appear in the judgment.

Douglas Lowe for the plaintiffs.

P. Mc. O'Connor for the defendant.

DENNING, J.: This case concerns money belonging to the estate of the late William Burns, who died in June, 1942. By his will, he named two persons as executors and trustees. One of them, named Potts, who was in this country, proved the will and obtained a grant of administration. The other, Simon Burns, was absent in Australia and took no part at that stage, but power was reserved for him to come in later. Mr. Potts opened an executor's account with the

Midland Bank, and the moneys of the late William Burns were transferred to it. In 1942 and 1943 Mr. Potts drew a number of cheques on that account in favour of David Larholt, a bookmaker, the defendant. Mr. Potts signed them "G. A. Potts, Executor of William Burns, dec." The amounts totalled £135. Suspicious people might suggest that the cheques were for betting debts of Mr. Potts, but both Mr. Potts and the defendant assured me that they were not, but that the cheques were cashed by the defendant for Mr. Potts. The defendant handed the money to Mr. Potts in return for the cheques, but Mr. Potts could not remember what he did with it. I am satisfied that Mr. Potts was acting fraudulently. He did not draw the cheques or use the money for the estate. He used it for his own purposes. The defendant handed the cheques to his bank for collection and received the amounts out of the estate funds. In 1946 Mr. Simon Burns returned to this country, obtained a grant in his own favour, and discovered the fraud of Mr. Potts. Together with the beneficiaries, he now brings this action against the defendant to recover the proceeds of the cheques.

The relevant legal principles have been much developed in the last 35 years. A man's money is property which is protected by law. It may exist in various forms, such as coins, Treasury notes, cash at bank, cheques, or bills of exchange, but, whatever its form, it is protected according to one uniform principle. If it is taken from the rightful owner, or, indeed, from the beneficial owner, without his authority, he can recover the amount from any person into whose hands it can be traced unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority. Even if the one who received it acted in good faith, nevertheless, if he had notice—that is, if he knew or ought to have known of the want of authority—he must repay. All the cases in the books, such as cases of trustees or agents who drew cheques on the trust account or the principal's account for their private purposes, or cases of directors who paid the company's cheques into their own account, fall within this principle. The rightful owner can recover the amount from anyone who takes the cheque with notice, subject, of course, to the limitation that he cannot recover twice over. This principle has been evolved by the courts of law and equity side by side. In equity it took the form of an action to follow moneys impressed with an express trust or with a constructive trust owing to a fiduciary relationship. In law it took the form of an action for money had and received or damages for conversion of a cheque. It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires.

Applying the principle in this case, it is plain that the moneys of the estate were transferred by Mr. Potts without any authority into the hands of the defendant. Mr. Potts had clearly no authority to draw cheques on the bank account for his own purposes. The law will, therefore, compel the defendant to restore the moneys to the estate unless he can show that he received the moneys in good faith and for value and without notice of the want of authority. It is plain that he received them for value and counsel for the plaintiffs did not suggest that he did not receive them in good faith. Counsel for the defendant argued that proof of good faith and value was sufficient by itself to warrant judgment in favour of the defendant and there are observations in some of the cases to that effect, but counsel for the plaintiffs said that absence of notice was also necessary to free the defendant from liability and cited *Reckitt v. Barnett, Pembroke & Slater, Ltd.* (1). In my judgment, counsel for the plaintiffs is right. If the defendant had notice of the want of authority, he is liable, although he acted in good faith and for value.

As to notice, if the defendant knew or ought to have known of the want of authority, as, for instance, if the circumstances were such as to put a reasonable man on inquiry and he made none, or if he was put off by an answer that would not have satisfied a reasonable man, or, in other words, if he was negligent in not perceiving the want of authority, then he is taken to have

notice of it. I am satisfied that the defendant had notice of the want of authority. Each of the cheques on its face showed that it was drawn on the executor's account. Mr. Potts brought it to him out of office hours with a request to cash it. Why did not Mr. Potts, if he wanted cash, get it from the bank? It seems to me that any reasonable person would have been put on inquiry. The defendant admits as much, for he says he asked Mr. Potts about it and that Mr. Potts said that he wanted the money in connection with the trust. On one occasion Mr. Potts said that he was going to Scotland on estate business. No reasonable man would be satisfied with those answers. If Mr. Potts as executor wanted money legitimately for estate purposes, he could have got it from the bank that day or waited till the next morning. All that applies to the first cheque which the defendant cashed, and when it comes to cashing cheque after cheque, seven in all, and the last one a piece of paper with a 2d. stamp on it, the inference is irresistible that the defendant knew or ought to have known that Mr. Potts had no authority to do what he was doing. I hold, therefore, that the plaintiffs are entitled to recover the money from the defendant and I award judgment for the amount of £135 with costs.

Judgment for the plaintiffs with costs.

Solicitors: *C. Butcher & Simon Burns* (for the plaintiffs); *Stanley Jarrett & Co.* (for the defendant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

HOUSE PROPERTY AND INVESTMENT CO., LTD. v. BENARDOUT.

[KING'S BENCH DIVISION (Singleton, J.), November 11, 12, 1947.]

Emergency Legislation—Liabilities adjustment order—Order in favour of assignee of lease—Effect on liability for rent of original lessee—Liabilities (War-Time Adjustment) Act, 1941 (c. 24), s. 12 (1).

The defendant was the original lessee under a lease of certain premises for 21 years from Sept. 29, 1928, made by the predecessors in title of the plaintiffs. The defendant assigned the lease to J.B. who allowed the payment of rent to fall into arrear. The plaintiffs started an action against J.B. claiming the arrears, and J.B. counterclaimed in respect of an alleged breach of covenant by the plaintiffs. In 1945, however, J.B. applied to the county court for the adjustment of his affairs under the Liabilities (War-Time Adjustment) Act, 1941, and it was ordered by the county court judge that the lease be disclaimed, that J.B. should withdraw his counterclaim, and that the lessors should receive a proportion of the arrears of rent then outstanding. The plaintiffs now claimed the balance of the arrears from the defendant.

HELD: (i) the court was not satisfied that the effect of the order of the county court judge was equivalent to execution, and, therefore, no question of double execution at the instance of the plaintiffs arose.

(ii) in so far as the order represented a compromise of claims, the compromise was between the plaintiffs and J.B., and did not enure for the benefit of the defendant.

(iii) the order of the county court judge followed by payment by J.B. in compliance with the order, provided a discharge for J.B., but did not affect the position of the defendant who, consequently, remained liable under his covenant in the lease.

[AS TO LIABILITIES (WAR-TIME ADJUSTMENTS), see HALSBURY, Hailsham Edn., Supp., Vol. 2, paras. 583A-P.

FOR THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941, ss. 3, 4, 5, 6, 12, 17, 18 and 28, see HALSBURY'S STATUTES, Vol. 34, pp. 26-32, 38, 45-46 and 50-51, and BUTTERWORTH'S EMERGENCY SERVICE, Statutes, Supp., Vol. 29, pp. 21-30, 38-39, 49-50, 50-51 and 58-59.]

Cases referred to :

- (1) *Brett v. Cumberland*, (1619), 3 Cro. Jac. 521; 3 Bulst. 163; Godb. 276; Poph. 136; 1 Roll. Rep. 359; 2 Roll. Rep. 63; 79 E.R. 446; 31 Digest 409, 5552.
- (2) *Hardy v. Fothergill*, (1888), 13 App. Cas. 351; *Sub nom.*, *Morgan v. Hardy*, 35 W.R. 588 (C.A. only); 31 Digest 328-9, 4709.
- (3) *Smith (J.) & Sons (Norwood), Ltd. v. Goodman*, [1936] Ch. 216; 105 L.J.Ch. 70; 154 L.T. 113; [1934-5] B. & C.R. 283; Digest Supp.

ACTION for rent by lessors against the original lessee under the latter's covenant in the lease to pay rent. The lease had been assigned by the original lessee to an assignee who, under an order by a county court judge made under the Liabilities (War-Time Adjustment) Act, 1941, had been discharged from his liability for arrears of rent on payment of a proportion thereof. The court now held the original lessee liable to pay the balance of the arrears. The facts appear in the judgment.

Quass and Milmo for the plaintiffs.

P. M. O'Connor for the defendant.

SINGLETON, J.: The claim of the plaintiffs, House Property and Investment Co., Ltd., is under a lease dated Feb. 11, 1929, under which they were the lessors as successors in title to Matthews & Sons, Ltd., and the defendant, Joseph Benardout, was the lessee. The lease was for 21 years from Sept. 29, 1928, and was of premises consisting of part of the ground floor and basement of 183, Brompton Road, London. There is no question that, if the plaintiffs' claim in law is right, the amount which they should recover is £945 5s. 3d. The defendant was the original lessee and at or after the date of the lease he was in business in partnership with his brother, Jack Benardout, as a carpet dealer or merchant. The rent at first was £650 a year. After seven years it was to rise to £750 a year, but in 1936 there was a memorandum endorsed on the lease to this effect: "It is hereby agreed that the rent of £750 reserved by the within written lease shall as from Lady Day 1936 until Lady Day 1941 be reduced to £550 per annum and the covenants relating thereto shall be read and construed accordingly." Some time later the defendant, Joseph Benardout, assigned the lease to his brother, Jack Benardout, who thereafter paid the rent, but later it fell into arrear. In 1941, an action was commenced against Jack Benardout by the plaintiffs, who claimed £677 13s. 0d. rent for periods between June 24, 1939, and June 24, 1941, less certain amounts received on account. To that claim a defence and counterclaim was delivered on July 23, 1942. The defence virtually admitted that the rent was due, but Jack Benardout counterclaimed £2,444, alleging that the plaintiffs had broken a clause in the lease for quiet enjoyment. In October, 1942, a reply was delivered, but the matter hung fire until 1945, when Jack Benardout put forward a claim for consideration of his affairs under the Liabilities (War-Time Adjustment) Act, 1941. From the reports of the liabilities adjustment officer it appears that there had been another reduction in the rent to £275 from Dec. 25, 1939.

The order made by the county court judge on July 16, 1945, recites that a protection order had been made on July 25, 1944, under the Act, and recites the filing of the reports. In the third recital it is stated :

On July 16, 1945, upon further consideration of the said matter and upon hearing Mr. D. Freeman Coutts, the liabilities adjustment officer, Mr. Driver, solicitor for the debtor, and Mr. Politzer, solicitor for the House Property and Investment Co., Ltd., a creditor, and the debtor, and the court being of opinion that the debtor was in such a position that if he were required to pay his accrued debts and to meet as they fall due his future liabilities in respect of obligations already incurred he would not have sufficient resources to enable him to preserve his business or to make reasonable provision for the future maintenance of himself and his family and that it was practicable and proper to deal with the matter under pt. I of the Liabilities (War-Time Adjustment) Act, 1941, as amended by the Liabilities (War-Time Adjustment) Act, 1944, it is hereby ordered : (1) that the lease of premises No. 183, Brompton Road, S.W.3, in the county of London, dated Feb. 11, 1929, and made between Matthews & Sons, Ltd., of the one part, and Joseph Benardout, of the other part, be hereby disclaimed and that the lessor of the said premises be at liberty to lodge a further proof of any debt or damage due to the said disclaimer.

Clauses 2 to 5 of the order provide :

(2) That the rent of the premises No. 183, Brompton Road be reduced to £275 per annum from Sept. 29, 1939, to the date of this order. (3) That the debtor do pay to the registrar of this court the sum of £200 within 28 days from the date of this order and the further sum of £200 within two calendar months from the date of this order. (4) That the debtor do discontinue and withdraw his counterclaim in the action *House Property and Investment Co., Ltd. v. Jack Benardout*. (5) That out of the monies ordered to be paid into court by this order the registrar do pay : (a) court fees . . . at 2 per cent. on the amount distributed to creditors ; and (b) the balance in court after making the payment above referred to, to the creditors who have proved their claims *pro rata* in full and final discharge thereof.

Thereafter the debtor, Jack Benardout, paid the sum of £200 and after he had complied with the terms of that order a final discharge was given to him dated Feb. 26, 1946. The defendant in the present proceedings, the original lessee, was not present when the order of the county court judge was made. There are two letters to which I was referred, the first of which is dated Feb. 1, 1945, from the plaintiffs' solicitors to him, pointing out that rent was owing and that his brother had sought the protection of the Liabilities (War-Time Adjustment) Act, 1941,

. . . and it would seem, therefore, that our clients will have to make a claim against you. We do not know whether you would like to call and see them with a view to making some proposition in the matter, but this letter is to give you an opportunity of doing so if you wish before our clients consider the question of taking steps against you.

The reply, dated Mar. 6, 1945, from the defendant's solicitors indicated that they were aware of the position and proposed to take no action at that stage. The claim of the plaintiffs is for rent at the reduced rate of £275 a year. Against that, credit is given for the sums paid by Jack Benardout under the judge's order. Before the order of the county court judge was made, £333 14s. 0d. had been paid, and after the order £346 16s. 0d. was paid or treated as having been paid. That is the *pro rata* amount payable to the plaintiffs out of the £400 which Jack Benardout paid under the order. Giving credit for those amounts, the plaintiffs claim a balance of £945 5s. 3d.

The plaintiffs' case is that the lease was assigned by the defendant to his brother, Jack Benardout. The assignee has not paid all the rent, and they claim from the defendant the balance. To that claim the defendant submits, first, that the effect of the order made under the Act of 1941 by the county court judge is equivalent to the levying of execution. He contends that the plaintiffs voluntarily proved in those proceedings and that they could not have further satisfaction, or, as he puts it, a second execution, and he refers me to an old case as supporting that proposition, *Brett v. Cumberland* (1). He relies on the following words of that decision (3 Cro. Jac. 522) :

The second question, and the more difficult, was, whether the assignee of a reversion who hath accepted the rent from the assignee of the term, and so taken him for his tenant, shall charge the executor of the lessee for this breach of covenant made after the assignment of the term, and after the assignment of the reversion ?—This point depended long in question, and after much argument was at length resolved, that he was chargeable with the breach of this covenant, and that the assignee of the reversion should have the action, by the statute of 32 Hen. 8, c. 34 . . . and by the express words of the statute of 32 Hen. 8, c. 34, such remedy as the lessor might have had against the lessee, or his executors, such remedy the assignee shall have against them, it being a covenant *en fait*, which runs with the land. But otherwise it is of a covenant in land, which is only created by the law ; or of a rent, which is created by reason of a contract, and is by reason of the profits of the land, wherein none is longer chargeable with them, than the privy of the estate continue with them : and this covenant may charge the assignee who hath the estate, and the lessee and his executors who made the covenant, all at one and the self same time ; but execution shall only be against one of them : for if he sue an action against the one, and after against the other, as he well may do, if he take several executions, he who is last taken in execution shall have an *audita querela*. Wherefore it was adjudged for the plaintiff.

It is important to notice that the marginal note of that report does not mention "execution," but says "but he can have only one satisfaction." Counsel cited to me HALSBURY'S LAWS OF ENGLAND, 2nd ed., vol. 20, p. 364, where the case is cited as authority for the proposition that in such a case the lessor may sue either the lessee or the assignee or both at the same time, but he

can have only one satisfaction. The editor of *WOODFALL ON LANDLORD AND TENANT*, 24th ed., p. 844, states:

The lessor may at the same time sue the lessee upon his express covenant, and the assignee upon the privity of estate; but it has been said that he can have execution against one only.

The authority given for that is the same case, *Brett v. Cumberland* (1), in the year 1619. I prefer the way it is put in Halsbury. I am not satisfied that it is right to say, in circumstances of this kind, there can be only the one execution, but it is not really necessary, I think, to go further into that matter, because the first point taken by counsel for the defendant is dependent on the submission that the effect of the county court judge's order is equivalent to execution. I do not think that it should be so regarded.

The next submission by counsel was that in any event there was a compromise before the county court judge. He reminded me that there was a counterclaim for £2,444 and said that by the order the plaintiffs in this action were released from any liability on the counterclaim. He submitted that the order itself had made a compromise. It contained the words "counterclaim withdrawn." He argued that the plaintiffs could not get judgment for the rent claimed, because it was the subject-matter of the order of the county court. In reply to that argument, the plaintiffs submitted that there was no evidence of any compromise. I take the view that, having regard to the recitals and having regard to the terms of the order, one can read into the order itself the element of compromise, but, again, I do not think it is important for the decision of this case because the compromise, if compromise it was, was between the plaintiffs and Jack Benardout. Even if there was something which can properly be called a compromise at that stage, I do not see that it enures for the benefit of Joseph Benardout, the defendant in these proceedings. That point is established by the defendant.

The third answer put forward by the defendant was that the order of the county court judge, followed by payment under the order, discharged the debt finally, and, that having been done, the plaintiffs cannot now recover judgment against the defendant. I bear in mind that the order in the county court affected a debt owed by Jack Benardout. It did not directly affect the defendant in the present proceedings. Counsel has submitted that I ought to read into the order something which would affect the position of the defendant before me. I cannot see my way to do that. The Act of 1941 was an Act to provide for the arrangement or the adjustment and settlement of the affairs of persons financially affected by war circumstances. In his second report, the adjustment officer thought the brother, Jack Benardout, was affected by war circumstances and the result was that he got out of his liabilities for a comparatively small sum. Section 5 of the Act of 1941 deals with disclaimer of property and under that section the court put an end to this lease, certainly as regards the debtor. Section 6 gives other powers with regard to leases, and s. 12 provides:

(1) Where the debtor has paid, either in full or to such extent as the liabilities adjustment order may specify, the proved debts and any costs of the proceedings payable by him and has otherwise complied with the order, the court shall on his application make an order of discharge, and he shall thereupon, subject to the next following subsection, be released from all debts provable in the proceedings, except those from which a bankrupt would not, by virtue of s. 28 of the Bankruptcy Act, 1914, be released by an order of discharge under that Act, and the liabilities adjustment order and the protection order shall cease to have effect.

It was under s. 12 of the Act of 1941 that the final order of discharge was made. That was done after the debtor had provided the two sums of £200 and certain sums for costs which he had to pay under the earlier order of the county court. He then got a final order of discharge, and, in the words of the Act, he was thereupon released from all debts provable in the proceedings

... except those from which a bankrupt would not, by virtue of s. 28 of the Bankruptcy Act, 1914, be released by an order of discharge under that Act, and the liabilities adjustment order and the protection order shall cease to have effect.

The debtor got out of his difficulties in that respect. His brother is now sued. During the argument it seemed to me that a very difficult position might arise,

because it was put to me by counsel for the defendant that the defendant, who knew nothing about Jack Benardout and had not heard a word of what had occurred in the county court, was faced with this claim and normally he would have, if judgment was given against him, a claim against Jack Benardout in respect of any judgment obtained against him in the present action. I rather assumed from what counsel for the defendant said that the result of that would be that Jack Benardout would be liable to be sued again, but this morning counsel for the plaintiffs referred me to certain decisions under the Bankruptcy Act, 1914, and the Companies Act, 1929, which make it clear that that is not the position—*Hardy v. Fothergill* (2), and *James Smith & Sons (Norwood), Ltd. v. Goodman* (3). The debts provable in bankruptcy would have included a contingent liability of the debtor to his brother who might be liable, and, indeed, is sued in the present action as liable, for the rent not paid by Jack Benardout. If that is so—and I am satisfied it is—that contingent liability was a debt provable in bankruptcy and is one of the debts against which there has been an order of discharge under s. 12 of the Liabilities (War-Time Adjustment) Act, 1941. I should have thought that it would have been wholly wrong if it could have been said that Jack Benardout, apparently freed by the order of the county court, was now subject to another claim in respect of the same rent by his brother in the event of his brother being held liable in this action. That point, however, does not arise.

It is clear, too, that if Jack Benardout had become bankrupt and had paid, say, 5s. in the £ in respect of the rent over a period, the landlords would have had a right to sue the original lessee, the defendant in this case, in respect of the balance of rent. There has not been a bankruptcy, but there has been an order made under the Liabilities (War-Time Adjustment) Acts, 1941 and 1944. The effect, I think, is the same. Jack Benardout is discharged from his debt, but that has not affected the position of the original lessee who assigned the benefit of the lease to Jack Benardout, and I think that, consequently, the defendant is liable on his covenant in the lease for the balance of rent now owing.

My attention was drawn to s. 17 of the Act of 1941 as to provable debts and to s. 18 as to the effect of liabilities adjustment proceedings or a scheme of arrangement on persons liable jointly or as sureties. At one time both the learned counsel agreed that s. 18 did not affect this case, though at a later stage counsel for the defendant said he had rather changed his mind and thought it was sufficient to affect this rent and that to that extent it did apply as reducing the rent by the terms of the order to £275 a year. I do not think it matters for the purpose of this case. I have come to the conclusion that the plaintiffs are entitled to recover, but I wish to add that in any such case where there are proceedings of this kind before the county court under the Liabilities (War-Time Adjustment) Acts, 1941 and 1944, I think all parties concerned ought to be before the court so that there is no misunderstanding. I can well see, in circumstances of this kind, that the defendant feels that it is a little hard on him that, the plaintiffs having been before the county court and the county court judge having made an order on his brother, they should thereafter sue him. It would have been better if everyone had been before the county court judge. At the same time, it is right to say that the defendant was warned by letter of the position and that he did through his solicitors see the war-time liabilities adjustment officer.

Judgment for the plaintiffs.

Solicitors: *Henry Gover & Son* (for the plaintiffs); *Stooke-Vaughan, Webster, Webster & Co.* (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

WHITING v. MIDDLESEX COUNTY COUNCIL AND ANOTHER.

[KING'S BENCH DIVISION (Croom-Johnson, J.), November 12, 13, 1947.]

Highways—Obstruction—Air-raid shelter—Street lighting obscured—Lamp on shelter unlit—Liability of local authority.

A motor cyclist driving along a street at night collided with the corner of an air raid shelter and was killed. The shelter jutted 6 feet into the roadway and although the road was lighted, the shelter had been constructed so close to a street lamp that a shadow was thrown which obscured the projecting corner. The corner was fitted with a red lamp which was strongly protected from interference, but on the night of the accident it was extinguished. The defendants, who were responsible for the shelter, were aware that the lamp was frequently not alight owing to interference by unauthorised persons, but inspections were not satisfactorily carried out, despite the fact that several accidents had occurred in the same place.

HELD: the existence of normal street lighting did not absolve the defendants from their duty to ensure that the shelter was so illuminated or otherwise distinguished that it would not be a danger to users of the highway.

Dictum of LORD GREENE, M.R., in Fisher v. Ruislip-Northwood Urban District Council and Middlesex County Council, ([1945] 1 All E.R. 458) explained.

[AS TO INDICATING OBSTRUCTIONS ON THE HIGHWAY, see HALSBURY, Hailsham Ed., Vol. 16, pp. 323, 324, para. 436; and FOR CASES, see DIGEST, Vol. 26, pp. 392-395, Nos. 1187-1212.]

Cases referred to:

- (1) *Fisher v. Ruislip-Northwood Urban District Council & Middlesex County Council*, [1945] 2 All E.R. 458; [1945] K.B. 584; 115 L.J.K.B. 9; 173 L.T. 261; 110 J.P. 1.
- (2) *Laing v. Middlesex County Council & Wembley Corporation* (unrep. Feb. 3, 1947).

ACTION for damages under the Fatal Accidents Acts, 1846-1908, in respect of the death of the plaintiff's husband which occurred when, while riding a motor-cycle, he collided with an air-raid shelter constructed on the highway by the defendants, Middlesex County Council and Harrow Urban District Council. The roadway was lighted by street lamps in the usual way, but CROOM-JOHNSON, J., in whose judgment the facts appear, held that the defendants had not taken adequate precautions against accidents of the type which occurred, and were liable.

Beney, K.C., and Elder Jones for the plaintiff.

Harold Williams, K.C., and W. B. Harris for the defendants.

CROOM-JOHNSON, J.: On Jan. 9, 1946, shortly before six o'clock in the evening, Arthur Albert Frederick Whiting, aged 38, was riding his motor-cycle on a road known as Walton Avenue, South Harrow, in a northerly direction. There is no suggestion that he was riding in anything other than a normal fashion, but he came into collision with the corner of an air-raid shelter which had been erected and was maintained by the Harrow Urban District Council, as agents for the Middlesex County Council, and he was killed almost on the spot. His widow, having obtained letters of administration of his estate and effects, brings this action under the Fatal Accidents Acts on behalf of herself, who is 35 years of age, or thereabouts, and her two children, aged 11 years and 5 years.

The statement of claim alleges that this air-raid shelter was unlighted at the time of the accident, and bore no other device to give a warning to the public at night that it existed. At the moment of the collision a red light or lamp, at the corner of the shelter was, for some reason, extinguished. The case has turned, very largely, on an examination into the circumstances in which the light at the corner of this shelter was maintained, with the object of showing, if it could be shown (and, as far as I can see, there is no onus on the defendants), that the defendants did all that was reasonably necessary to give warning to the public of the presence on this highway of this obstruction. There was no

restriction on public lighting on the day that the accident happened. I have to consider whether the authorities which have enunciated the principles in relation to the duty of public authorities in connection with these air-raid shelters in the highway have any, and, if so, what application to the facts and circumstances of this case. This shelter was built partially on the footway, to the extent of about one foot, and it jutted out into the roadway for about another six feet. Its length was 24 feet, the width of the carriageway was about 24 feet, and the shelter had been constructed in close proximity to a street lamp which threw a shadow into the roadway. At the corner of the shelter there had been installed by the defendants, the responsible authorities, a tin structure for lighting purposes, occupying the space of a brick or so. That was protected from outside interference by a wire mesh grill, and inside there were arrangements carefully devised to ensure that, if anybody took that grill off, it would not be possible to remove the red glass which was inside covering the lamp without first removing two screws. The lamp was an ordinary electric bulb of the familiar type fitting into a socket with two pins to keep it in position. Anybody coming down the road would see this red light and would be effectively warned of the obstruction. Inside the shelter, and carefully protected, there was a switch-board. I have no doubt that, normally, this arrangement for lighting was satisfactory and proper, providing the local authority took reasonable steps to see that the lamps were kept in proper order, but I am satisfied from the evidence I have heard that the system of inspection—a misnomer—which existed with regard to this lighting was casual in the extreme. Apparently, this was one of four air-raid shelters where there was in the roadway a pool of darkness such as I have described, and it had attracted the attention of mischievous or evilly disposed persons on many occasions. If I am to believe the evidence called on behalf of the defendants, the lighting arrangements at this place had been destroyed over and over again. I was told of two other accidents which happened about this time by two people who were called before me, and whose evidence I accept. With people repeatedly destroying the carefully designed and otherwise efficacious lighting system and with accidents being reported to them, it is remarkable that the local authorities did nothing else but order the workpeople to go to the shelter and put the light back, with the result that in a very short time it was destroyed again. I cannot think that that was taking reasonable steps. It was equivalent to taking no steps at all and, without the smallest doubt or hesitation, I find that the defendants in substance did nothing to protect the public.

In the circumstances, what was the duty of the defendants? In *Fisher v. Ruislip-Northwood Urban District Council and Middlesex County Council* (1), the Court of Appeal laid down, once again, what was the duty of public authorities in respect of the safety of works executed under statutory powers. The only question which was really involved in that case was whether there was an obligation on the defendants to light street surface refuges similar to the one which is in question in this action. The present defendants accepted the position that the duty which arises in such circumstances is to take reasonable steps to prevent the obstruction, which, *ex hypothesi*, is on the highway, from becoming a danger to the public. In view of that, the only question that arises is whether it makes any difference to the obligation of the defendants that in *Fisher's* case (1) the accident occurred during the "blackout," whereas in the present case public lighting was unrestricted at the relevant time. The duty, as was pointed out in *Fisher's* case (1), is not a duty to light, although that is an obvious way of fulfilling the duty, and, it may be, the only possible effective precaution, but it is a duty to ensure that a warning is given so that there may be protection for the public. I will read a few lines from the judgment of LORD GREENE, M.R., ([1945] K.B. 593):

... some confusion has been introduced into the cases by treating the alleged duty as a duty to light the obstruction. This appears to me to be a misconception. Lighting in such a case is no doubt the obvious and simplest measure of precaution during the hours of darkness. But the duty, if it exists, is, as I see it, not a duty to light (unless that be, in the circumstances, the only possible effective precaution) but a duty to take reasonable steps to prevent the obstruction becoming a danger to the public. In a given case there may be other steps which can be taken which would be as effective as lighting, or which a jury might hold to be sufficient.

Accepting that as the rule, I have to decide whether it makes any and, if so, what difference that street lighting has been resumed.

A difficulty arises, having regard to an observation made by the MASTER OF THE ROLLS in *Fisher's* case (1) ([1945] K.B. 613) :

... the true view, in my opinion, is that the date of the erection of an obstruction and the purposes for which it is intended to be used are (apart from some special circumstances or some special language in the statute) both immaterial ; that the duty to take reasonable care to prevent danger to the public is present throughout : that so long as the streets are properly lit the duty is *ipso facto* performed : but that when the street lighting is suspended, either as the result of lighting restrictions, or (in cases where street lighting is optional) as the result of the local authority's decision to extinguish the street lamps, or as the result of a breakdown in the lighting system, it becomes the duty of the local authority to take such steps to safeguard the public by special danger lights or otherwise, as in the circumstances of the case are reasonably possible.

Except for the words "so long as the streets are properly lit the duty is *ipso facto* performed," it seems to me that that passage indicates that where, as here, the lighting is not suspended, but is repeatedly destroyed to the knowledge of the defendants, they cannot say : "We will put the lighting back and until such time as somebody comes along and destroys it again, we have performed our duty to the public." I had occasion to consider those words in that judgment in *Laing v. Middlesex County Council* (2), which I tried on Feb. 3, 1947, which was an action brought by a young man, who had been horribly mutilated as a result of a deficiency in lighting at a time when street lighting had been resumed. I then said :

I do not think that the Lord Justice, in using that expression "so long as the streets are properly lit the duty is *ipso facto* performed," meant to say that a local authority, if they light the streets properly, are entitled to put anything they like upon the highway ; and *Mr. Slade* [counsel for the Middlesex County Council] with his usual care and caution—when he came to argue the case for the defendants before me, I thought accepted that position.

I do not think that the MASTER OF THE ROLLS meant in the least that a mere lighting of street lamps released the defendants responsible for the maintenance of such a shelter as this from anything further being done or maintained by way of warning to the public. I think that those words have reference only to an ordinary case where the street lighting is so effective and so clear that anybody driving along the highway with due care and attention would find the shelter duly illuminated. I think the emphasis is on "properly lit." In my view, those words do not impel me to give any relief to these defendants where the public lighting has resulted in something almost like a trap in this place, and it seems to me that the duty to take reasonable care that this structure should not be a danger to the public persisted even after the public lights were restored. It is, perhaps, difficult to define the exact circumstances in which the presence of adequate and proper street lighting would relieve the defendants from responsibility. I suppose it would have to be considered in connection with whether the defendants were guilty of negligence in carrying out their duty and authority, and whether the plaintiff in a particular case was guilty of contributory negligence in not looking and seeing something which was properly lighted.

In those circumstances, without repeating all that I said in my judgment in *Laing's* case (2), I have come to the conclusion that these defendants are liable to compensate the plaintiff, on behalf of herself and her two children.

[HIS LORDSHIP then assessed the damages at £2,000 and £55 special damage, and apportioned it between the plaintiffs.]

Judgment for the plaintiff.

Solicitors : *Wood, Nash & Co.* (for the plaintiff) ; *C. W. Radcliffe* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

SOTHEYBY v. GRUNDY.

[KING'S BENCH DIVISION (Lynskey, J.), November 10, 1947.]

Landlord and Tenant—Repairs—Inherent defects—Improper and insecure foundations—Premises demolished as dangerous structure—Liability of lessee for expenses of demolition.

A lease of a newly erected house, made in 1861 for a period of 99 years, contained a covenant by the lessee to "repair uphold support maintain . . ." the premises "with all necessary reparations and amendments whatsoever." In 1944 the walls were bulged, fractured and overhanging, and the house was condemned by the London County Council as a dangerous structure under the London Building Acts and was demolished. The expenses incurred by the council were recovered from the landlord who sought to recover them from the tenant as damages for breach of the repairing covenant. The evidence showed that, contrary to the Metropolitan Building Act, 1855, which was then in force, the main walls of the house were built entirely without, or on defective, footings, that, having regard to the defective foundations and the made-up ground on which the house was built, there was every likelihood that what in fact happened would happen as a result of the settling of the foundations, and that the only way in which this could have been avoided would have been by underpinning, which would have meant shoring up the premises, the removal of existing foundations, stage by stage, and the substitution of a new foundation in the way of footings and concrete :—

HELD : the expenses were incurred because of the inherent nature of the defect in the premises, and, therefore, did not come within the terms of the repairing covenant, with the result that the landlord was not entitled to recover them from the tenant.

[AS TO EFFECT OF INHERENT DEFECTS IN PREMISES ON TENANT'S LIABILITY FOR REPAIRS, see HALSBURY, Hailsham Edn., Vol. 20, p. 209, para. 229; and FOR CASES, see DIGEST, Vol. 31, p. 329, Nos. 4712-4714.]

Cases referred to :

- (1) *Lister v. Lane and Nesham*, [1893] 2 Q.B. 212; 62 L.J.Q.B. 583; 69 L.T. 176; 57 J.P. 725; 31 Digest 328, 4700.
- (2) *Anstruther-Gough-Calthorpe v. McOscar*, [1924] 1 K.B. 716; 130 L.T. 691; sub nom., *Calthorpe v. McOscar*, 93 L.J.K.B. 273; 31 Digest 329, 4710.

ACTION by a landlord to recover from a tenant the amount paid by the landlord to the London County Council in respect of expenses incurred by them in the demolition of a house condemned as a dangerous structure under the London Building Acts. Judgment was given for the tenant on the ground that the expenses incurred did not come within the repairing covenant in the lease. The facts appear in the headnote.

Morle and R. M. Talbot for the landlord.

Heathcote-Williams for the tenant.

LYNSKEY, J., recited the facts, reviewed the evidence and continued : *Lister v. Lane and Nesham* (1), a decision of the Court of Appeal, is relied upon by the tenant, in particular, the judgment of LORD ESHER, M.R., wherein he says ([1893] 2 Q.B. 216) :

. . . if a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair.

That raises the question whether it can be said that this was a building which, by its own inherent nature would, in course of time, fall into a particular condition. I am sure that that is so, but the matter does not end there, because, in view of some of the other authorities to which I have been referred, particularly *Anstruther-Gough-Calthorpe v. McOscar* (2), it seems to me that it must be a question of degree in each case. It may be that the inherent nature of a building may result in its partial collapse. One can visualise the floor of a building collapsing, owing to defective joists having been put in. I do not think *Lister v. Lane* (1), would be applicable to such a case. In those circumstances, in my opinion, the damage would fall within the ambit of the

covenant to repair, but, as I say, it must be a question of degree in each particular case. I am told here by the two witnesses whose evidence I accept that the only way in which what happened could have been prevented would have been by underpinning. It is suggested that if 15 years ago, when bulging was noticed, the tenant had underpinned, he would have been able to prevent further deterioration taking place. I am told that that would have meant shoring up the premises, the removal of the existing foundations, such as they were, stage by stage, and the putting in of a new foundation in the way of footings and concrete to make the building safe. That, in my view, would, in effect, be asking the tenant to give the landlord something different in kind from that which had been demised. The premises demised here were premises with insecure foundations. What the tenant would have had to do would be to put in a new foundation which would alter the nature and extent of the property demised, turning a building which, as originally constructed, would not last more than some 80 odd years into a building that would last for probably another 100 years.

In my view, that does not come within the purview of the repairing covenant in question here. If the landlord desired to obtain such rights, he ought to have made it clear in the lease, so that the tenant would know that he was undertaking an obligation, not merely to repair, maintain and support the existing building demised, but also to make good original defects in the premises as erected. The expenses claimed were incurred because of the inherent nature of the defect in the premises and do not come within the terms of the covenant contained in the lease. The result is that there must be judgment for the defendant, with costs.

Judgment for defendant with costs.

Solicitors: *Wainwright & Pollock, O'Bryen-Taylor & Co.* (for the landlord); *R. Voss & Son* (for the tenant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

JAY'S THE JEWELLERS, LTD. v. INLAND REVENUE COMMISSIONERS.

INLAND REVENUE COMMISSIONERS v. JAY'S THE JEWELLERS, LTD.

[KING'S BENCH DIVISION (Atkinson, J.), October 31, Nov. 7, 1947.]

Revenue—Excess profits tax—Trade receipts—Period of account—Pawnbroker's undistributed surpluses—Pawnbrokers Act, 1872 (c. 93), ss. 16, 17, 18, 19, 21, 22, 24—Finance (No. 2) Act, 1939 (c. 109), s. 14 (1); sched. VII, para. 1.

The Pawnbrokers Act, 1872, ss. 16-19, 21, 22, and 24, requires a pawnbroker to hold a pledge for twelve months and seven days. If the pledged article has not been redeemed by then and the loan is under 10s., the pledge becomes the property of the pawnbroker who can sell it and keep the proceeds. If the loan exceeds 10s., the pawnbroker is entitled to sell the pledged article by auction, observing the requirements of sched. V of the Act, and to take the amount of the loan, and the interest due and the cost of the sale out of the amount realised. Subject to the terms of any special contract, which is permitted if the loan exceeds 40s., at any time within three years of the sale the pledgor has the right to inspect the pawnbroker's books and demand payment of the surplus. After three years the pledgor loses that right and the surplus becomes the property of the pawnbroker.

Special contracts entered into by pawnbrokers with pledgors in some cases incorporated the three years period, but in others the pledgor's rights to redeem were barred only by the ordinary period of limitation, six years.

HELD: for excess profits tax purposes the surpluses were trade receipts, not in the year in which they came into existence, but in the year in which they finally became the property of the pawnbrokers.

Morley v. Tattersall ([1938] 3 All E.R. 296), *applied*.

[AS TO PERIOD OF ACCOUNT TO WHICH TRADE RECEIPTS AND EXPENSES ARE REFERABLE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 118-120, paras. 223-225; and FOR CASES, see DIGEST Supp.]

Cases referred to :

- (1) *Morley v. Tattersall*, [1938] 3 All E.R. 296; 159 L.T. 197; 22 Tax Cas. 51; Digest Supp.
- (2) *British Mexican Petroleum Co., Ltd. v. Jackson, British Mexican Petroleum Co., Ltd. v. Inland Revenue Comrs.*, (1932) 16 Tax Cas. 570; Digest Supp.

A

CASE STATED by the Special Commissioners of Income Tax.

The commissioners held that undistributed surpluses held by the taxpayers, a firm of pawnbrokers, were not trade receipts in the year in which they came into existence, but were trade receipts only on the failure of the pledgor to demand payment within the prescribed time limit, at the expiration of which period they became the property of the taxpayers. The Crown appealed against the first finding and the taxpayers against the second. The appeals were dismissed. The facts appear in the judgment.

B

The Solicitor-General (Sir Frank Soskice, K.C.) and Reginald P. Hills for the Crown.

Graham-Dixon for the taxpayers.

Cur. adv. vult.

C

ATKINSON, J. : This appeal raises the question whether certain gains made by a firm of pawnbrokers were profits assessable to excess profits tax. The Pawnbrokers Act, 1872, requires a pawnbroker to hold a pledge for twelve months and seven days. If it has not been redeemed by then, the position depends on the amount of the loan. If the loan was 10s. or less, the pledged article becomes the property of the pawnbroker, who can sell it when he likes and keep the proceeds. If the loan exceeded 10s., he is entitled to sell, observing

D

the requirements of sched. V to the Act, but the proceeds of sale are not his property. He is entitled to take the amount of the loan and the interest due and the costs of the sale out of the amount realised, but the balance belongs to his debtor. Subject to the terms of any special contract—and a special contract is permitted where the loan exceeds 40s.—at any time within three years of the sale the debtor has a right to inspect the pawnbroker's books and demand payment of the surplus. After three years he loses that right and the money becomes the property of the pawnbroker.

E

In this case there are special contracts for loans of over 40s., by the terms of which, if the loans are of an amount between 40s. and £10, the three-years period is retained, but for loans over £10 the three-years period is not incorporated and the borrower's right to recover any surplus is not barred for six years, the ordinary period of limitation, after which he loses his right of action. There are, therefore, two cases to be considered, one where the loan is over 10s. and the three-years period for claiming applies, and the second where the three-years period does not apply and the pledgor's rights are not barred for six years. For various reasons, in practice, the greater part of the surpluses is never demanded, and ultimately it becomes the property of the pawnbroker.

F

The question is : Are these surpluses receipts in the pawnbroker's trade and are they assessable profits, and, if so, when ? The Crown claims that they are ordinary trade receipts at the time of the sale and as such become forthwith assessable profits, and that any payment out of those surpluses during the following years would be an ordinary trade expense allowed in the ordinary way. Alternatively, they say they must be assessed as in the year of receipt, subject to an allowance of such a sum as represents the probable amount which the pawnbroker will be called on to pay. In the further alternative, they say that at any rate at the end of the three years and at the end of the six years

G

any unreturned surplus must be deemed to be a trade receipt of the pawnbroker. It is common ground that proceeds of the sale of pledges under 10s. are trade profits in the year of receipt, and nothing turns on that. The Special Commissioners rejected the contention that these surpluses are receipts in the year in which they are received, but they have taken the view that they are receipts at the end of the three years or the six years and that any undistributed surpluses must be brought into the profit and loss account as a taxable trade receipt on those dates. The Crown appeals against the first finding and the taxpayers appeal against the latter finding.

H

The taxpayers, in their trading accounts, dealt with surpluses thus. They entered them in the profit and loss account as receipts, with the words: "Profits of sale of pledged goods," and on the other side of the account they debited themselves with a sum roughly amounting to two-fifths of the surplus, with the words "Reserve for return of profit on sale of pledged goods." This gave effect to their experience that about three-fifths of sale surpluses went unclaimed and in time would become their own. In fact, the profit made in this way was expected to be the most valuable part of their business, judging by the trading accounts for the year in question, the year ending Mar., 1943. They had two shops, one in Essex Road and one in Charlotte Street. As to the Essex Road shop, the receipts by way of interest amounted to £874, and the item "Profit on sale of pledged goods" was £1,332. Against that they created a reserve of £500 for return of profit on sale. For Charlotte Street the receipts by way of interest amounted to £1,171 and the "Profit on sale of pledged goods" amounted to £4,410. Against which there was a reserve of £1,700. Formerly the taxpayers ran no risks in keeping their accounts in that way. They had a substantial sum to the credit of profit and loss account in their balance sheet, and, if they were called on to pay in the following years more than the reserve created, the excess would be treated as an outgoing and so reduce the profit for the year in question. When, however, the excess profits tax was introduced the position was changed. If the difference between the amount of the reserve and the surpluses was treated as profit and was paid away as excess profits and the reserve allowed turned out to be insufficient, there would a loss which could not easily, if at all, be recovered. Therefore, the taxpayers claim that in the account as between themselves and the Revenue they are entitled to leave these surpluses out of their trading account altogether, or, if they have to include them as receipts, to debit the account on the other side with an equivalent sum as representing their indebtedness to their customers. There is no doubt but that these surpluses are debts owing to customers, and that for three years or six years the taxpayers could be called on to pay.

I cannot see any principle on which the Crown can claim that surpluses are trade receipts in the year in which they come into existence. The position can be tested thus. As LORD GREENE, M.R., said in *Morley v. Tattersall* (1) ([1938] 3 All E.R. 304): "One must look at each sum received as it comes in." Supposing there was only one sale, which produced a surplus of £x., can the Crown say: "You must treat that as your own money as a trade receipt augmenting your taxable profit?" Surely the taxpayers could say: "But it is not ours, we owe that money to our client. He may come for it at any date." Can the Crown retort: "Well, you must value the chance of being called on to pay. Experience shows that it is a three-to-two chance against the payment being demanded." The Revenue claim that three-fifths of that sum is excess profit. It is well established that, if book debts are fairly valued in an account and written down in an accounting year because of a doubt whether they will be paid, the fact that they ultimately turn out to be good does not entitle the Crown to have the account re-opened, and the same principle has been established with regard to a debt owing by the accounting party. The *British Mexican Petroleum Co., Ltd.* case (2) established that. I will refer to one passage in the judgment of LORD GREENE, M.R., in *Tattersall's* case (1) ([1938] 3 All E.R. 303):

It has been settled by authority which binds us that, where a liability which has properly entered into accounts in a previous year is released by the creditor in a subsequent year, that does not justify either re-opening the accounts for the previous year or treating that release as creating a trading receipt in the year in which it took place.

It is said by the taxpayers that the same principle must apply to a debt which is extinguished not by release but by laches, and I think very likely it may be so. It would seem to follow from these two principles that, if the taxpayer has been allowed and accepted a debit of, say, two-fifths of these surpluses, and is subsequently called on to pay more than the two-fifths, it is difficult to see how he can get the account re-opened. If there were no such thing as excess profits tax, doubtless it would work out fairly enough in the end, but a payment of excess profits tax would put the trader in a very difficult position if his liabilities had been underestimated.

A The answer to the Crown's appeal, in my opinion, is that these surpluses are not trading receipts in the year in which they are received. I think the case is completely governed on this point by *Tattersall's* case (1). There, Tattersalls, acting as auctioneers, sold horses for clients and received the proceeds of the sales. In practice a large proportion of such receipts are never demanded by the owners of the horses sold. One of the conditions on which Tattersalls acted as auctioneers was that no money became due to a client until it was demanded, and, therefore, the Statute of Limitations did not run. After a time Tattersalls treated these sums in their books as their own property, and the Revenue sought to have these sums included in the taxable profits. That was resisted successfully. In that case LORD GREENE, M.R., said (*ibid.*, 301) :

B The Crown put forward two arguments. The Solicitor-General put forward one argument and adumbrated another. *Mr. Hills* would have none of the Solicitor-General's argument, and developed at considerable length the argument which the Solicitor-General had only adumbrated. Both arguments proceeded on the footing that it was impossible to say that the sums when received were trading receipts. That was subject to a qualification, I think, in the Solicitor-General's argument, as will appear when I come to describe it. It might be more convenient to deal with *Mr. Hills's* argument first, because that is the one which starts off with the perfectly clear admission that the money, when received from the purchasers, was not a trading receipt. That proposition, I should have thought was, in any case, quite incontestable. The money received was money which had not got any profit-making quality about it. It was money which, in a business sense, was the client's money, and nobody else's. It was money for which Messrs. Tattersall were liable to account to the clients, and the fact that Messrs. Tattersall paid it into their own account, as they clearly did, and the fact that it remained among their assets until paid out, do not alter that circumstance. It would have been for income tax purposes, in my judgment, entirely improper to have brought those receipts into the account at all for the purpose of ascertaining the balance of profits and gains. Indeed, as I have said, D the Crown did not suggest that that would have been proper.

That, and the observations following, seem completely applicable to this case. As a matter of law, these monies when received were not the taxpayers' monies at all ; they belonged to their clients, and if a client came in the next day and demanded his money they would have to pay it away.

E In my opinion, the commissioners were right in holding that these sums could not be deemed to be trade receipts of the year in which they were received. Therefore the Crown's appeal fails.

F Then comes the more difficult question : Can a surplus be treated as a trade receipt of the year in which, it not having been claimed by the pledgor, the pawnbroker becomes entitled to retain it as his own ? The taxpayers' argument is this. Either it is a trading receipt or it is not at the time of receipt. If it is not a trade receipt, nothing that could happen afterwards could make it a trade receipt. They rely on what LORD GREENE, M.R., said (*ibid.*) :

G I invited *Mr. Hills* to point to any authority which in any way supported the proposition that a receipt which at the time of its receipt was not a trading receipt could by some subsequent operation *ex post facto* be turned into a trading receipt—not, be it observed, as at the date of receipt, but as at the date of the subsequent operation. It seems to me, with all respect to that argument, that it is based on a complete misapprehension of what is meant by a trading receipt in income tax law. H No case has been cited to us in which anything like that proposition appears. It seems to me that the quality and nature of a receipt for income tax purposes is fixed once and for all when it is received. What the partners did in this case, as I have said, was to decide among themselves that what they had previously regarded as a liability of the firm they would not, for practical reasons, regard as a liability. That does not mean, however, that at that moment they received something, nor does it mean that at that moment they imprinted on some existing asset a quality different from that which it had possessed before.

Alternatively, they say that, if the surpluses are trade receipts, the position is that, as between themselves and the Revenue, if bound to treat them as trade receipts for the year in which the monies are received, they would be entitled to set off against each receipt an equivalent indebtedness on the other side which would mean that there would be no profit in the year of receipt, and if that liability be extinguished in whole or in part by voluntary release of the customer's claim, the extent to which the debts were forgiven cannot become a credit item in the trading account for the period in which the concession is

made. That is made clear in LORD MACMILLAN's opinion in the *British Mexican Petroleum Co., Ltd.* case (2). They say that, if that is true of a release, the same result must follow if the liability is extinguished by the laches of their creditors. They say, in short, that, if these sums are trade receipts, all that follows is the elimination from the liabilities side of the balance sheet of something which previously appeared as a liability. I have already held that these sums cannot be regarded as trade receipts, and, if that be right, it follows that it is unsound to regard all that follows as merely the elimination from the liabilities side of the balance sheet of a liability to clients. The true accountancy view would, I think, demand that these sums should be treated as paid into a suspense account, and should so appear in the balance sheet. The surpluses should not be brought into the annual trading account as a receipt at the time they are received. Only time will show what their ultimate fate and character will be. After three years that fate is such, as to one class of surplus, that in so far as the suspense account has not been reduced by payments to clients, that part of it which is remaining becomes by operation of law a receipt of the company and ought to be transferred from the suspense account and appear in the profit and loss account for that year as a receipt and profit. That is what it in fact is. In that year the taxpayers become the richer by the amount which automatically becomes theirs, and that asset arises out of an ordinary trade transaction. It seems to me to be the common-sense way of dealing with these matters, and it is the way in which the Special Commissioners have dealt with them.

It is, however, argued that I cannot give effect to that view because of *Tattersall's* case (1). Is there anything in *Tattersall's* case (1) to indicate that that view is wrong? In that case there had been no change whatever in the character and nature of the money held. The Statute of Limitations had not commenced to run, and the court was dealing merely with the effect of a change in the method in which these sums were dealt with in the company's books. LORD GREENE, M.R., said (*ibid.*, 302):

What the partners did in this case, as I have said, was to decide among themselves that what they had previously regarded as a liability of the firm they would not, for practical reasons, regard as a liability. That does not mean, however, that at that moment they received something, nor does it mean that at that moment they imprinted on some existing asset a quality different from that which it had possessed before. There was no existing asset at all at that time. All that they did, as I have already pointed out, was to write down a liability item in their balance sheet, and how by effecting that operation it can be said that a sum received years ago has been converted into something which it never was is a thing which, with all respect, passes my comprehension.

Here the position is different. Here, at the end of three years, the money in question, the three-year-old surplus, did attain a totally different quality. I think there was then a definite trade receipt. At the end of the three years a new asset came into existence, an asset which had arisen out of a trade transaction. Dealing with the argument that the quality of the transaction was changed, LORD GREENE, M.R., said this (*ibid.*, 303):

It was essential for the argument, of course, to discover some act of receipt within the income tax year for which the assessment was made, and, to get an act of receipt, the metaphorical expressions, such as I have described, were used,—the holding in a new capacity of something which the partners had previously held in a different capacity, the turning into a trading asset of something which had previously not been a trading asset, and things of that kind, which, if they accurately represented the facts, might form some basis for an argument that, at the moment when they took place, a receipt had taken place.

I have here exactly what the MASTER OF THE ROLLS was there suggesting. If "things of that kind" represented the facts, the position might well be different. Things of that kind did here represent the facts. There, no asset was created. A mere change in the method of book-keeping created no asset. In this case a new asset was created automatically by operation of law at the end of the three years, and common sense would seem to demand that that should be entered in the profit and loss account for the year and be treated as taxable. In my judgment, there are grounds to justify the view taken by the Special Commissioners.

The position is somewhat different as to pledges for over £10, because the only change which takes place at the end of six years is that the customer's remedy is barred, but, from the business point of view, I think, it ought to be treated as the same. In practice those amounts would be properly dealt with by the taxpayers as their own. They could not get into difficulties by so doing. They cannot be called on to pay. I do not think any distinction ought to be drawn between the three-yearly surpluses and the six-yearly surpluses, and I am not prepared to differ from the view held by the Special Commissioners. Therefore, both appeals will fail.

Appeals dismissed.

Solicitors : *Solicitor of Inland Revenue* (for the Crown) ; *Norton, Rose, Greenwell & Co.* (for the taxpayers).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

JELIC v. CO-OPERATIVE PRESS, LTD.

[COURT OF APPEAL (Scott, Somervell and Evershed, L.JJ.), November 25, 1947.]

C *Practice—Costs—Security*—"Plaintiff ordinarily resident out of jurisdiction"—*"Temporarily resident within jurisdiction"*—R.S.C., Ord. 65, r. 6A.

The plaintiff, a Yugo-Slavian, was brought to England during the war. After being detained for some time in a detention camp in the Isle of Man he returned to England. He deposed that he had now no intention of leaving England and there was evidence that there was no present probability of his being required by the government to leave the country. He having begun an action for libel against the defendants, on June 27, 1946, an order for security for costs was made against him in the sum of £100. On Oct. 27, 1947, an order was made for security for a further £750. On appeal against that order :—

HELD : even if, at the date of the first order or after it, there had been a probability of the plaintiff going out of the jurisdiction, there was no evidence on the present application to justify the view that his residence in this country still continued to be temporary within R.S.C., Ord. 65, r. 6A, and the appeal should be allowed.

[AS TO SECURITY FOR COSTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 64-67, para. 108 ; and FOR CASES, see DIGEST, Practice, p. 909, Nos. 4497-4506.]

F APPEAL by plaintiff against an order made by LYNSEY, J., dismissing an appeal by the plaintiff against the order of a master directing the plaintiff to give security for costs in the sum of £750. The Court of Appeal allowed the appeal.

Aiken Watson, K.C., for the plaintiff.

John Thompson for the defendants.

SCOTT, L.J. : This is a case relating to security for costs under R.S.C., Ord. 65, r. 6A, which says :

G A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction.

In my view, r. 6A means that r. 6, which provides for security against a plaintiff resident out of the jurisdiction, may still be applied against him if the facts show that he is merely temporarily within the jurisdiction.

H An action for libel was brought by the plaintiff against the defendants, the proprietors of a newspaper, and an order for security for costs in their favour was made in the sum of £100 on June 27, 1946. On Oct. 27, 1947, security for a further £750 was ordered. On Nov. 4, 1947, an appeal from that order was dismissed by LYNSEY, J. The plaintiff is a foreigner, his native country being Yugo-Slavia and he being a Croatian by race. Early in the recent war he was brought to this country by a naval vessel after being first taken to Gibraltar. He has been in the British Isles ever since, though a large part of his time was spent in a detention camp in the Isle of Man which is outside the English jurisdiction so far as the Rules of the Supreme Court are concerned.

He has been in England for the past two years. There are affidavits which, in my view, show clearly that he has no intention of going abroad and that there is no present probability of his being required by the government of this country to go abroad either on a deportation order made by a magistrate in consequence of some offence or because the King, in the exercise of his prerogative in regard to aliens, decides, through the Home Secretary, that it is not desirable that he should remain in this country. There is, therefore, no evidence that the plaintiff is likely to go abroad and so resume the position of "a plaintiff ordinarily resident out of the jurisdiction."

My view is that if, during the period he has been in this country, whether at the date of the first order for security in the sum of £100 or since, there has been a time when there was a probability of his going out of the jurisdiction, there is no evidence before this court today, and there was none before the master or the judge, to justify the view that his residence in this country still continues to be merely temporary within the meaning of R.S.C., Ord. 65, r. 6A. He has ceased to be resident out of the jurisdiction and there is no evidence to indicate that his presence here is now merely temporary. The appeal must be allowed.

SOMERVELL, L.J. : I agree that this appeal succeeds on the ground that the residence (whatever it may have been when the earlier order was made) has ceased to be temporary residence within the jurisdiction within the meaning of R.S.C., Ord. 65, r. 6A.

EVERSHED, L.J. : I also agree. As we are differing from LYNSEY, J., I will add two sentences. First, I think it may be that the argument before him, as before the master, succeeded on a somewhat different basis from the basis on which it has succeeded here, and, secondly, there has been put before us that which was not before LYNSEY, J., namely, an affidavit on the part of the plaintiff, dated November, 1947, in which, after stating that all restrictions on his movements in the United Kingdom have been removed (with one exception which is immaterial to the present question), he adds: "I have no intention of leaving the United Kingdom"—a statement unqualified by the words "at present" which appeared in the earlier affidavit. For reasons which my Lord has stated, it seems to me on the facts as they are now before the court that the residence of the plaintiff in this country cannot be said to be of such a temporary character (or, indeed, to be temporary at all) as would bring into operation against him R.S.C., Ord. 65, r. 6A, on which the claim for an order for security for costs is founded.

Appeal allowed. No order as to costs.

Solicitors: Waller, Neale & Houlston, agents for Marsh & Ferriman, Worthing (for the plaintiff); Church, Adams, Tatham & Co. (for the defendants).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

TUDOR v. GREAT WESTERN RAILWAY COMPANY.

[COURT OF APPEAL (Bucknill, Somervell and Asquith, L.JJ.), November 20, 1947.]

Railways—Accommodation works—Adjoining owners accepting compensation in lieu—Rights of occupiers—Railways Clauses Consolidation Act, 1845 (c. 20), s. 68.

The Railways Clauses Consolidation Act, 1845, s. 68, requires a railway company to make and maintain certain works, including fences, for the accommodation of owners and occupiers of land adjoining the railway, with a proviso that the company shall not be required to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation *in lieu*.

The plaintiff was the occupier of two farms abutting on the defendant company's railway. The fences separating the fields from the railway were in a state of disrepair and sheep belonging to the plaintiff strayed on the railway and were killed. The land over which the railway ran had been acquired by the company by means of a number of conveyances from owners other than the plaintiff's landlord. In all cases the owners had accepted compensation from the company in respect of a release by the

owners of any obligation owed to them by the company under s. 68 of the Act of 1845. The plaintiff was not in occupation at the time of the acquisition of the land by the company.

HELD : on a true construction of the section, the compensation given to an owner did not relieve the company in respect of an existing occupier or anyone claiming under him, but it did relieve the company once that occupation had come to an end and the owner for the time being had negotiated a fresh lease with a new occupier, and, therefore, the plaintiff was not entitled to recover damages for the loss of his sheep.

[AS TO ACCOMMODATION WORKS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 57-64, paras. 109-121; and FOR CASES, see DIGEST, Vol. 38, pp. 280-292, Nos. 181-241.]

Cases referred to :

(1) *Corry v. Great Western Ry. Co.*, (1881), 7 Q.B.D. 322; 50 L.J.Q.B. 386; 44 L.T. 701; *sub nom. Covey v. Great Western Ry. Co.*; 45 J.P. 712; 38 Digest 291, 231.

(2) *Symons v. Southern Ry. Co.*, (1935), 153 L.T. 98; Digest Supp.

APPEAL by the defendant railway company from an order of His Honour JUDGE CLARK WILLIAMS, K.C., made at Bridgend County Court, and dated Feb. 27, 1947, awarding £85 damages to the plaintiff for the loss of a number of sheep which had strayed from his farms on to the railway through defective fences and been killed. The appeal was allowed. The facts appear in the judgment of SOMERVELL, L.J.

Andrew Clark, K.C., and *J. P. Ashworth* for the railway company.
Edmund Davies, K.C., and *Dapho Powell* for the plaintiff.

BUCKNILL, L.J. : I will ask SOMERVELL, L.J., to give the leading judgment.

SOMERVELL, L.J. : This case turns on the construction of s. 68 of the Railways Clauses Consolidation Act, 1845. In that section the legislature dealt, *inter alia*, with this problem. Where a railway is constructed over land there is introduced on that land a potential danger to animals, and, no doubt, also to persons, unless adequate steps are taken to produce some sort of barrier between the railway line and the adjoining land. Section 68, therefore, provided :

The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (that is to say) . . . sufficient posts, rails, hedges, ditches, mounds or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the railway . . . Provided always, that the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, nor to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them.

In the present case the plaintiff was the occupier of two farms which abut on the defendant company's railway, and sheep belonging to the plaintiff, which were grazing on those lands, strayed on the railway line and were killed. It is common ground that the fences separating the plaintiff's land from the railway line were in disrepair, that the sheep strayed on to the line owing to that disrepair, and that, if the railway company were under an obligation to the plaintiff to fence the land, the judgment of the court below was right. The defence is quite short. The plaintiff's claim is disputed "because the defendants were not negligent or guilty of breach of duty as alleged or at all, and will rely on the proviso to s. 68 of the Railways Clauses Consolidation Act, 1845." Before the county court judge evidence was given that the land occupied by the railway company had been acquired by a number of conveyances from owners other than the plaintiff's landlords, but, of course, the parcels were taken from the land of which the plaintiff is in present occupation. In all cases (except one which can be disregarded) there was the payment of a sum of money by the railway company which included a sum in respect of a release by the owners of any obligation owed to them by the railway company under s. 68.

What is the position of the occupier where compensation has been paid under

the proviso at the time of the acquisition of the land to the owner but not to the occupier? The plaintiff was not in occupation at the time of the acquisition. His counsel suggested in argument that the railway company ought to have called evidence to exclude the possibility of the plaintiff's lease being derived from someone who was in occupation at the time of the acquisition, but he made it plain that he did not desire to take that point if, in our view, it had not been sufficiently taken below. Speaking for myself, it is clear from the county court judge's notes that counsel in argument said that the plaintiff claimed as occupier and not as the successor of an occupier, and I think the railway company were entitled to regard that as meaning that the plaintiff was claiming as somebody who obtained a lease after the acquisition of the land and the payment of compensation by the railway company.

The words which we have to construe have come before the courts in two cases, and the main argument has turned on what exactly the second of those cases decided. In the first case, *Corry v. Great Western Ry. Co.* (1), as in this case, the railway company had paid compensation to the landlord, the owner of the land, but no compensation had been paid to the occupier. The occupier at the material date of acquisition was a tenant under a yearly tenancy. A fence was constructed by the railway company, but some 30 years later, the occupier still being there under his yearly tenancy, the fence became defective, a cow belonging to the occupier got on to the line and was killed, and the occupier brought an action claiming damages. BRAMWELL, L.J., said (7 Q.B.D. 325):

The plaintiff was an occupier with a right to have a fence between his land and that of the railway company, and his tenancy and his right under it to have such fence have continued, as it seems to me, to the present time. It is conceded that if he had a lease, say for fifty years, though determinable at six months' notice, he would have had this right. He had not such lease, but was tenant only from year to year, determinable at six months' notice. But still the tenancy is the same, and his right against the landlord is the same.

Analysing what BRAMWELL, L.J., said there, it seems to me to be in accordance with the position as submitted by counsel for the railway company, and to amount to this. When a railway company seek to acquire land there are two persons who may be interested. If the land is let, one person interested is the lessee, who, if it is grazing land (and that is the simplest example) and he has his sheep or cattle in a field which is going to have railway trains running through it, is interested in seeing that a fence is put up. The owner also is interested because the lease will not go on for ever and the lessee might, at the material date, have given notice and been about to leave the field in a year or eighteen months' time, when the landlord would have to negotiate another lease of the land when there was an unfenced railway on it. As BUCKNILL, L.J., said in the course of the argument, this conception of the meaning of the proviso can be very simply put thus. Assume that the total compensation payable in respect of the new danger being brought on the land is £100, and assume that a lessee of the land has a lease for seven years, the lessee would get compensation in respect, possibly, of the initial erection of the fence and in respect of its maintenance for seven years, and the landlord would receive the balance of the £100 in respect of maintaining the fence *in futuro*. I do not think that in any of the cases the exact basis on which the sum paid to the owner was calculated is stated, and it may well be that the decision in *Corry v. Great Western Ry. Co.* (1), where the occupier had remained on though only a yearly tenant, was unfair to the railway company. It is possible that the owner may have got compensation from the company on the basis that he only had a yearly tenant who might go at any time, when the liability would fall directly on him either because he must build or maintain the fence or because he would get less rent if the tenant had to do so. Although all the judges in that case said that a decision one way or the other might be hard on the plaintiff or hard on the railway company, the one person who obviously suffered no hardship was the landlord who was not a party to the dispute. He had had his compensation, and 30 years after the acquisition he was still not having to do anything with it by way of maintaining the fence.

The judgment of BAGGALLAY, L.J., in *Corry's* case (1) contains a sentence on which counsel for both parties rely. The question is which of their views

about it is the right one. BAGGALLAY, L.J., said (7 Q.B.D. 327) :

No doubt it would have been in the power of the railway company to have required such tenancy [*i.e.*, the yearly tenancy] to be put an end to.

Pausing there, what I think he means is that the railway company could have said to the owners : " If you want compensation in respect of the whole period after two years you must give notice to your existing occupier because if you do not, as we are not proposing to compensate him, he will be able to claim compensation from us as occupier." BAGGALLAY, L.J., continued :

- A If that had been done I should have agreed with *Mr. Wright*, that a person who acquired a fresh tenancy after the owner had given up his right to the accommodation works, could not enforce such a demand as is made by the plaintiff in the present action ; but, in my opinion, although this is only a tenancy from year to year, it continues until it is properly determined, and it never having been determined, I think the plaintiff is entitled to succeed.
- B I think the *ratio decidendi* of the judgments of BRAMWELL, L.J., and BAGGALLAY, L.J., was this : " We treat this tenancy, although in form a yearly tenancy, as the same tenancy as existed at the date of acquisition. The plaintiff was the occupier at that date. He has never been compensated, and, therefore, he can call on the railway company to fulfil their obligations under the part of the section apart from the proviso. If his tenancy had come to an end and a new tenant had come in, then—it may be said that this was a *dictum*, but it seems to me to be the basis of the judgments—he would not be entitled to put forward the claim which the plaintiff is now putting forward." LUSH, L.J., did not expressly deal with that matter, but I do not find in his judgment anything inconsistent with what I extract from the judgments of the two Lords Justices to which I have referred.

- D That view of the case supports the argument put forward by counsel for the railway company, but it is possible that a later decision might not be regarded as inconsistent with that if it had, as it were, upheld it on a broader ground. The broader ground is that, if no compensation is paid to the occupier at the time of the acquisition, thereafter any subsequent occupier can call on the railway company to carry out their obligations under the section. It is suggested (and I think this was the view of the county court judge) that that was laid down in *Symons v. Southern Ry. Co.* (2) in this court. The facts there were a little complicated, and are not, perhaps, very clear, but the date of the acquisition of the land was 1885. At that time the father of the plaintiff was in occupation, and at some time between that date and 1911 it appears that the son was to be regarded as in occupation jointly with the father. Whether there was some new arrangement with the landlord, or whether the father had some arrangement with the son, or what exactly happened, it is difficult to say, but that is what is stated in the judgment. In 1911 the plaintiff's father was still alive and he became the owner of the farm. He died in 1932, and the farm was conveyed by his executors to the plaintiff who remained in occupation. Two years later sheep belonging to the plaintiff, owing to a defective fence, strayed on the railway, and two were killed. Compensation had been paid to the owner, but none to the occupier who was at that date the plaintiff's father. The question arose whether the plaintiff could claim compensation, and the main argument turned on a point based on the principle of merger. It was said that when the plaintiff's father bought the reversion there was a merger, and that, as the owners or the predecessors in title of the owners from whom he bought had received compensation; he must now be treated as an owner in occupation, so that his previous right as occupier under the lease had disappeared, and, therefore, he could not claim. The answer by the plaintiff to that was :
- G " Equitable principles have affected and modified the strict common law rule as to merger, and if a person has a limited interest which would, by common law, merge in a larger estate which he obtains, he can, if it is his intention to do so (and, if it is his interest to do so, intention would, no doubt, be readily implied) keep alive the more limited interest and defeat the argument that the rights flowing from his limited interest had been defeated by the merger." No attention seems to have been directed to the circumstances in which the plaintiff became occupier with his father, nor do the learned judges seem to deal with the question, which might have been raised, whether what took place when the father died and his interest vested in his executors and was subsequently trans-
- H

ferred to the plaintiff ought not to be regarded as creating a new tenancy. But I cannot read what was said as based on the view that, where an occupier at the time of the acquisition receives no compensation, a subsequent occupier who has nothing to do with the estate or term which was vested in the first occupier can also claim compensation. In my view, it would be extremely difficult to justify any such decision in principle, and it would require very clear words for me to interpret and construe the judgment as producing that result. I think—whether or not the facts fully justify it if certain points had been taken—that both LORD HANWORTH, M.R., and ROCHE, L.J., proceeded on the basis that the plaintiff was the successor of—*i.e.*, he was, in effect, in the same position as—his father who had been occupier at the date of acquisition. I say that because LORD HANWORTH, M.R., says (153 L.T. 102):

If, then, merger does not prevail to have taken away the plaintiff's rights, he is in the same position as the plaintiff in *Corry's* case (1).

I do not want to repeat myself, but it seems to me plain that the plaintiff in *Corry's* case (1) was regarded as being in occupation under the same tenancy as subsisted at the date of acquisition. ROCHE, L.J., said (*ibid.*):

The father and son continued as occupiers after the purchase in 1911 until the father's death, when the plaintiff became sole occupier and soon afterwards owner of the land by conveyance from his father's executors . . . In addition to the matters of evidence referred to in this connection by my Lord, it is to be observed that in 1911 and before the occupiers of the land were the plaintiff's father and the plaintiff, whereas the conveyance of the fee simple in 1911 was to the plaintiff's father alone.

That is, perhaps, on a slightly different point, but the language indicates to my mind that ROCHE, L.J., was regarding the plaintiff, the son, as carrying on and remaining in occupation under the same title as his father originally had at the date of acquisition.

In the present case the county court judge took the view that *Symon's* case (2) laid down that what I may call successive occupiers could each sue if the original occupier had received no compensation. I do not think that case does so decide, and I think it would be a very anomalous result if it did so. I find it difficult to see what, in that event, would be the basis in the ordinary case of compensation to the owner. In most cases the owner would never be the occupier. In those days, which were the days of big estates, as in these days, much of the land of the country was held by bodies who did not themselves occupy, but who leased their land to farmers. In the normal case the land would be successively leased to the farmer year after year, and so long as there was an occupier, the railway company, on this view of the law, would remain liable to keep up the fences. It is a little difficult to see what obligation they get rid of by paying compensation to the owner. I have given my reasons for thinking that *Symon's* case (2) does not lay down what the county court judge regarded it as laying down. I think the right principle is that for which counsel for the railway company contends, *viz.*, that the compensation given to owners does not relieve the railway company in respect of the existing occupier or anyone claiming under him, but it does relieve the railway company once that occupation has come to an end and the owner for the time being negotiates a fresh lease with a new occupier. For these reasons, I think that the appeal should be allowed.

BUCKNILL, L.J.: I agree. I only add this. For the reasons given by SOMERVELL, L.J., it would appear to me that, if one pushed the argument of counsel for the plaintiff to its logical extreme, the owner might receive compensation at a time when the farm was let to a tenant, and then, when the lease came to an end and the owner became occupier himself, he might say that the proviso did not apply and that as against him the company must maintain the necessary posts and rails, etc.—in other words, the compensation which they had paid would be stultified.

ASQUITH, L.J.: I agree that the appeal should be allowed for the reasons given by my Lord.

Appeal allowed with costs.

Solicitors: M. H. B. Gilmour (for the railway company); Jaques & Co., agents for W. M. Thomas, Bridgend (for the plaintiff).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

Re LUCAS (deceased), SHEARD v. MELLOR.

[CHANCERY DIVISION (Roxburgh, J.), November 13, 14, 20, 21, 1947.]

Charities—Charitable trusts—Gift to institution—Institution closed in lifetime of testator—Cy pres doctrine.

By her will dated Oct. 12, 1942, the testatrix bequeathed a legacy and a share of her residuary estate to "the Crippled Children's Home, Lindley Moor, Huddersfield." The home had been closed on the expiration of the lease on Apr. 6, 1939, but, as funds still remained, a scheme was sealed by the Charity Commissioners on Oct. 17, 1941, by which, under the title of "The Huddersfield Charity for Crippled Children," the income was applied towards sending poor crippled children to holiday or convalescent homes. The testatrix, who died on Dec. 19, 1943, was unaware, at the time of making her will, that the home had been closed and that a scheme was in operation:—

HELD: the bequest had been made for the upkeep of a particular institution which had ceased to exist during the lifetime of the testatrix, and not to supplement its endowment, and, therefore, it could not be applied *cy pres* but fell into residue and the gift of the share of the residue was undisposed of.

Per cur.: The construction of a will containing a charitable bequest cannot depend on the existence or non-existence of a *cy pres* scheme.

[AS TO GIFTS TO INSTITUTIONS WHICH CEASE TO EXIST, see HALSBURY, Hailsham Edn., Vol. 4, p. 180, para. 243; and FOR CASES, see DIGEST, Vol. 8, pp. 310-312, Nos. 911-927].

Cases referred to:

- (1) *Re Rymer, Rymer v. Stanfield*, [1895] 1 Ch. 19; 64 L.J.Ch. 86; 71 L.T. 590; 43 W.R. 87; 39 Sol. Jo. 26; 12 R. 22. C.A. 8 Digest 312, 926.
- (2) *Re Wilson, Twentymen v. Simpson*, [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 57 Sol. Jo. 245 8 Digest 313, 948.
- (3) *Re Faraker, Faraker v. Durell*, [1912] 2 Ch. 488; 81 L.J.Ch. 635; 107 L.T. 36; 56 Sol. Jo. 668, C.A. 8 Digest 311, 921.
- (4) *Re Pochin's Will Trusts, Midland Bank Executor and Trustee Co., Ltd. v. Godkin and Others*, (Dec. 14, 1943) (unreported).

ADJOURNED SUMMONS to determine whether, on the true construction of the will of the testatrix and in the events which happened, the bequest of a legacy and a part of the residuary estate to a crippled children's home constituted a valid and effectual charitable bequest. The bequest was held to have failed by lapse owing to the closing of the home in the lifetime of the testatrix.

T. A. C. Burgess for the plaintiff.

C. A. J. Bonner for the first defendant.

B. S. Tatham for the second defendant.

Danckwerts for H.M. Attorney-General.

Newsom for the Treasury Solicitor.

ROXBURGH, J.: By her will, dated Oct. 12, 1942, Elizabeth Lucas, of Huddersfield, who died on Dec. 19, 1943, bequeathed a legacy of £500 and 3-22nd parts of her residuary estate to the Crippled Children's Home, Lindley Moor, Huddersfield, and declared that "the receipt of the treasurer or other proper officer for the time being of any institution, church, society or fund to which a legacy or share in my residuary estate has been given by this my will shall be a sufficient discharge for the same." John Sykes, once of Lindley, Huddersfield, made arrangements in his lifetime for erecting, equipping and endowing an institution to be used as a holiday home for crippled children living within the county borough of Huddersfield and for certain other purposes. He acquired a lease of a piece of land at Lindley Moor for the term of 25 years from Apr. 6, 1914—the length of the term is important—at a rent of £5 for the whole term, which sum was paid in advance by him. A draft trust deed was prepared and certain persons agreed to act as trustees. John Sykes died on Aug. 9, 1914, and by his will he directed and authorised his executors to carry out and complete the arrangements to pay and provide the cost of erecting the said institution and to transfer the piece of land and the buildings thereon when completed to trustees, who had been already nominated by him, to be held on

the terms of the trust deed relating thereto which was in preparation at the date of his will. He also directed and authorised his executors to set aside out of his personal estate and to invest in a terminable annuity a sum sufficient to produce the annual income of £120 if not already provided by him during his life—and it was not—for the purpose of endowing the institution and providing the expenses of carrying on the same during the existence of the said lease. The executors completed the arrangements, the institution was erected and made fit for occupation in 1916, and in due course the terminable annuity was purchased and the lease was granted. The name of the institution was the Huddersfield Home for Crippled Children and it was carried on so long as the lease endured. The lease expired on Apr. 6, 1939, and the last payment of the annuity was on Oct. 6, 1938. When the lease came to an end and the annuity expired, the institution was closed and the organisation was broken up, but the trustees still had some funds in their hands, about the precise origin of which there is no evidence. Accordingly, on Oct. 17, 1941 (and it is to be observed that all these things happened before the date of the will of the testatrix) a scheme was sealed by the Charity Commissioners. The heading of the scheme is: "In the matter of the charity consisting of the endowment of the Huddersfield Home for Crippled Children formerly carried on at Lindley Moor in the county borough of Huddersfield." With regard to that charity, the Charity Commissioners provided by the scheme that "with regard to the above charity and the endowment thereof specified in the schedule hereto and all other the endowments, if any, of the charity" it should be administered and managed subject to and in conformity with the provisions of the scheme under the title of the Huddersfield Charity for Crippled Children by a body of trustees consisting of the members for the time being of the finance committee of the institution called the Huddersfield Royal Infirmary in the county borough of Huddersfield. The scheme provided that, subject to certain payments, which I need not specify, the yearly income of the charity should be applied by the trustees in or towards sending poor crippled children to holiday or convalescent homes.

As I have mentioned, the testatrix lived at Huddersfield at the date of her will and she died at Greenleigh Hospital, Lindley, Huddersfield, but she cannot have known very much about the crippled children's home because I feel bound to conclude, as a matter of inference, that when she made her will she did not know that it had been closed for more than three years, neither did she know anything about the trust deed under which it had, in fact, been carried on or about the scheme in question. Mr. Bonner has suggested that, although in the trust deed, unless there be something in the subject or context inconsistent therewith, the institution means the home which was in course of erection at the date of the deed together with the buildings annexed or appurtenant thereto, and although its primary object is stated as being "to provide a holiday home for poor crippled children living within the district," yet there are subsidiary purposes to which income may well be applied under the trust deed. His submission, in effect, is that the testatrix has given a legacy in augmentation of the fund subject to the trusts of the trust deed which ought, as he submitted, to be applied for the subsidiary purposes envisaged by the trust deed although its primary purpose has come to an end. Of course, that submission is subject to this, that they could not be literally so applied by reason of the charity scheme because now these funds, if they were an augmentation to the fund subject to the trusts of the trust deed, would be undoubtedly subject to the scheme. That, however, does not affect the point of Mr. Bonner's argument. His submission is that as an augmentation to the funds subject to the trusts of the trust deed this legacy and share of residue ought to be applied for the subsidiary purposes envisaged by the trust deed although its primary purpose has come to an end.

If I were able to accept Mr. Bonner's construction of the will of the testatrix, I do not think that I should find much difficulty in accepting the rest of his submissions qualified in the manner in which I have just indicated that they might be and as I am sure he intended them to be, *viz.*, that they are subject, of course, to the scheme, but the question is what is the true construction of this will. That I regard as an extremely difficult question.

A gift to a crippled children's home at a particular address is capable of alternative constructions neither of which is grammatically accurate. A home

cannot literally take a bequest, and that is why this will and all well drawn wills contain such a provision as I have read, declaring that the receipt of the treasurer or other proper officer for the time being shall be a sufficient discharge. The real question, therefore, is not to whom is the legacy to be paid, for it is undoubtedly to be paid to the proper officer, but for what purpose is it to be received. Here I have no assistance from any context in the will and the purpose for which the gift is to be received by the proper officer has to be extracted from the language of the gift itself. The purpose might well be to augment the endowment out of which the home was maintained. If that were the true construction, I should accept Mr. Bonner's submission, but, in my judgment, the more natural meaning of the language denotes a gift for the upkeep of the particular home which must necessarily fail if the home has been closed. The addition of the address, in my view, indicates a localisation which is more appropriate to a particular institution than to its endowment. The circumstance that the testatrix has given the home a correct address but an inaccurate description points, in my view, in the same direction. Though, as I have already said, the testatrix seems to have known little enough about the home, I can well believe the building together with the organisation housed there was known to the testatrix as the Crippled Children's Home, but I have certainly no reason to think that she knew anything about this trust deed or its endowment, or that, if she had done so, she would have misdescribed the charity, meaning by that phrase, the aggregation of the funds held on particular charitable trusts which might have been called the Huddersfield Home for Crippled Children, but would more properly be called the endowment of that institution. In my judgment, the testatrix has made a gift in favour of a particular institution for a particular purpose which fails because the particular home has been closed and, therefore, cannot be maintained or kept up.

The ATTORNEY-GENERAL adopted a different line of approach and presented a reasoned argument which requires careful study, though it really leads to the same point of construction in the end. The point of construction, in my judgment, lies in the debatable territory between *Re Rymer* (1), *Re Wilson* (2) and *Re Faraker* (3), and I do not think that any authority really assists me in its solution. The submission made on behalf of the Attorney-General was, in effect, that the 1941 scheme clothed the home with legal immortality, and that, however remote the purposes of the *cy pres* scheme may be from the purpose envisaged by the testatrix, a gift to the home must, as a matter of law, take effect as an augmentation of the fund applicable under that scheme. This proposition rests mainly on *Re Faraker* (3). In testing it, I have derived great assistance from an unreported judgment of BENNETT, J., in *Re Pochin's Will Trusts* (4). I quite agree that the decision in *Re Pochin* (4) does not give me much assistance on the mere point of construction, for, although BENNETT, J., did, in fact, decide the question of construction there in the same way that I have decided the question of construction here, the language in that case was very different from the language in the present case. The language there was a direction that £6,000 should be paid to the trustees of the Charnwood Forest Convalescent Home by Nanpantan and that they should "stand possessed of the said investments on trust to pay and apply the income thereof for the upkeep of the said home (but not for building purposes)." Then the testator gave one moiety of his residuary estate "to the trustees of the said Charnwood Forest Convalescent Home on the same trusts as are declared concerning the before-mentioned bequest to them." BENNETT, J., laid down the law applicable in some concise sentences which seem both to bind and to guide me. He says:

It is now well settled that a gift by will to a particular charitable institution for the purposes thereof lapses if the particular charitable institution ceases to exist in the lifetime of the testator: see *Re Rymer*, *Rymer v. Stanfield*, (1). It is also settled that a gift by will for a particular charitable purpose fails and that the gift lapses if at the death of the testator it is impossible to carry out that particular purpose: see *Re Wilson*, *Twentyman v. Simpson*, (2). It is also settled that a gift by will to a named charity takes effect although between the date of the will and the date of the testator's death the charitable purposes for which the property of the charity may be applied have been lawfully changed: see *Re Faraker*, *Faraker v. Durell*, (3). The meaning of the word "charity" in such a context is property which is held upon a charitable trust.

In view of the careful and important argument which counsel for the Attorney-General submitted to me I should like to say a little more about *Re Faraker* (3). I believe that what I am about to say is implicit in the last sentence which I have read from the judgment of BENNETT, J., but whether it be so or not it is what I wish to say about the case. The essential features of that case were: (1) that there was a fund already held on a charitable trust; (2) that the bequest made by the testatrix was construed as being an augmentation of that fund, so construed as a matter of construction; (3) the only ground for contending there that the trust affecting that fund had come to an end was that the Charity Commissioners had made a scheme for the consolidation of that and other charitable trusts which permitted an application of the income of the consolidated fund at variance with the original trusts of the particular fund. The essence of the decision was, in my opinion, that once a fund had been subjected to charitable trusts its identity could not be destroyed by any alteration lawfully made in those trusts by the court or the Charity Commissioners and that any subsequent augmentation of that fund would take effect and be held upon the trusts so altered. If that be a true analysis of *Re Faraker* (3), it introduces no new principle of law. It has long been accepted law that once a fund has been devoted to charitable purposes it cannot be diverted from charity by any supervening impracticability, but must be applied *cy pres*. It appears to me that the position in *Re Faraker* (3) can by no means be limited to those cases in which a scheme has, in fact, been made by the Charity Commissioners, but must apply to all cases in which a scheme ought to be made by the Charity Commissioners, *i.e.*, to all cases in which there is a fund which has been devoted to charity and there has been subsequent impracticability and accordingly the fund has to be applied *cy pres*. The bearing of *Re Faraker* (3) upon the present case would, I think, be that if I were to hold that this bequest was intended to be an augmentation of the fund held upon the trusts declared by the trust deed regulating the home, *i.e.*, an addition to the endowments of the home, the circumstance that those trusts had been lawfully altered by the Charity Commissioners under a *cy pres* scheme would not cause the gift to fail. But it does not, in my judgment, compel me to hold that a gift for the upkeep of a particular home for crippled children in a particular place which has closed down must be applied in aid of crippled children in homes which have no connection with the home designated except that they are beneficiaries under a *cy pres* scheme. Otherwise the authority of *Re Rymer* (1) would be impaired, and that can only be by a decision of the House of Lords because it is a decision of the Court of Appeal.

In my judgment, the answer to a question of construction cannot depend on the existence or non-existence of a scheme. First, why should the construction of a will be affected by some event of which the testatrix might never have known—the construction of the will, not the legal consequences? Secondly, why should the question of construction depend on whether trustees who have in their hands property which has been devoted to charity and can no longer be applied to the charitable purposes for which it was originally designed have or have not used due diligence in getting a *cy pres* scheme? If I am free to decide, as I think I am, I hold as a pure matter of construction, and certainly not an easy matter of construction, that this gift is a gift for the upkeep of a particular home for crippled children and not a gift to supplement its endowment and, accordingly, it is not now available for maintaining crippled children in homes scattered up and down the country. Though I am aware that the tide flows strongly in favour of charity, I do not feel able to extract such a gift from the language used by the testatrix. I should like to add that in reaching this conclusion I have not allowed myself to be influenced by any judicial guess as to what the testatrix intended. I think it would be idle to do so, for I am certain that she did not know that the home had closed down and she intended her gift to be in favour of a home which she assumed to be still in operation. It is impossible to speculate what amendment she would have made in her testamentary disposition if, in fact, she had known that this home had been closed down.

There is one other point. Counsel for the Attorney-General did advance the proposition that there might be a general charitable intention in this case, but I do not think that he was prepared to press that if I should reach the construction of the will which I have in fact reached.

I declare that the legacy and the gift of the share of residue to the crippled children's home fail or lapse and that the legacy falls into residue and the share of residue is undisposed of.

Declaration accordingly.

Solicitors: *Dixon, Hunt & Tayler*, agents for *Cartwright & Fieldhouse*, Huddersfield (for the plaintiff); *Gregory, Rowcliffe & Co.*, agents for *Ramsden, Sykes & Ramsden*, Huddersfield (for the first defendant); *Crossman, Block & Co.*, agents for *Eaton Smith & Downey*, Huddersfield (for the other defendant); Treasury Solicitor.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

KIRKBY v. PHILLIPS AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), November 4, 18, 19, 1947.]

Wills—Construction—Annuity—Gift of £100 a year for life and “to give away” by will to donee’s children—Gift by will of donee to her children living at her death and to survivor and on death of survivor capital to children living at donee’s death and attaining 21 years.

A testator, who died on Nov. 15, 1865, by his will gave the whole of his property to trustees to pay to his wife £200 per annum during her life and also to pay to his adopted child, A.K. “the sum of £100 . . . a year during her life and for her to give away by her will to any child or children she may have in marriage.” By her will she provided: “. . . in exercise of the power for this purpose given to me by the hereinbefore recited will I appoint and give the said yearly sum of £100 and also so far as I have power to do so the trust funds and property the income of which shall at my death be applicable for the payment of the said yearly sum in manner following that is to say I give the said yearly sum of £100 unto such children or child of mine as shall be living at my death and if more than one then after the death of any or either of such children unto the survivors or survivor of such children and from and after the death of the survivor of my said children and so far as I have power so to do I give the said yearly sum trust funds and property unto such children or child of mine as shall be living at my death and shall being male then have attained or thereafter attain the age of 21 years or being female then have attained that age or be or have been married or thereafter attain that age or marry and if more than one in equal shares . . .”

HELD: (i) on the true construction of the testator’s will, the annuity given to A.K. was not perpetual, but was limited to the lives of those to whom A.K. had directed it to go.

Blewitt v. Roberts ((1841) Cr. & Ph. 274); *Yates v. Maddan* ((1851) 3 Mac. & G. 532); and *Blight v. Hartnoll* ((1881) 19 Ch.D. 294), applied. *Townsend v. Ascroft* ([1917] 2 Ch. 14), distinguished.

(ii) the attempted gift over by A.K. on the death of a child of hers to the other or others of them transgressed the rule against perpetuities, and the two surviving sons of A.K. were entitled to the £100 annuity in equal shares so long only as both were living.

[AS TO DURATION OF ANNUITY GIVEN BY WILL, see HALSBURY, Hailsham Edn., Vol. 34, p. 336, para. 385, and Vol. 28, pp. 195-198, paras. 357-361; and FOR CASES, see DIGEST, Vol. 39, pp. 135-139, Nos. 292-336].

Cases referred to:

- (1) *Blewitt v. Roberts*, (1841), Cr. & Ph. 274; 41 E.R. 495; *sub nom. Blewitt v. Roberts*, *Blewitt v. Stauffers*, 10 L.J.Ch. 342; 5 Jur. 979; 39 Digest 137, 305.
- (2) *Yates v. Maddan*, (1851), 3 Mac. & G. 532; 21 L.J.Ch. 24; 16 Jur. 45; 42 E.R. 365; 39 Digest 135, 294.
- (3) *Blight v. Hartnoll*, (1881), 19 Ch.D. 294; 51 L.J.Ch. 162; *sub nom. Re Blight*, *Blight v. Hartnoll*, 45 L.T. 524; 30 W.R. 513; 39 Digest 136, 299.
- (4) *Savery v. Dyer*, (1752), Amb. 139; Dick. 162; 27 E.R. 91; 39 Digest 112, 41.
- (5) *Hedges v. Harpur*, (1846), 9 Beav. 479.
- (6) *Bent v. Cullen*, (1871), 6 Ch. App. 235; 40 L.J.Ch. 250; 19 W.R. 368; 39 Digest 137, 308.
- (7) *Re Morgan*, *Morgan v. Morgan*, [1893] 3 Ch. 222; 62 L.J.Ch. 789; 69 L.T. 407; 39 Digest 137, 310.
- (8) *Townsend v. Ascroft*, [1917] 2 Ch. 14; 86 L.J.Ch. 517; 116 L.T. 680; 39 Digest 139, 336.

ADJOURNED SUMMONS to determine whether, on the true construction of the testator's will, Alfreda Kirkby had power by will to appoint (a) the yearly sum of £100 by the said will bequeathed to her during her life to any child or children she might have for the life or lives of such child or children or for some and what other interests, and (b) so much of the capital of the funds in court to the credit of the action, "the account of the annuity of £100 given to A.K.," as produced the said yearly sum of £100 or some and what other part of the said funds in court to any child or children she might have, and also to determine whether Alfreda Kirkby's will was an effective appointment of (a) the said yearly sum of £100 to Alfreda Kirkby's two sons who survived her during their joint lives and to the survivor of them during the residue of his life, and (b) so much of the said funds in court as produced the said yearly sum to the said sons in equal shares subject to their said life interests. VAISEY, J., held that the annuity was limited in duration to the lives to whom Alfreda Kirkby appointed it, and that the surviving sons of Alfreda Kirkby were entitled to the annuity in equal shares so long, and only so long, as both were living.

Donald H. Cohen for the applicants (the sons of Alfreda Kirkby).

Winterbotham for the respondents (trustees under the original will).

Cur. adv. vult.

Nov. 18. VAISEY, J., read the following judgment. By his will dated Sept. 16, 1863, the testator, Simon Hart Wynn, gave the whole of his property to Thomas Phillips and Edward Lawton Hannan in trust to pay to his wife, Maria Louisa Wynn, £200 a year during her life and (quoting the words of the will) :

... also to pay to my dear adopted child Alfreda Kirkby now under my care the sum of £100 of lawful English money a year during her life and for her to give away by her will to any child or children she may have in marriage.

Those are the words which I have to construe, but it is necessary for me to refer also to the rest of the will, whereby the testator gave the remainder of his property, after paying thereout his debts and funeral expenses, to the same two persons in trust to pay the annual income thereof to his sister Sarah Kirkby for her life and (again quoting from the will) :

... after her death to pay this said annual income in equal shares to the daughter or daughters who shall survive her but if any one or more of her daughters shall have died before her the said Sarah Kirkby leaving one or more child or children born either in or out of wedlock the share that this or these daughter or daughters would have had had she survived her mother shall be divided equally to every child this or these daughters shall have left living at the time of her or their mother's death.

In conclusion, the testator appointed the said two persons to be trustees and executors of his will. The testator died on Nov. 15, 1865, and his will was proved on Dec. 21, 1865. Shortly afterwards the present action for the administration of the testator's estate was instituted, and on Mar. 10, 1866, a decree for such administration was made. There are funds in court to the credit of the action, from the income of which the annual sum of £100 has been and still can be provided.

Alfreda Kirkby, the testator's adopted daughter, was married once only, namely, on May 5, 1884, to Robert Stewart Irvine, and I will call her "Mrs. Irvine." They had four children, two of whom, namely, Alfred Robert Irvine and Harry Vyvyan Stewart Irvine, are the present applicants. The other two died in infancy many years ago. By her will dated July 15, 1898, Mrs. Irvine (after reciting the relevant provisions of the testator's will) in exercise of the power thereby given to her appointed and gave the said yearly sum of £100 and also, so far as she had power to do so, the trust funds and property, the income of which should at her death be applicable for the payment of the said yearly sum in manner following, that was to say, she gave the said yearly sum of £100 unto such children or child of hers as should be living at her death, and, if more than one, then after the death of any or either of the said children unto the survivors or survivor of such children, and from and after the death of the survivor of her said children and so far as she had power so to do she gave the said yearly sum, trust funds and property unto such children or child of hers as should be living at her death and should being male then have attained or

thereafter attain the age of 21 years or being female then have attained that age or be or have been married or thereafter attain that age or marry, and if more than one, in equal shares. Mrs. Irvine survived her husband and died on Nov. 10, 1940. Letters of administration to her estate with her said will annexed were, on Oct. 5, 1943, granted to the applicants in Queensland, and were on Nov. 22, 1944, resealed in the Principal Probate Registry.

A The question which the applicants now ask me to determine is whether, upon the true construction of the testator's will and in the events which have happened, Mrs. Irvine had power by will to appoint (a) the said yearly sum of £100 to any child or children of hers for the life or lives of such child or children or for some and what other interests, and (b) so much of the capital of the funds in court to the credit of the before-mentioned action the account of the annuity of £100 given to Mrs. Irvine as produces the said yearly sum of £100 or some other and what part of such funds to any child or children of hers. They further
B want to know whether, in the events which have happened, Mrs. Irvine's will is an effective appointment of (a) the said yearly sum of £100 to the applicants during their joint lives and to the survivor of them during the residue of his life, and (b) so much of the said funds in court as produces the said yearly sum to the applicants in equal shares subject to their said life interests in the said yearly sum.

C Stated shortly, the main problem which I have to solve is whether the sum which Mrs. Irvine had power to give away to her children or child was a perpetual annuity of £100 (equivalent to a capital sum sufficient to produce that amount out of income) or was limited in duration to the lives or life of such children or child. The first point to be noticed is that a similar problem arose in connection with the residuary gift in the testator's will, by which he directed that after the death of his sister, Sarah Kirkby, the income of his residuary estate was to be paid in equal shares to her daughters surviving her with a substitutionary gift to the children of any daughter of hers who might predecease her. That problem was resolved by an order made in this action on July 27, 1901, which decided in effect that the daughters (or their children taking a share by substitution) were entitled to their proportionate shares in the capital and income of the residuary estate, and not merely to life interests in the income. It was argued before me that, as the testator had already been held to have given
E the capital of his residue out and out by means of an indefinite gift of income, I must attribute to him a corresponding or similar intention with regard to the gift of the annuity. On the other side, it was said that his will contains typical examples of each of the alternative kinds of indefinite income gifts and that they ought to be treated not as corresponding but in contrast. In my judgment, the decision in respect of the residue cannot be treated as affecting and still less as concluding, the construction of the will in respect of the annuity, and I think
F that I must determine such construction in the light of the authorities to which I must now refer.

The general effect of these authorities, so far as they affect the present case, is thus stated in JARMAN ON WILLS, 7th ed., at p. 1102:

G If an annuity is given to A for life and after his death to B, B will take the annuity for life only in the absence of any indications that he is to take a different interest. So the bequest of an annuity to several persons and the survivors of them, or to a person for his life, and then to his children, does not create a perpetual annuity.

For the last of these propositions the relevant English cases are said to be *Blewitt v. Roberts* (1), *Yates v. Maddan* (2) and *Blight v. Hartnoll* (3). The headnote in *Blewitt v. Roberts* (1) is (Cr. & Ph. 274):

H A testator bequeathed to his wife £600 per annum for her life, to be paid quarterly, and after her death the said annuity to be equally divided between six persons, whom he named, or the survivors or survivor of them. He also gave to each of these six persons £100 per annum during their lives, to be paid quarterly, with power to leave their said respective annuities at their deaths to any persons they might marry, or any children they might leave: but in case of any of them dying without exercising such power, then to the survivors or survivor. HELD, reversing the decree below, that the gifts over of the annuities of £600 and £100 respectively were not gifts of so much stock in the 3 per cents. as would produce those annuities, but gifts of annuities for the respective lives only of the persons, to whom they were limited, as tenants in common.

In his judgment, LORD COTTENHAM, L.C., said (*ibid.*, 280) :

There is a marked distinction between the gift of the produce of a fund without limit as to time, and a simple gift of an annuity. An annuity may be perpetual, or for life, or for any period of years ; but, in the ordinary acceptation of the term used, if it should be said that a testator had left another an annuity of £100 per annum, no doubt would occur of the gift being an annuity for the life of the donee. It is the gift of an annual sum of £100 ; that is, of as many sums of £100 as the donee shall live years. In *Savery v. Dyer* (4), LORD HARDWICKE says (Amb. 139) : " If one give by will an annuity not existing before, to A, A shall have it only for life." In that case, the gift was of an annuity to A during the life of B, and B having survived A, the question was, whether the annuity had ceased, notwithstanding the express provision that it should be during the life of B . . . It does not appear to me that there is any inconsistency in the cases. To hold that a simple gift of an annuity to A does not give an annuity beyond the life of A, is not inconsistent with holding that a gift of the produce of a fund without limit as to time gives the fund itself. In the former case, there is no allusion to any principal sum. It is, indeed, the course of this court to secure an annuity by investing a capital sum ; but a testator with an income much exceeding the annuity given is not very likely to contemplate any such investment. He may, indeed, be without the immediate means of making it ; as, for instance, if his whole property consisted of long leaseholds. If a testator were minded to give £10,000, can it be supposed that he would set about effecting this object by giving £500 per annum to the intended legatee, without making any mention of the £10,000 or of any other capital sum ? To carry into effect the gift of an annuity of £500 by raising £10,000 out of the estate, would, probably, be very foreign from the testator's intention. I feel no disposition to question the doctrine laid down by LORD HARDWICKE, and followed in the cases I have referred to ; and if I did, I should not feel at liberty to depart from a rule established upon such authority.

In *Yates v. Maddan* (2) the headnote reads (3 Mac. & G. 532) :

A testator, by his will, gave an annuity in the following terms : " I give devise and bequeath unto my son E. C. Yates one clear annuity of £100 per annum, for and during his natural life, and should he die, a child him surviving, I continue the same annuity for such child's use and benefit, to be paid to his or her mother : " and after making other bequests of legacies and annuities, he devised and bequeathed the residue of his estate real and personal or mixed on trust to keep up his plantations in the West Indies, in the next place to pay satisfy and discharge the several legacies and annuities before given and to apply the residue for the benefit of his wife and his other children : HELD, that the daughter of E. C. Yates was, on the death of her father, entitled not to a perpetual annuity but to an annuity during her life only. HELD, also, that the direction to pay the annuity to the mother did not show that the annuity was to be confined to the minority of the child of E. C. Yates. The general rule is, that where an annuity is given to a person by will (the will also creating the annuity), the annuitant takes it for life only.

LORD TRURO, L.C., in his judgment, reviewed the earlier decisions. He expressed doubt (upon what grounds I am not very clear) as to the correctness of his predecessor's decision in *Blewitt v. Roberts* (1) and referred with apparent approval to *Hedges v. Harpur* (5), where a testator gave to each of his five daughters £400 a year to be paid half-yearly during their lives and after their deaths he gave the same to their children in equal shares, and it was held that the children of each daughter became each of them entitled for life only to an equal share of the annuity bequeathed to their mothers.

In *Blight v. Hartnoll* (3) the relevant portions of the headnote are (19 Ch. D. 294) :

1. A testatrix bequeathed an annuity payable out of the rental of certain hereditaments to her sister C for life, with remainder for life to certain persons, and on their deaths the testatrix directed her executors to pay the annuity out of the said rental to the surviving children of B : HELD, that the children of B took the annuity for their lives only . . . 2. The rule against perpetuities requires that not only the extreme limit of the class of persons who may take, but the actual persons who are to take, should be ascertained within the prescribed period.

The general principle is stated by FRY, J. (*ibid.*, 296) :

The question is, whether the last takers under the gift of this annuity take in perpetuity, or for life, or for the duration of the lease of the wharf ? As a general rule there can be no doubt that the gift of an annuity to A is a gift of the annuity during the life of A and nothing more. It is equally free from doubt that where the testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, there the annuity is presumed to be a perpetual annuity. It is equally without doubt that there are cases

in which the court has come to the conclusion that the gift is not really that of an annuity, but the gift to a person of the income arising from a particular fund without limit, and there the court holds that the unlimited gift of the income is a gift of the *corpus* from which the income arises.

A There are many other cases in which that principle has been applied, and they are (admittedly, I think) not very easy to reconcile. In *Bent v. Cullen* (6) a testator gave £50 a year to be paid out of the income arising from his personal property and gave the said £50 after his decease to his two daughters and a grand-daughter or the survivors of them, and it was held by LORD HATHERLEY, L.C., reversing the judgment of JAMES, V.-C., that the survivors were entitled to the principal sum which would produce the annual sum of £50. In *Re Morgan* (7), a decision of the Court of Appeal, *Bent v. Cullen* (6) was observed on with some asperity, LINDLEY, L.J., saying that he thought that the Lord Chancellor in that case ([1893] 3 Ch. 228) "did for a moment fail to observe the difference
B between giving a person a portion of the income of a fund and something payable out of it." LOPES, L.J., described it as (*ibid.*, 230) "a decision which has been repeatedly avoided," and A. L. SMITH, L.J., said that he did not know whether it was right or wrong.

C The latest authority is, I think, *Townsend v. Ascroft* (8), where a testator gave to his daughter an annuity of £30 charged on his real estate for her life with a general power of leaving it by her will. The daughter by her will appointed the annuity to her daughter absolutely, and it was held by EVE, J., that the appointee was entitled to a perpetual annuity of £30. This decision is not, perhaps, easy to reconcile with the earlier cases, but it differs from the present case because there the so-called annuity could be regarded as a true legal rent charge and the power to appoint it was not a special power to be exercised necessarily in favour of living individuals, but was a general power
D capable, I suppose, of being exercised in favour of a charity or of a corporation which has no life by which the duration of the annuity could be measured.

Looking at the will of the testator in the present case and comparing and contrasting the gift in question with the residuary gift, I have come to the conclusion that the annuity here is not perpetual, but is limited to the lives of those to whom the donee of the testamentary power has directed it to go. That seems to me to be the result of the authorities which I have mentioned, and of the
E proper application of the principles enunciated therein. On that view of the construction proper to be placed upon the testator's will, I must now consider what is the construction and effect of Mrs. Irvine's will.

[After further argument HIS LORDSHIP continued (Nov. 19) :] The attempted gift over on the death of a child of hers to the others or other of them clearly transgresses the rule against perpetuities. But for that gift, it may well be that
F the trust for such children or child of hers as should be living at her death would have operated as a valid appointment to them as joint tenants of the entirety, which incidentally would have had much the same consequences as the gift over would have had. I have first to construe the will without regard to any question of perpetuity, and then to consider the effect of the perpetuity rule on the construction. So approaching the problem, I have come to the conclusion that the applicants, as the only children of Mrs. Irvine who survived her, are entitled
G to the £100 annuity in equal shares so long, and only so long as both are living, and that is my decision of the case.

Declaration accordingly.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *T. W. Emerson*, Plymouth (for the applicants); *Coodo, Kingdon, Cotton & Ward* (for the respondents).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

BARRINGTON v. KENT RIVERS CATCHMENT BOARD.

[KING'S BENCH DIVISION (Hilbery, J.), November 24, 25, 1947.]

Master and Servant—Common employment—Dissimilar tasks—Plaintiff and negligent workmen in different departments of employers' organisation—"Factory"—Building not ready for use as factory—Preparation for performance of work when building equipped as factory—Factories Act, 1937 (c. 67), s. 25 (3), 151 (1) (b).

The defendants were a catchment board constituted under the Land Drainage Act, 1930, and the plaintiff was the superintendent of the mechanical department of the board, the duty of which was to maintain the mechanical equipment used by the works department in carrying out the duties placed on the board by the Act. In April, 1946, a building had been erected by contractors employed by the board for use as a workshop for the mechanical department, there having been constructed in the floor of the building two inspection pits for use in the examination of vehicles and mechanical plant from beneath. On Apr. 17 machinery was moved into the building for use by the mechanical department in their work. None had been installed so as to be capable of being used, there was no electric power in the building by which the machinery could be driven, and there was no shafting to transmit power to the plant. On Apr. 18 G., the head of the works department, and members of his staff began to instal the plant and to fix brackets on the wall for the shafting, and on G.'s instructions one of his staff removed some of the boards covering one of the inspection pits so that they could be included in the scaffolding needed in the fixing of the shafting brackets. Later in the day the plaintiff visited the building to examine a lorry which had just been bought by the board and to decide how and to what extent it should be painted. The driver of the lorry had begun to clean it in preparation for its being painted. The lorry had been placed alongside the open inspection pit, and, while the plaintiff was examining it, he fell into the pit and was injured. In an action brought by the plaintiff against the board in which he claimed damages for personal injuries, the judge held that the board, through its servants, had been guilty of negligence resulting in the plaintiff's injuries and also that the plaintiff had not been guilty of contributory negligence. He further

HELD: (i) that the work of the works department being ordinarily of a completely different nature from that on which the plaintiff and his staff would ordinarily be engaged and the juxtaposition with members of the works department in which the plaintiff found himself at the material time being exceptional to the point of being unique, the plaintiff and the members of the works department could not be said to be fellow labourers engaged on the same work, but they were employed on wholly distinct and dissimilar tasks, and, therefore, the defendants could not avail themselves of the defence of common employment.

Principle enunciated by LORD WRIGHT in Radcliffe v. Ribble Motor Services, Ltd. ([1939] 1 All E.R. 637), applied.

(ii) although the building and the equipment were still incomplete and the building was incapable of use as a factory or workshop, the driver of the lorry and the plaintiff had begun to do the kind of work therein which it was intended to do in the building when it was a complete factory, and, as that work involved manual labour and was a process for or incidental to the altering, repairing, cleaning, etc., of the lorry, the building was a "factory" within s. 151 (1) (b) of the Factories Act, 1937, and, therefore, the board were liable to the plaintiff for a breach of s. 25 (3) which provides: "All openings in floors shall be securely fenced, except in so far as the nature of the work renders such fencing impracticable," an exception which had no application to the present case.

[AS TO THE DOCTRINE OF COMMON EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328; and FOR CASES, see DIGEST, Vol. 34, pp. 207-220, Nos. 1697-1824.

FOR THE FACTORIES ACT, 1937, ss. 25 (3), and 151 (1) (b), see HALSBURY'S STATUTES, Vol. 30, pp. 221, 295.]

Case referred to :

(1) *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] 1 All E.R. 637; [1939] A.C. 215; 108 L.J.K.B. 320; 160 L.T. 420; Digest Supp.

ACTION tried by HILBERY, J.

A The plaintiff claimed from the defendants damages for personal injuries suffered by him through falling into an inspection pit in a building which was in course of being fitted as a factory or workshop for the repair of mechanical plant used by the defendants in the performance of their statutory duties. The learned judge found that the defendants, through their servants, had been guilty of negligence and that the plaintiff had not been guilty of contributory negligence, and he further held that the defendants could not avail themselves of the defence of common employment nor evade liability under the Factories Act, 1937, s. 25 (3), on the ground that at the time of the accident the building was not a "factory" within the Act.

B *Glyn-Jones, K.O.*, and *Showan* for the plaintiff.
Marven Everett for the defendants.

C **HILBERY, J. :** The defendant board is a catchment board constituted pursuant to the Land Drainage Act, 1930, and, as its name denotes, exercising the functions of such a board in Kent. For some time before April, 1946, the board had a workshop at Gillingham, Kent, where vehicles and machines owned and used by the board in the performance of its duties were brought in for repairs, overhaul and renovation. It had been found that the workshop there was too small and not conveniently situated. In consequence, the board decided to erect a new building on a site which it owned at Maidstone. To effect that purpose, the board employed contractors to erect a suitable building on that site. At that time the plaintiff, who is an engineer, held the position of mechanical superintendent in the employment of the defendants. It was his duty to act as the superintendent of the workshops where the mechanical work to the vehicles and mechanical contrivances used by the board came for attention. He had collaborated in the preparation of the plan for the new building, and, no doubt, partly at his suggestion, there were in the new building two inspection pits over which vans, lorries and other mechanical contrivances could be brought so as to enable them to be inspected from below. They had a covering composed of boards. The pit with which we are concerned was 3ft. 7ins. wide and 14ft. long, and it was covered by twenty-seven boards. This new workshop had been completed, so far as the contractors' work was concerned, before Apr. 18, 1946. On Apr. 17, the machinery which had been used in the workshop at Gillingham was removed to the new building and waited to be put in the positions appropriate for each piece of it. None of it could be used on Apr. 18. Not only was it not assembled or fixed, but there was no electric power yet in the building. Before the machinery could be used, it was also necessary that shafting should be fixed on brackets on the walls and that a large moving overhead crane on rails should be installed and put into working order and, that these things should be done and the workshop made ready to go into action as a workshop, certain of the servants of the defendant board were instructed to execute the work. The work of the board was divided into three sections. One was the civil engineering side, the department which would decide the work necessary to be done outside in the catchment area and how it should be done. The department that actually carried out the work decided on by the civil engineering department was called the works department and was under its own superintendent, Mr. Griggs. That work would often be done by means of one or other of the mechanical contrivances which were suitable. The plaintiff was superintendent of the mechanical department which maintained and kept in running order all this mechanical equipment.

H On Apr. 18 Mr. Griggs, with his men of the works department, was in this new building. They had to begin the installation of the plant, and Mr. Griggs had given orders to his men to erect a scaffolding to fix wall brackets to carry shafting. It was found that the scaffolding was not high enough, and, to get greater height for the scaffolding, Mr. Griggs ordered one of his men, Mr. Sharpe, to take some of the covering boards from the 14ft. pit, and use them for giving greater height to the scaffolding. Mr. Sharpe removed some of the boards

from one end of the pit, leaving in place the boards which covered the other end of the pit. In the early afternoon, therefore, that pit was left as an opening in the floor of the workshop building uncovered and without protection. At that time the plaintiff came to the premises to inspect a lorry which had formerly been an army lorry and had been bought by the board, to decide with the store-keeper the amount of paint it would be necessary to have issued for the painting of the lorry. The lorry had been driven alongside the 14ft. pit off which the end covering planks had been removed, and the driver had begun to clean the front of the lorry in preparation for its being painted. The plaintiff entered the premises and looked towards the lorry towards which he was advancing. The whole of the lorry shut off from his view the front end of the pit from which the covering boards had been moved. So far as he could see, the covering boards were on the pit. He went up to the off-side of the lorry—that is, the side which was the further away from the hole—and he began closely to inspect the lorry down the off-side, beginning at the front and working down towards the back. In doing that he stooped slightly to see exactly what the state of affairs was. He passed round the back of the lorry, and, still facing the lorry and working along it, he began to work up towards the front on the near side. When the plaintiff got to the cab of the lorry he opened the door, got up on the step to look inside the cab, looked inside the cab, stepped back off the step of the lorry and, to make room for shutting the door, he unfortunately took one more step back. In fact, he stepped into the end of the inspection pit which had been left uncovered. He fell to the bottom of the pit and sustained a comminuted fracture of his ankle.

In those circumstances the plaintiff claims damages. He alleges that he has a cause of action both at common law and for breach of the duties imposed on the defendants by the Factories Acts. The defendants deny that they failed to take reasonable care for his safety or that they were guilty of the alleged breach of duty, and they say in the alternative that, if there was any negligence on their part, there was contributory negligence on the part of the plaintiff. In the further alternative, they say that he is barred from a remedy by virtue of the doctrine of common employment, since, whatever negligence there was, it was that of a fellow servant of his in common employment with him of the board. As to the claim under the Factories Act, 1937, the defendants deny that they were in breach of any provisions of the Factories Act, 1937, and they say, further, that at the material date the premises did not constitute a factory within the definition of the Act so that the Act had no application in the circumstances.

[HIS LORDSHIP reviewed the evidence and held that the defendants, by their servants, had been guilty of negligence, but the plaintiff had not been guilty of contributory negligence, and he continued:] The next point I have to consider is whether, since the negligence from which the plaintiff suffered was the negligence of Mr. Griggs and the workman, Sharpe, in causing the removal of the covering planks of the pit and actually removing them and was the negligence of servants in the employment of the board, as was the plaintiff, the plaintiff is barred from recovering by the doctrine of common employment. I am most anxious to avoid overloading reports with yet another decision on common employment, but I must decide the point and I cannot do better than decide it as shortly as possible. I take the principle which should guide one in considering whether the doctrine is applicable to a particular set of circumstances to be that stated by LORD WRIGHT in *Radcliffe v. Ribble Motor Services, Ltd.* (1) (1939) 1 All E.R. 650, where he says:

The essential question in this appeal is to ascertain the limitation relevant to this case, and to see if the facts fall within the principle as so limited. The relevant limitation, in my opinion, is that the rule does not apply where the injured man and the negligent co-employee are not engaged in the same common work, or are not fellow-labourers in the same work, or are engaged in different departments of duty . . . However, it is clear on the authorities in this House that there is always the limit, however expressed, that it must be the same work in which the workmen are employed. They must be employed in common work—that is, work which necessarily and naturally, or in the usual course, involves juxtaposition, local or causal, of the fellow-employees, and exposure to the risk of the negligence of one affecting the other.

Those statements must be read in the light of the principle that the doctrine is based on the implied contract of the workman to take the risk of the negligence

- of fellow employees working with him in the same employment. Applying that principle here, I think that this case, in the particular circumstances, is one where the doctrine does not apply. The work of those employed in Mr. Griggs' department was ordinarily of a completely different nature from that on which the plaintiff and his fitters and foreman, or ganger, would ordinarily be engaged. The two departments were completely separate, and they were so organised because the work to be done in each department was of a completely different type. On this occasion the juxtaposition in which the plaintiff found himself with the workers in Mr. Griggs' department was the result of a state of circumstances which was exceptional to the point of being unique. They were only working near one another in this building because of the removal of the workshop and its appliances to a new building—a thing which had never happened before and was hardly likely ever to occur again. By no stretch of the imagination can one see how, when the plaintiff entered into the employment of the defendant board, he could ever have had it in contemplation that he would be working in his workshop alongside members of Mr. Griggs' department so as to be exposed to the risk of negligence on their part. Furthermore, they were not engaged in any common task at the time. They were engaged in wholly distinct and dissimilar tasks. To use LORD WRIGHT's expression, they were not engaged in the same common work. They were not fellow labourers in the same work. They were, in truth, engaged in different departments of duty. It only happened that, being so engaged, they were thus engaged under one roof. I think that view of the matter is not only consonant with *Radcliffe v. Ribble Motor Services, Ltd.*, (1), but is also consonant with the decisions that have been reported since *Radcliffe v. Ribble Motor Services, Ltd.* (1), and have been brought to my attention. In those circumstances, in my view, the defence of common employment fails.
- The only matter that remains is the allegation that this was a factory and there was a breach of the duty imposed on the defendant board by the provisions of the Factories Act, 1937. It is said that this shop was a factory within the definition given in s. 151 of the Factories Act, 1937. The definition there of a factory is that it means :

... any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely . . . (b) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article : . . . being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control.

The fact that these premises, if they were premises in which any person was employed in manual labour in any process of altering, repairing, ornamenting, finishing, cleaning, or washing or the breaking up or demolition of any article, were not being used for trade or gain, does not matter because, by s. 151 (9), it is enacted :

Any premises belonging to or in the occupation of the Crown or any municipal or other public authority shall not be deemed not to be a factory, and building operations or works of engineering construction undertaken by or on behalf of the Crown or any such authority shall not be excluded from the operation of this Act, by reason only that the work carried on thereat is not carried on by way of trade or for purposes of gain.

First, I have to say whether these premises were premises in which persons were employed in manual labour in any process for or incidental to the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article. It is said that this was not yet a factory or workshop, that the contractors had only just left it, that it was intended to become a factory, but it was only in process of being turned into one—in other words, it had not yet arrived at the status of a workshop or factory. Having regard to the words that I have read, the argument of counsel for the plaintiff, in my opinion, is right. The test must be whether the premises are premises in which a person or persons is or are employed in manual labour. "Manual labour" is any process for or incidental to any of those matters which I have quoted more than once. It is perfectly true that this workshop was not yet in a position to do or to afford the facilities necessary for the doing of the work

which it was intended eventually to do there, and for a time I was impressed with the view that it had not yet come to be a place which could be said to be a factory within the definition. Reading the statute carefully, however, I think that counsel for the plaintiff is right when he says that the test is not whether the building is complete as a factory. It may be very incomplete and much may remain to be done to it before it is the finished factory that everyone contemplates, but if in one corner of it somebody has begun to do one of the things which it is intended shall be done there when it is a completed factory, and if that thing comes within the definition in s. 151 and can be said to be a process for or incidental to the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article, then the building is a factory. It has become a factory then and there. Here, as I have said, the man who had driven the lorry to the premises was already at work on it in furtherance of the object of altering it and repairing it by painting it anew and the plaintiff was himself inspecting it to determine, with the store-keeper with him there in attendance, how it should be painted and how much paint should be put on it. That would normally be a part of the work done in the premises when they were completed as a workshop, and, in those circumstances, the premises had already begun to be used as a workshop and there was already a person or persons employed in it in manual work incidental to the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of this lorry. The result of that is that s. 25 (3) of the Factories Act, 1937, was binding on the defendants at the material time and imposed on them the duty to have "all openings in floors . . . securely fenced, except in so far as the nature of the work renders such fencing impracticable." The nature of the work which Mr. Griggs had to do was the fixing of brackets in the wall with the use of a scaffold and did not involve the use of the boards which were intended to be the cover of the pit. The nature of the work in hand both in regard to Mr. Griggs and in regard to the plaintiff and the driver of the lorry was not work which rendered the maintenance of the covering on the pit impracticable, and, in my view, therefore, the defendants were under the duty imposed on employers by s. 25 (3). That duty was not discharged in so far as those covering boards were off the pit and the opening in the floor of the factory was left open and unguarded, and in the circumstances, the plaintiff recovers. [HIS LORDSHIP considered the evidence of injury and assessed the damages at £2,245 less certain agreed deductions].

Judgment for plaintiff, with costs.

Solicitors: *Rye & Eyre* (for the plaintiff); *Hair & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

KADEL CHAJKIN AND CE DE, LTD. v. MITCHELL COTTS & CO. (MIDDLE EAST), LTD., AND A/S MOTORTRAMP.

[KING'S BENCH DIVISION (Sellers, J.), November 21, 1947.]

Practice—Writ—Service—Service out of jurisdiction—Contract not governed by English law—Bill of lading—R.S.C., Ord. 11, r. 1 (e) (iii) and (g).

Goods were shipped in Santos, Brazil, to be carried to Haifa in transit to Beirut. The shippers were Brazilian, and the ship a Danish ship managed by Norwegian managers for Swedish time charterers. The bill of lading, which was headed "Scandinavia—South America—Mediterranean Line" was mainly in English with two stamped endorsements in Portuguese. Weight was expressed in kilograms, measurements in metres, and freight in dollars translated into Brazilian currency. Clauses provided as follows: "(a) Landing at Oslo to be effected by the ship on account of goods and in accordance with the rules and tariffs of a [Danish company]. (b) In case of average same to be adjusted in Oslo or another port in owner's option according to York-Antwerp Rules, 1924. (c) All the terms, provisions and conditions of the Act of the Kingdom of Norway dated Feb. 4, 1938, relating to the enforcement of the International Convention Concerning Bills of Lading of Aug. 25, 1924, are to apply to the contract contained in this bill of lading, and the carriers are to be entitled to the benefit of all privileges, rights and immunities contained in such Act as if the same were herein specifically set out." In an action for breach of

the bill of lading,

HELD : notwithstanding the use of technical language in clauses many of which had been the subject of English decisions, the three clauses cited, and especially (c), coupled with the fact that the form of contract adopted was not the standard form of English contract, but was expressly applicable to Scandinavia—South America—Mediterranean trade, indicated that the proper law of the contract was not English law, and, therefore, no order could be made under R.S.C., Ord. 11, r. 1 (e) (iii) or (g), for service out of the jurisdiction of the writ in the action.

[AS TO SERVICE OUT OF THE JURISDICTION WHERE CONTRACT GOVERNED BY ENGLISH LAW, see HALSBURY, Hailsham Edn., Vol. 26, p. 31, para. 44 ; and FOR CASES, see DIGEST, Practice, p. 344, No. 608, 609.]

Cases referred to :

- (1) *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft*, [1937] 2 All E.R. 164 ; [1937] A.C. 500 ; 106 L.J.K.B. 236 ; 156 L.T. 352 ; Digest Supp.
- (2) *Johnson v. Taylor Brothers & Co., Ltd.*, [1920] A.C. 144 ; 89 L.J.K.B. 227 ; 122 L.T. 130 ; 39 Digest 660, 2515.
- (3) *George Monro, Ltd. v. American Cyanamid & Chemical Corporation*, [1944] 1 All E.R. 386 ; [1944] K.B. 432 ; 113 L.J.K.B. 235 ; 170 L.T. 281 ; Digest Supp.
- (4) *Spurrier v. La Cloche*, [1902] A.C. 446 ; 71 L.J.P.C. 101 ; 86 L.T. 631 ; 11 Digest 389, 644.

SUMMONS by the second defendants under R.S.C., Ord. 12, r. 30, that the order of a master, dated Aug. 22, 1947, the writ in an action in the Commercial List, the service thereof, and subsequent proceedings against them, be set aside on the ground that the action was not within R.S.C., Ord. 11, r. 1. SELLERS, J., set aside the order.

Stephen Chapman for the plaintiffs.

Mocatta for the defendants.

SELLERS, J. : The plaintiffs issued a writ on Aug. 15, 1947, against two defendants, Mitchell Cotts & Co. (Middle East), Ltd., and the owners of a vessel called the "Stensby." They claim against the first defendants damages for negligence as bailees of the plaintiffs' cargo and for conversion thereof, against the second defendants damages for breach of contract of carriage of goods by sea, and against both defendants damages for breach of contract and duty in and about the carriage, storage, transhipment, custody and care of the plaintiffs' cargo loaded at Santos in 1946 on board the ship "Stensby."

On Aug. 22, 1947, the plaintiffs applied *ex parte* for, and obtained, an order to serve the writ on the second defendants, who are resident in Denmark, out of the jurisdiction. The first defendants had been duly served within the jurisdiction. The plaintiffs relied as the basis for their application on R.S.C., Ord. 11, r. 1 (e) (iii) and (g). That rule provides :

Service out of the jurisdiction of a writ of summons . . . may be allowed by the court or a judge whenever . . . (e) the action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract . . . (iii) by its terms or by implication to be governed by English law . . . (g) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

I was referred to several authorities on the proper law of the contract. I do not propose to refer to them all, but LORD ATKIN's speech in *R. v. International Trustee for the Protection of Bondholders Aktiengesellschaft* (1) deals with the principle in this matter. He says ([1937] 2 All E.R. 166) :

The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion the court will be guided by rules which indicate that particular facts or conditions lead to a *prima facie* inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law : *e.g.*, the country where the contract is made, the country where the contract is to be performed, if the contract relates to immovables the country where they are situate, the

country under whose flag the ship sails in which goods are contracted to be carried. But all these rules only serve to give *prima facie* indications of intention: they are all capable of being overcome by counter indications, however difficult it may be in some cases to find such.

The way the court should approach this matter has also been indicated by a decision of the House of Lords in *Johnson v. Taylor Bros. & Co., Ltd.* (2), and, in particular, a passage from the speech of LORD HALDANE. He says ([1920] A.C. 153):

Order 11, r. 1 does not lay down in imperative terms a new principle of law as to be applicable in all cases. What it does is, while leaving intact the old principle that by the law of England jurisdiction depends, broadly speaking, on presence within the jurisdiction, to enable the court to give special leave for service out of the jurisdiction in certain circumstances. The court may do so, that is to say that the court has a new power which it is enabled to exercise in particular cases which seem to it to fall within the spirit as well as the letter of the various classes of case provided for. This appears to me to entitle the court to refuse to give such leave in an instance in which the proceeding, though for a breach within the jurisdiction and in the letter within the terms of the rule, is in substance not so.

That has been repeated and exemplified in other cases. There was a case recently before the Court of Appeal, *George Monro, Ltd. v. American Cyanamid & Chemical Corporation* (3), in which SCOTT, L.J., said ([1944] 1 All E.R. 388):

Service out of the jurisdiction at the instance of our courts is necessarily *prima facie* an interference with the exclusive jurisdiction of the sovereignty of any foreign country where service is effected. I have known many continental lawyers of different nations in the past criticize very strongly our law about service out of the jurisdiction. As a matter of international comity it seems to me important to make sure that no such service shall be allowed unless it is clearly within both the letter and the spirit of R.S.C., Ord. 11.

The facts which are before the court make it a little difficult to draw any very certain inferences. The bill of lading is headed: "Scandinavian—South America—Mediterranean Line." It is for the most part in English with two stamped endorsements in Portuguese. The goods were shipped in Santos, Brazil, by Brazilian shippers. The ship was a Danish ship, the "Stensby," managed by Norwegian managers on behalf of Swedish time charterers. The cargo was 334 cases of cocoa butter, and, according to the bill of lading, it was to be carried from Santos to Haifa in transit to Beirut. The weight of the cargo was in kilograms, the measurements in metres, and the freight in dollars translated, I think, into Brazilian currency. There are clauses in the bill of lading itself which the Danish shipowners say indicate that the fact that this bill of lading is in English is not to be regarded as conclusive evidence that the intention of the parties was that the contract should be governed by English law. Some reference was made to cl. 3, which provides:

Landing at Oslo to be effected by the ship on account of goods and in accordance with the rules and tariffs of [a Danish company],

and, perhaps, more particularly cl. 15, which provides:

In case of average same to be adjusted in Oslo or another port in owner's option according to York-Antwerp Rules, 1924.

Above all it is said that there is, at the end of the printed clauses of the bill of lading, a clause paramount which provides:

All the terms, provisions and conditions of the Act of the Kingdom of Norway dated Feb. 4, 1938, relating to the enforcement of the International Convention Concerning Bills of Lading of Aug. 25, 1924, are to apply to the contract contained in this bill of lading, and the carriers are to be entitled to the benefit of all privileges, rights and immunities contained in such Act as if the same were herein specifically set out.

Some authorities have been referred to which deal with the importance to be attached to the form of the contract and the fact that the contract is in the English language. Counsel for the plaintiffs, who is seeking to support this service, has laid the greatest stress on that and argued that it should be the deciding factor. He points out that it is a technical contract, that the language is of a technical character, and that a great many of the clauses have been the subject of English decisions. He contends that, therefore, there is a strong indication that it was the intention of the parties that the contract

should be governed by English law and it is appropriate that the English courts should deal with it. I think, however, that the reply is justified so as to it is not the standard form of English contract because it is adapted so as to be expressly applicable to the Scandinavian, South American and Mediterranean trade. Reliance is placed also by the plaintiffs on the fact that the bill is in English and in the conventional terms of an English bill of lading, and they contend that there is no reasonable alternative to be adduced from the evidence as to the intention of the parties. I was referred to *Spurrier v. La Cloche* (4), and, in particular, to an extract from the decision of the Judicial Committee. LORD LINDLEY said ([1902] A.C. 450 :

The first question which arises is whether this is to be regarded as an English contract or as a Jersey contract. Their Lordships are of opinion that, although this policy was made in Jersey, and any money payable under it would have to be paid to the assured in Jersey, the nature of the transaction, the language in which the policy is expressed, and the terms of the agreement and of the conditions, all shew that the contract between the parties is an English contract, and that wherever sued upon its interpretation and effect ought, as a matter of law, to be governed by English and not by Jersey law.

All contracts must, of course, be considered on their own facts and circumstances, and I do not find it easy to form a satisfactory conclusion in the present case. The burden is on the plaintiffs to satisfy the court that it is proper to exercise a discretion. The conclusion at which I have arrived is, not merely that they have not satisfied the court, but that the proper law of this contract is not English law, notwithstanding the forcible arguments adduced by counsel for the plaintiffs. In my view, great force arises from the inherent nature of the contract itself and the shipowners derive sufficient help to turn the scales in their favour from the clauses in the bill of lading to which I have referred, particularly the clause paramount at the end of the conditions. The circumstances outside the document itself do not afford any evidence which would associate the contract with this country. There is nothing to indicate that the parties intended that any troubles which arose should be dealt with in this country or that the law of this country should govern the contract. The contract originated in Brazil, the goods were to be carried from Brazil to Palestine, the vessel was a Danish vessel, and there was no association, so far as I can see, with this country. In those circumstances I find against those contentions of the plaintiffs which are based on para. (e) (iii) of R.S.C., Ord. 11, r. 1.

[HIS LORDSHIP reviewed the evidence and said that he was not satisfied that the action was properly brought against the first defendants so as to make it proper for him to come to the conclusion that service out of the jurisdiction should be ordered in the case of the second defendants under R.S.C., Ord. 11, r. 1 (g). Accordingly, he made an order setting aside the order for service out of the jurisdiction made by the master on Aug. 22, 1947.]

Order set aside.

Solicitors: *Clyde & Co.* (for the plaintiffs); *William A. Crump & Son* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

HOUSE PROPERTY AND INVESTMENT CO., LTD. v.

JAMES WALKER, GOLDSMITH AND SILVERSMITH, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), November 6, 7, 1947.]

H *Landlord and Tenant—Lease—Breach of covenant—Sub-letting without consent—Forfeiture—Relief—Grounds for relief—Law of Property Act, 1925 (c. 20), s. 146 (2).*

The Law of Property Act, 1925, s. 146 (2), which gives the court power to grant relief from forfeiture for breach of covenant, applies to a breach of covenant against assigning or underletting without consent.

[AS TO RELIEF AGAINST FORFEITURE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 260-262, paras. 293-295; and FOR CASES, see DIGEST, Vol. 31, pp. 487, 488, Nos. 6354-6356, p. 489, Nos. 6368-6370, and pp. 490, 491, Nos. 6381-6387.]

Cases referred to :

- (1) *Barrow v. Isaacs & Son*, [1891] 1 Q.B. 417; 60 L.J.Q.B. 179; 64 L.T. 686; 55 J.P. 517; 31 Digest 491, 6388.
- (2) *Eastern Telegraph Co. v. Dent*, [1899] 1 Q.B. 835; 68 L.J.Q.B. 564; 80 L.T. 459; 31 Digest 491, 6389.

ACTION for possession of a shop on the ground that the lease had been forfeited for breach of covenant in underletting without the landlords' consent. The tenants admitted the breach of covenant, but counterclaimed for relief under the Law of Property Act, 1925, s. 146 (2), on the ground that they had been obliged to grant a short underlease of the premises to a government department to avert the threat of requisitioning. LORD GODDARD, C.J., held that s. 146 (2), which gives the court a discretionary power to grant relief from forfeiture for breach of covenant, applied to a breach of a covenant against underletting without consent and that this was an appropriate case in which to grant relief. The facts appear in the judgment.

Beresford, K.C., and *John W. Russell* for the landlords.
R. F. Levy, K.C., and *Lloyd-Jones* for the tenants.

LORD GODDARD, C.J. : This is an action to recover possession of property in High Street, Hounslow, on the ground that a forfeiture of the lease has been incurred by reason of a breach of covenant. The breach alleged is that the tenants have underlet the premises and granted possession to the Commissioners of Works without obtaining the consent of the landlords. There was a covenant in the lease against assigning, underletting or parting with the possession of the premises or any part thereof without the previous written licence of the landlords. There was also a proviso for forfeiture in the event of breach by the tenants of any of the covenants, and, therefore, it is admitted that *prima facie* there has been a breach of covenant and a forfeiture has been incurred. Strictly speaking, I could give judgment for possession unless I saw fit to grant relief against a forfeiture. It is submitted for the landlords that the court has no power to grant relief against forfeiture in this case, because the tenants did not ask for permission. Against that, it is said that the court can grant relief under s. 146 (2) of the Law of Property Act, 1925, which was passed after *Barrow v. Isaacs & Son* (1) and *Eastern Telegraph Co. v. Dent* (2) were decided. These cases were certainly the law until the Law of Property Act, 1925, was passed. Section 146 (1) of that Act is in these terms :

A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice [specifying certain things] . . . and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

This sub-section limits the right of the landlord, because he cannot bring an action for breach of covenant unless these conditions have been fulfilled. In this case they were fulfilled and I have, therefore, to consider s. 146 (2) which provides :

Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

Before the Act of 1925, so far as courts of law were concerned, the Conveyancing Act, 1881, s. 14, contained the relevant provisions on this matter. Section 14 (1), which was similar to s. 146 (1) of the Act of 1925, deprived the landlord of the right of re-entry unless he complied with the requirements of the sub-section, and s. 14 (2) conferred on the court power to grant relief against forfeiture—a power which had hitherto only been exercised by courts of equity. Section 14 of the Act of 1881 did not, however, apply to covenants against assignment or underletting or parting with the possession of property without the consent of the landlord [s. 14 (6) (i)], and, therefore, the courts

had no power to grant relief in such cases. In spite of the limitation which was placed on the powers of the courts by the Act of 1881, in *Barrow v. Isaacs & Son* (1) it was held that, in certain circumstances, a court of equity could still give relief, but not where it was a mere matter of neglect and mistake, and, therefore, in the latter circumstances the tenant could get relief neither at law nor at equity.

A The Conveyancing Act, 1881, was repealed *in toto* by the Law of Property Act, 1925, except for a few immaterial provisions, and one object of s. 146 of the Act of 1925 was to extend the powers of the courts which had been limited by the earlier Act. Section 146 of the Act of 1925, however, applies to any breach of covenant and, therefore, it applies equally to covenants against assignment or underletting without consent as it does to any other breach. Under the Landlord and Tenant Act, 1927, s. 19, the tenant commits no breach of covenant if he underlets after applying for permission to do so and the landlord B refuses it. He can then underlet without consent, except in certain cases, but, if the landlord has a valid objection, it would, no doubt, be upheld by the court. That the court has power to grant relief from forfeiture where a tenant assigns or underlets without consent is put beyond any doubt by s. 146 (8) of the Act of 1925, which provides :

C This section does not extend (i) to a covenant or condition against assigning, underletting, parting with the possession, or disposing of the land leased where the breach occurred before the commencement of this Act . . .

Obviously, if a breach occurs after the commencement of the Act, power is conferred on the court to relieve against it.

D The question is whether I should grant relief in this case. It seems to me that the landlords have acted in a thoroughly unreasonable manner. The premises were let to the tenants [a company] to carry on business as jewellers. Owing to lack of labour and the difficulty of obtaining supplies of jewellery during the war, the shop was shut and used as a store for the fittings and so forth from other shops. It was not suggested that the tenants were committing any breach of covenant by not carrying on their business, because, no doubt, they could not carry it on at that time. After the shop had been in that condition for a long time, the Commissioners of Works, in the autumn of 1944, wrote to the tenants as follows :

E . . . this is to confirm that this department is endeavouring to find accommodation in Hounslow High Street suitable for the occupation of the Ministry of Labour, who are wishing to open shortly a resettlement advice office. Accommodation for this purpose is required in a prominent position and I notice that a portion of your shop at the west end of Hounslow High Street is unused. I shall, therefore, be glad to hear whether these premises can be made available for the purpose required. If so, perhaps facilities could be given for an inspection to be made to see whether the shop is large enough.

F In the circumstances it was obvious that there was a great danger of the shop being requisitioned if the tenants did not come to terms with the Ministry. On Oct. 31, 1944, the commissioners again wrote to the tenants, saying :

G With reference to my letter of the 16th instant and your reply of the 23rd *idem*, the above premises have now been inspected and it is considered, subject to survey, that they will be suitable for the purpose required, and I will write you further in the matter shortly.

H Miss Jones (who was at the time the sole managing director of the defendant company) kept them waiting as long as she could by saying that she was using the shop as a store for the company's property, but in March, 1945, the commissioners told her that, if she did not come to terms and let the shop to them, they would requisition it. She, therefore, wrote this letter, dated Mar. 15, 1945 :

We have further considered this matter and are prepared to grant a 2 years' lease from Mar. 25 at the rental we pay of £225 per annum, it being understood that accommodation will be found for all the fixtures and fittings we now have stored in the premises, and if any part of our shop front or fixed fittings are removed, these will be reinstated at the end of the term.

I am invited to say that Miss Jones' object in writing that letter was simply to get the company relieved of the payment of £225 a year to the landlords, or, rather, to get the money back so that she could pay the rent. I am satisfied

that she did not want to let the premises, because she was using them as a store. She knew that she had to come to terms with the commissioners or the premises would be requisitioned. She obviously did a sensible thing, which was not only in her interests, but certainly also in the interests of the landlords, in making a bargain with the commissioners to let only for two years, because she hoped that a short lease with terms with regard to reinstatement, would be better for all parties concerned than a requisition. She ought to have asked for consent, but there is small blame attaching to her in the circumstances. The commissioners went in, and this derelict shop was re-opened as an office. The managing director of the plaintiff company (the landlords) admitted that it was better for their other property in the neighbourhood for these premises to be re-opened as an office rather than to remain closed. It is not suggested that they received any complaints from the tenants of the adjoining shops, which they own, and they did not even find out that this sub-letting had taken place until some fifteen months later. Then I suppose they thought: "Well, now, here is a chance to get these premises back. There are still a good many years of the lease to run, and, if we get rid of the tenants, we can re-let them." This kind of attitude does not commend itself to me and I will grant relief.

With regard to terms, the question is what conditions can I impose? The Commissioners (now the Ministry) of Works, having had their two years' lease, have now requisitioned the property. I cannot order the Crown to go, and I cannot order the premises to be re-opened as a jeweller's shop. The only benefit which could inure to the landlords by this action, which I think is a thoroughly unreasonable one, would be to get vacant possession of the shop when the Ministry of Works choose to go out, which they may do this year or next year, or when the Supplies and Services (Transitional Powers) Act, 1945, which maintains requisitioning, expires, and then the landlords could let the premises at an increased rent. I cannot order the tenants to do the alterations to the shop and to replace the partitions or internal fixtures that the Ministry of Works have taken out. Therefore, it seems useless for me to attempt to impose any terms, and, accordingly, I grant relief in this case and impose no conditions.

[After hearing counsel on the question of costs, HIS LORDSHIP ordered the plaintiffs to pay three-fifths of the defendants' costs on the counter-claim.]

Order accordingly.

Solicitors: *Henry Gover & Son* (for the landlords); *Bulcraig & Davis* (for the tenants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

HUTCHINSON v. HUTCHINSON.

[KING'S BENCH DIVISION (Denning, J.), November 24, 1947.]

Husband and Wife—Legal proceedings—Claim for possession of house—Parties judicially separated—Married Women's Property Act, 1882 (c. 75), s. 17.

The parties were married in 1924 and a son was born in 1929. In 1932 the husband bought a house in his own name, and the parties resided there as their matrimonial home until the husband left to live with another woman. The wife obtained a decree of judicial separation and the husband made payments for the support of his wife and son. The husband applied under s. 17 of the Married Women's Property Act, 1882, for an order for possession of the house.

HELD: the court had a discretion under s. 17 which was not affected by the fact that a decree for judicial separation had been obtained, and in the circumstances it would be unjust to make an order for possession.

[AS TO LEGAL PROCEEDINGS BETWEEN HUSBAND AND WIFE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 739-741, paras. 1209-1214; and FOR CASES, see DIGEST, Vol. 27, pp. 258-261, Nos. 2278-2305.]

Cases referred to :

- (1) *Gaynor v. Gaynor*, [1901] I.R. 217; 27 Digest 259, e.
- (2) *Hill v. Hill*, [1916] W.N. 59; 27 Digest 260, 2291.
- (3) *Bramwell v. Bramwell*, [1942] 1 All E.R. 137; [1942] 1 K.B. 370; 111 L.J.K.B. 430; Digest Supp.
- (4) *Pargeter v. Pargeter*, [1946] 1 All E.R. 570; Digest Supp.

A APPEAL by a wife against an order of a Master that she deliver up forthwith to her husband a house owned by him which had previously been the matrimonial home and in which the wife had continued to reside with her son after obtaining a decree of judicial separation against the husband. The appeal was allowed. The facts appear in the judgment.

Stranders for the wife.

C. E. Rochford for the husband.

B DENNING, J. : In this case the wife, who has obtained a decree of judicial separation from her husband, appeals against an order of a Master that she forthwith deliver up to the husband possession of 25, Park Drive, East Sheen, the matrimonial home. The parties were married in 1924 and they have one child who was born in 1929 and is now not in good health. In 1932 the husband purchased the house in question in his own name, and he is, in point of law, C the owner of the house. The parties moved into the house in that year and lived there until the husband, who had become involved with another woman, left his family and went to live with her. On Feb. 15, 1942, the wife obtained an order of judicial separation. In the course of the proceedings she obtained an order for alimony pending suit at the rate of £250 a year, to be reduced to £150 a year while she resided in the matrimonial home, and an order for £200 D a year for the maintenance of the son. Since the decree the wife has continued to reside with the son in the matrimonial home and the husband has made regular payments to her of £150 and no more. The husband has asked her to divorce him, but she has refused to accede to his request. Counsel for the husband says that the husband is entitled to an order for possession of the house and that I have no alternative but to dismiss the appeal. Counsel for E the wife says that I have a discretion.

E At common law the husband had no right to turn his wife out of the house. He could not sue her for ejectment or trespass or any other tort. His only rights are under s. 17 of the Married Women's Property Act, 1882, which does not give him the right he is now claiming, but leaves it open to the court to make such order as it thinks fit. The court has a discretion which, of course, must be exercised judicially. The wife has behaved quite properly, and, if there had been no order for judicial separation, the husband clearly could F not have turned the wife out. Does the decree of judicial separation make any difference? In my opinion, it does not. The parties still remain husband and wife. In making an order for permanent alimony the court will take into account the fact that she is still in the house, but it cannot order her out except under s. 17. The discretion remains with me, and I am quite satisfied that it would be unjust to turn the wife and the son out of their home. I allow the G appeal with costs.

Appeal allowed with costs.

Solicitors : *H. G. Greenwood* (for the husband); *Curwen, Carter & Evans* (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

RAILWAY ASSESSMENT AUTHORITY v. GREAT WESTERN RAILWAY CO.

[HOUSE OF LORDS (Lord Thankerton, Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord Macdermott), October 31, November 3, December 5, 1947.]

Rates and Rating—Railways—“Railway hereditament”—Hostel and canteen for railway staff—“Occupied as dwelling-house or hotel”—Railways (Valuation for Rating) Act, 1930 (c. 24), s. 1 (3).

For the purposes of the Railways (Valuation for Rating) Act, 1930, it is provided by s. 1 (3) of the Act that “‘Railway hereditament’ means . . . any hereditament occupied for the purposes of the undertaking . . . Provided that no premises occupied as a dwelling-house, hotel or place of public refreshment . . . shall be deemed to be, or to form part of, a railway hereditament.”

A railway company provided for the use of its staff a hostel and canteen, with recreation, reading and writing rooms, and 256 sleeping cubicles each of which was completely separated from the rest and shut in by breeze block walls. The building of the hostel was necessitated by the lack of local accommodation for railway staff who were away from their home stations. The canteen was open to any employee of the company, approximately 25 per cent. of the meals being served to employees who were not occupying sleeping cubicles, but the rest of the premises was open only to men occupying cubicles. Only servants of the company who were away from their home stations were allowed to occupy the cubicles. The occupants had keys to their cubicles, and were charged 1s. a night. It was shown that most of the occupants dwelt in the hostel for substantial periods.

HELD : while the premises were not “occupied as a . . . hotel” within s. 1 (3), there was no justification for attaching to the words “premises occupied as a dwelling-house” a meaning other than their ordinary meaning, and the hostel was occupied by the company, through the occupants of the cubicles, as a dwelling-house.

[FOR THE RAILWAYS (VALUATION FOR RATING) ACT, 1930, s. 1 (3), see HALSBURY’S STATUTES, Vol. 23, p. 456.]

Cases referred to :

- (1) *London and North Eastern Ry. Co. v. Brentnall*, [1933] A.C. 489 ; 102 L.J.K.B. 438 ; 148 L.T. 530 ; *sub nom. Brentnall v. London and North Eastern Ry. Co.*, 26 B.W.C.C. 225 ; Digest Supp.
- (2) *Railway Assessment Authority v. Southern Ry. Co., London County Council v. Southern Ry. Co.*, [1936] 1 All E.R. 26 ; [1936] A.C. 266 ; 105 L.J.K.B. 115 ; 154 L.T. 314 ; 100 J.P. 123 ; *affg. S.C. sub nom. Re Southern Ry. Co. Appeals*, (1935), 152 L.T. 299 ; Digest Supp.

APPEAL by the Railway Assessment Authority against an order of the Railway and Canal Commission allowing an appeal by the railway company against the exclusion of certain hostel premises by the assessment authority from the third Railway Valuation Roll. The case turned on the question whether the hostels were “occupied as a dwelling-house [or] hotel” within s. 1 (3) of the Railways (Valuation for Rating) Act, 1930, and, holding that the premises were occupied by the railway company as a dwelling-house, the House of Lords now reversed the order of the Railway and Canal Commission. The facts appear in the opinion of LORD THANKERTON.

Simes, K.C., and *C. E. Scholefield* for the Railway Assessment Authority.
FitzGerald, K.C., and *Patrick Browne* for the company.

The House took time for consideration.

Dec. 5. LORD THANKERTON : My Lords, the appellant authority was constituted by the Railways (Valuation for Rating) Act, 1930, for the ascertainment of values for rating purposes of railway hereditaments in England occupied by a railway company to which the Act applied. As the respondent company’s undertaking is wholly in England, I need not refer to the statutory provisions in the case of a railway undertaking which is partly in England and partly in Scotland. In broad terms, the appellant authority’s duties under

the Act are to prepare quinquennially a railway valuation roll, showing the net annual and rateable values of every railway hereditament in England, and, for the purposes of the preparation of such roll, in the case of each railway company's undertaking, to determine the net annual value of the undertaking as a whole, by ascertaining the average net receipts of the company as directed by the Act, and by then estimating with reference to such receipts the annual rent at which the railway hereditament occupied

A by the company might reasonably be expected to let as a whole. Thereafter, the appellant authority are directed to apportion the cumulo net annual value of the company's undertaking as a whole among all the railway hereditaments occupied by that company by an apportionment scheme, which requires the approval and confirmation prescribed by s. 13, to which, however, it is unnecessary to refer. In the course of preparation of their third quinquennial valuation roll, the appellant authority completed the part relating to the respondent company's undertaking on Feb. 25, 1944. Subsequently, certain premises were erected by the respondent company at Didcot and Newbury stations for the use of their staff. Before this House, as also before the Railway and Canal Commission, the Didcot premises were alone referred to, as the parties were agreed that the same principle would apply in the case of the Newbury premises. I will, therefore, confine myself to the premises at Didcot.

B
C The question between the parties turns on the proper construction of the definition of "railway hereditament" in s. 1 (3) of the Act of 1930, which provides :

For the purposes of this Act . . . "Railway hereditament" means, subject as hereinafter provided, any hereditament occupied for the purposes of the undertaking of a railway company : Provided that no premises occupied as a dwelling-house, hotel or place of public refreshment, or so let out as to be capable of separate assessment, shall be deemed to be, or to form part of, a railway hereditament.

D It is to be noted that the proviso excludes from the definition of "railway hereditament" for the purposes of the Act certain hereditaments, though occupied for the purposes of the company's undertaking. It is not disputed that the Didcot premises, with the land on which they are erected, are a hereditament occupied for the purposes of the respondent company's undertaking, nor is it disputed that the group of buildings form one occupation and one hereditament for rating purposes. Again, it cannot be said that the premises are occupied as a place of public refreshment or are "so let out as to be capable of separate assessment," and the only question in this appeal is whether these premises are occupied as a dwelling-house or a hotel. It is, therefore, necessary to examine the nature of the occupation of the Didcot premises.

E
F The main building, which was opened in May, 1944, is a staff hostel and canteen, which, in addition to the canteen, has recreation, reading and writing rooms, and 100 sleeping cubicles, with bath and lavatory accommodation, drying room and kitchen. There is also administrative and hostel staff accommodation. There is an annexe, opened in July, 1944, with 20 sleeping cubicles and a workshop. In 1945, four dormitory huts were opened, three of them having 40 cubicles each, and the fourth hut having 16 cubicles and hostel staff accommodation. The total number of cubicles is 256, apart from
G hostel staff accommodation. These premises came to be built as the result of the great increase during the war in the traffic handled at Didcot Junction, and the consequent increase in the footplate, locomotive and traffic department staffs, coupled with the shortage of local lodging accommodation. It was essential that sleeping and canteen accommodation should be available for the company's servants who were away from their home stations, and the company at first provided sleeping-coaches and a dining-car, standing in a siding, but that did not prove satisfactory, and the premises here in question were built. The canteen is open to any employee of the company, approximately 25 per cent. of the meals being served to employees who are not occupying cubicles. The rest of the premises are only open to men who are occupying cubicles. Only servants of the company who are away from their home stations are allowed to occupy cubicles. Such men may be able to return to their homes for the week-end, or when on leave. The cubicles are separated by breeze block walls, which go to the ceiling, and entirely shut in each cubicle. The cubicles

H

are furnished with furniture provided by the Ministry of Works; the occupant has a key and can leave his personal belongings there; the manager of the hostel has a master key, so as to enable the necessary cleaning to be done by the hostel staff. A charge of one shilling a night, collected either weekly or fortnightly, is made for the occupation of a cubicle. The canteen has its own moderate charges, but the canteen and hostel are run at a loss by the company. There are printed regulations for behaviour in the hostel, but these do not appear materially to affect the present question. As regards permanency of occupation, on which some stress was laid in the judgments appealed against, it may be looked at broadly. The manager of the hostel produced a table showing the number of changes in occupancy of the cubicles since the opening of the buildings up to Dec. 15, 1946. For this purpose, I will treat the hostel, opened on May 3, 1944, and the annexe, opened on July 24, 1944, as having been open for two and one-half years in December, 1946, and the four huts, opened on dates from Apr. 21 to June 18, 1945, as having been open for one year and a half in December, 1946. The hostel and annexe, containing 133 cubicles, during the two and a half years, had 19 cases of no change, 77 cases of one change or two changes, 32 cases of three or four changes, and 5 cases of five or six changes. The four huts, containing 96 cubicles, during the year and a half, had 17 cases of no change, 80 cases of one or two changes, 37 cases of three or four changes, and 1 case of five or six changes. It may be added that a considerable number had been accommodated in the sleeping-coaches before transference to these cubicles. The land on which these premises were built had previously been let for grazing, and was not within the definition of railway hereditament and was excluded from the third Railway Valuation Roll. On the subsequent erection of these buildings, the respondent company made a representation to the appellant authority under s. 11 of the Act of 1930, in the case of each erection, that the premises should be included in the roll as a railway hereditament. On July 25, 1946, the appellant authority rejected these representations, and excluded the premises from the roll. On appeal by the respondent company to the Railway and Canal Commission, the latter court allowed the appeal, and directed the appellant authority to include the premises in question in their roll. The appellant authority are now appealing against that order.

My Lords, I may say at once that I quite agree with the Railway and Canal Commission that these premises are not occupied as a hotel within the meaning of the proviso in s. 1 (3) of the Act of 1930. A hotel, in my opinion, connotes a building in which a hotel business is carried on, to which the public are entitled to resort for accommodation and refreshment, and to which the edict *Nautae, caupones* would apply. A hotel, so defined, is often contrasted with a lodging-house, sometimes dubbed a guest-house or a private hotel, in which control may be retained over the choice of lodgers to be admitted and in which there is no obligation to the public generally. There remains the important question whether these premises are "occupied as a dwelling-house" within the meaning of the section. These words "occupied as a dwelling-house" must be taken as being used in their ordinary meaning unless the context shows an intention to use them in a different meaning. There was some suggestion that they had such a special meaning here. I will deal with these suggestions later, and give my reasons for their rejection, and for reading these words in their ordinary meaning.

My Lords, I am of opinion that these premises are, undoubtedly, occupied by the company, through the occupants of the cubicles, as a dwelling-house. The reason for their provision is two-fold, *viz.*, (a) that the members of the staff who use the cubicles are away from their homes and cannot dwell at home, and (b) that sufficient lodging-house accommodation is not available at Didcot. While they are at their work, these members of the staff, in my opinion, may properly be said to dwell or reside in the hostel or to inhabit the hostel. That most of them so dwell or reside for substantial periods is shown by the figures to which I have referred, and they use these premises in substitution for their home dwelling-houses, which are not available while they are on duty. WROTTESELEY, J., begins by saying that these premises are not, in fact, a dwelling-house. While I am not prepared to agree with that statement without further consideration, it is not necessary to the decision of the present question, which

relates to the character of the occupation, and not directly to the class of the building occupied. On this question the judge says (see 111 J.P. 208-9) :

Nevertheless, I appreciate the question is not in fact: are these premises a dwelling-house or a hotel, but are these premises occupied as a dwelling-house or are they occupied as a hotel? If dwelling made the premises a dwelling-house, the question would be answered in favour of the respondents, for they are dwelt in after a fashion. But so to hold would be to ignore the word "house." It seems to me that these premises are not occupied as a house but instead of a house, and, looking at the object of the Act to which I have referred, we should not, I think, be astute to extend it to premises which are not a house and cannot, as I understand it, be used as a house. It is a kind of barracks which is used to house railway servants for whom no dwelling-house is available elsewhere.

In my opinion, these buildings are houses. Mr. Bodman, in his evidence, refers to them as buildings and to their permanent nature, and they are used as houses to dwell or reside in. The conclusion of the judge appears to be influenced by his view that the premises were not, in fact, a dwelling-house, and by his views as to the object of the Act, to which I will refer later, as they would result in a restriction of the ordinary meaning of these words. SIR FRANCIS TAYLOR agreed with WROTTESELEY, J., and observed (see 111 J.P. 209) :

I would desire to add that, in my view, the expression "dwelling-house" involves a more permanent intention to abide than is shown to exist in the present case from the evidence which we have had and it involves also the presence of families and of household goods. It is a place from which the occupier is reluctant to depart. It is quite true to say, and there has been evidence of it, that the occupiers, that is, the railway company's servants, do in fact comply with tests which have been laid down in other cases. They sleep there and live there and have recreation there. But the same might be said of men in barracks and students in hostels. We are not deciding the question of residence or dwelling but whether, having regard to the occupation of the buildings in this case, they are, in fact, on the construction of this statute, dwelling-houses.

With all respect, the judge appears to have misdirected himself. It is the question of residence or dwelling that here awaits decision, and not whether these are, in fact, dwelling-houses, and the judge's observations on the true question would appear to lead to a conclusion in agreement with the view that I have expressed. As regards the element of permanence of the occupation, it appears to me that the fact that the occupants of the cubicles do reside in the hostel through all the periods of their duty, and do not leave the hostel until their employment at Didcot terminates, provides a sufficient element of permanence. I cannot think that the presence of families and household goods is an essential element affecting the present case. SIR FRANCIS DUNNELL concurred, and made no additional observations on the "dwelling-house" question. The only passage in which WROTTESELEY, J., refers to the object of the Act of 1930 is (see 111 J.P. 207-8) :

This Act deals with the railway companies' undertakings as they existed in 1930, when all the railway companies owned, I suppose, hundreds, if not thousands, of dwelling-houses. Of the dwelling-houses owned by railway companies very many were, I suppose, occupied as dwelling-houses, and I think all parties are agreed on that as being the fact in 1930. So that upon all such dwelling-houses used as such the proviso has effect and classifies them. It may, I think, be said that all hereditaments occupied by the railway company either are or are not railway hereditaments. Such premises occupied as dwelling-houses are dealt with in the proviso and would be, even though they were occupied for the purposes of the principal undertaking.

No one need dispute that dwelling-houses, owned by the railway company and occupied as dwelling-houses, though occupied for the purposes of the undertaking, are excluded from the definition of railway hereditaments by the proviso. They would equally have been excluded if the proviso had begun with the words "provided that no dwelling-house," and it should be assumed that an enlargement of the excluded class was intended by the insertion of the words "premises occupied as." I have no reason to suppose—if it were material—that staff hostels owned by railway companies were not in existence in 1930. There was certainly one in existence in April, 1931: cf. *London and North Eastern Ry. Co. v. Brentnall* (1). These observations of the judge are not inconsistent with the proviso including other premises besides those referred to by him, provided they are "premises occupied as dwelling-houses," but, in any event, the Act of 1930 rests on a new definition of what constitutes the

railway undertaking to be valued by the appellant authority, and any prior practice cannot justify any limitation of the clear language of the Act of 1930. This also affords an answer to the contention put forward by counsel for the respondent company, that the Act of 1930 preserved by means of the proviso to the definition of a railway hereditament the distinction drawn under the practice prevailing before 1930 between hereditaments whose receipts directly or indirectly enable the railway company to carry on the undertaking as a railway and those which do not do so.

My Lords, the authoritative opinion of LORD HAILSHAM, L.C., unanimously concurred in by the other noble and learned Lords, in *Railway Assessment Authority v. Southern Ry. Co.* (2), states the position in this matter under the practice prior to the Act of 1930, and under the Act of 1930. He says ([1936] A.C. 274), with regard to the earlier practice :

So far as the railways were concerned, the method adopted was to divide the undertaking into those portions which were regarded as directly productive of profit, such as the permanent way, and those portions which were regarded as only indirectly productive, such as stations and other hereditaments of that kind

and he went on to point out that the latter were usually valued on "the contractor's basis," and the former on "the profits basis." After pointing out that the provisions of s. 4 (1) of the Act for arriving at the net annual value of the company's undertaking as a whole is on the same basis as had been previously applicable, LORD HAILSHAM, L.C., stated (*ibid.*, 279) :

The only substantial difference from the old system is the provision that the annual value of the whole undertaking shall be ascertained as a whole and shall then be apportioned between the different parishes, instead of attempting to ascertain the earning capacity of each part of the railway line lying within a particular parish, as was done in pre-war days. The new method also does away with the necessity of drawing a distinction between directly and indirectly productive parts of the undertaking and calculating the rateable value of the indirectly productive parts of the undertaking in each parish upon the "contractor's basis."

LORD HAILSHAM, L.C., was there discussing the valuation of the undertaking as a whole by the appellant authority under s. 4, the hereditaments excluded by the proviso in the definition of a railway hereditament having already been excluded from consideration by the appellant authority. The proviso to the definition of a railway hereditament has no reference to receipts or profits, or to the hereditaments being directly or indirectly productive—a distinction which has disappeared—nor does the proviso contain anything which can be held either expressly or impliedly to refer to the receipts from the hereditaments being such as to enable the undertaking to be carried on as a railway.

I am, therefore, unable to find any justification for attaching to the words "premises occupied as a dwelling-house" a meaning other than their ordinary meaning, as to which I have already stated my views. I should add that a number of cases were cited at the hearing of this appeal, but none of them, in my opinion, is of any material assistance. I propose that the appeal should be allowed, that the order of the Railway and Canal Commission dated Feb. 4, 1947, be set aside, and that the appeal by the present respondent to the Railway and Canal Commission against the determination of the present appellant authority in regard to the staff hostel and canteen at Didcot Station and the station staff canteen and hostel at Newbury should be dismissed. The respondent company should pay the appellant authority's costs of this appeal and the costs of the appellant authority and of the Berkshire County Valuation Committee before the Railway and Canal Commission.

LORD SIMONDS : My Lords, I concur.

LORD THANKERTON : I have also to state that the noble lord, LORD NORMAND, has expressed the same opinion.

LORD MORTON OF HENRYTON : I also concur.

LORD MACDERMOTT : My Lords, I also agree.

Appeal allowed.

Solicitors : *Torr & Co.* (for the Railway Assessment Authority) ; *M. H. B. Gilmour* (for the company).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

LONDON AND NATIONAL PROPERTY COMPANY, LTD.

v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Atkinson, J.), November 5, 6, 7, 26, 1947.]

Revenue—Excess profits tax—Contract extending beyond accounting period—Spread-over of profits—“Special circumstances”—Discretion of commissioners—Appeal from decision of commissioners—Competence—Finance (No. 2) Act, 1939 (c. 109), sched. VII, pt. I, para. 11.

By the Finance (No. 2) Act, 1939, sched. VII, part I, para. 11 (which deals with the adaptation of income tax principles to the computation of profits for excess profits tax): “Where the performance of a contract extends beyond the accounting period, there shall (unless the Commissioners [of Inland Revenue], owing to special circumstances, otherwise direct) be attributed to the accounting period such proportion of the entire profit and loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to the accounting period, having regard to the extent to which the contract was performed therein.”

It is for the commissioners to decide whether there are or are not “special circumstances” connected with the agreement within the paragraph. If they decide that there are and what they are, it is for them in the exercise of their discretion to determine whether it is, in view of those special circumstances, more just to direct that para. 11 should not be applied. Their decision as to what the circumstances are and whether they are special is open to review on appeal. If their findings as to special circumstances cannot be successfully assailed, their decision whether or not para. 11 should apply is a matter for their discretion which must be exercised judicially.

Inland Revenue v. Dickson’s Executors ((1928) 14 Tax Cas. 69); *Jenkins Productions, Ltd. v. Inland Revenue Comrs.* ([1944] 1 All E.R. 610); principle laid down by LORD HALSBURY, L.C., in *Sharp v. Wakefield* ([1891] A.C. 173, at p. 179); *Jones v. Curling* ((1884), 13 Q.B.D. 262); *Campbell (Donald) & Co., Ltd. v. Pollak* ([1927] A.C. 732); and *Port of London Authority v. Inland Revenue Comrs.* ([1922] 2 K.B. 599), applied.

R. v. Inland Revenue Comrs. ([1918] 1 K.B. 143) and *Williamson Film Printing Co., Ltd. v. Inland Revenue Comrs.* ([1918] 2 K.B. 720), considered.

[FOR THE FINANCE (NO. 2) ACT, 1939, SCHED. VII, PT. I, PARA. 11, see HALSBURY’S STATUTES, Vol. 32, p. 1221.]

Cases referred to:

- (1) *Inland Revenue v. Dickson’s Executors*, (1928) 14 Tax Cas. 69; 1928 S.C. 752.
- (2) *Jenkins Productions, Ltd. v. Inland Revenue Comrs.*, [1944] 1 All E.R. 610; 170 L.T. 292; Digest Supp.
- (3) *Sharp v. Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 70; 64 L.T. 180; 55 J.P. 197; affg., S.C. (1888), 22 Q.B.D. 239; 30 Digest 12, 49.
- (4) *R. v. Market Bosworth Licensing JJ.*, (1887), 56 L.J.M.C. 96; 57 L.T. 56; 51 J.P. 438; 30 Digest 36, 286.
- (5) *Jones v. Curling*, (1884), 13 Q.B.D. 262; 53 L.J.Q.B. 373; 50 L.T. 349; 38 Digest 788, 1201.
- (6) *Campbell (Donald) & Co., v. Pollak*, [1927] A.C. 732; 96 L.J.K.B. 1132; 137 L.T. 356; 43 Digest 335, 1570.
- (7) *Ritter v. Godfrey*, [1920] 2 K.B. 47; 89 L.J.K.B. 467; 122 L.T. 396.
- (8) *Port of London Authority v. Inland Revenue Comrs.*, [1922] 2 K.B. 599; 91 L.J.K.B. 746; 12 Tax Cas. 112; Digest Supp.
- (9) *R. v. Inland Revenue Comrs.*, [1918] 1 K.B. 143; sub nom., *R. v. Inland Revenue Comrs., Ex p. France (William) Fenwick & Co., Ltd.*, 87 L.J.K.B. 198; 118 L.T. 162; 16 Digest 309, 1213. Appeal from [1917] 2 K.B. 405.
- (10) *Williamson Film Printing Co., Ltd. v. Inland Revenue Comrs.*, [1918] 2 K.B. 720; 88 L.J.K.B. 24; 119 L.T. 374.
- (11) *Inland Revenue Comrs. v. Auld, Pemberton & Co., Ltd.*, [1919] 2 I.R. 66.

CASE STATED by the Special Commissioners of Income Tax under the Finance (No. 2) Act, 1939, s. 21 (2), and the Income Tax Act, 1918, s. 149.

Under the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 11, the Commissioners of Inland Revenue directed that, in view of the special circumstance that under an agreement for a lease for 40 years an increase of rent after the

first 10 years from £160,000 to £200,000 a year was not referable to any matter performed during the first 10 years, para. 11, which provides for a "spread-over" of the profits from an agreement extending beyond the accounting period, should not apply to the assessment of a company's profits under the agreement for the purposes of excess profits tax. On appeal, the Special Commissioners held that the questions whether any special circumstance existed and whether there should be a direction excluding the application of para. 11, were matters in the discretion of the Commissioners of Inland Revenue, with the result that, by virtue of the Finance (No. 2) Act, 1939, s. 21 (2) (a), no appeal lay in respect thereof. ATKINSON, J., now held that the decision of the Commissioners of Inland Revenue as to what the circumstances were and whether they were special circumstances was open to review, but if their findings thereon were unassailable, the making or not making of a direction was a matter of discretion. In this case their finding of a special circumstance was based on a misconstruction of the agreement, and the appeal must be allowed. The facts appear in the judgment.

Grant, K.C., and Tribe for the company.

The Solicitor-General (Sir Frank Soskice, K.C.), J. H. Stamp and R. P. Hills for the Crown.

Cur. adv. vult.

Nov. 26. ATKINSON, J., read the following judgment. This is an appeal by the London and National Property Co., Ltd., against an assessment to excess profits tax for the year 1941. The company carries on a property-owning business, the bulk of its profits being derived from the rent received from Shell-Mex, Ltd., under a lease of Shell-Mex House in the Strand. The company was incorporated on Jan. 30, 1931, with a capital of £1,000,000 divided into 1,000,000 shares of £1 each to acquire the assets of the Burlington Investment Co., Ltd. These assets consisted almost entirely of properties situated between the Strand and the Embankment now, but not then, covered by Shell-Mex House. The Burlington Investment Co., Ltd., was indebted to the Anglo-Saxon Petroleum Co. and the Eagle Oil and Shipping Co. to the extent of £563,269 13s. 2d. in equal shares. The consideration payable by the company was fixed at £1,563,269 13s. 2d. to be satisfied as to £1,000,000 by the allotment by the company of the whole of the 1,000,000 shares and as to the balance by giving an undertaking to discharge the said debts. The purchase was completed on Feb. 6, 1931, and on the same day the company entered into an agreement with Shell-Mex, Ltd., for the building and lease of the premises now known as Shell-Mex House. The agreement recited that the company was about to create an issue of first mortgage debenture stock to the amount of £2,000,000 at 5 per cent. interest redeemable on or before Apr. 15, 1967, by the annual operation of a cumulative sinking fund of 2 per cent., the first operation to take place in the year commencing Apr. 15, 1941. This meant that in that and in subsequent years £40,000 a year would have to be paid into the sinking fund. The company agreed to grant to Shell-Mex, Ltd., a lease, in accordance with the form in the schedule to the agreement, of the premises from Feb. 7, 1931, to Mar. 25 and thereafter for 40 years at a rental from Feb. 7, 1931 to Mar. 25, 1941, of £160,000 a year, and during the remaining 30 years of the lease of £200,000 a year. The lessees agreed to erect Shell-Mex House and for that purpose to enter into a building agreement already made and approved with certain builders, discharging in the first instance the whole of the costs, but the appellants company agreed ultimately to contribute a sum of £1,346,730 6s. 10d., which would equal the sum they hoped to have available out of the debenture issue after discharging the debts which they had taken over to the two oil companies.

Everything went according to plan. The £2,000,000 was raised and the building was erected. The £1,346,730 was paid and in fact covered the cost of the building. The increase of the rent from £160,000 to £200,000 was fixed to coincide with the starting of the sinking fund so that the distributable income of the company should remain constant. Paragraph 9 of the Case states that the

... rents have been duly paid to date. The amount payable in the company's "standard period" for excess profits tax was thus £160,000, and the amount payable in the chargeable accounting period for the calendar year 1941 (being the period now

under appeal) was £190,000 (namely, at the rate of £160,000 up to Mar. 25, 1941, and thereafter at the rate of £200,000 per annum). The amount payable for each subsequent chargeable accounting period (*i.e.*, up to Dec. 31, 1946) is £200,000. The average yearly amount of rent payable over the whole 40 years of the lease is £189,911. The company's rights under the lease (except for the increase of rent in 1941) are constant in all years. The company's only obligation under the lease is to allow quiet enjoyment.

A Paragraph 10 recites the relevant enactments. The Finance (No. 2) Act, 1939, s. 12, charges excess profits tax on the excess of the profits of a trade or business arising in any chargeable accounting period over the standard profits. Paragraph 11 of pt. I of sched. VII to that Act, on the proper interpretation of which this case turns, provides :

B Where the performance of a contract extends beyond the accounting period, there shall (unless the commissioners, owing to any special circumstances, otherwise direct) be attributed to the accounting period such proportion of the entire profit or loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to the accounting period, having regard to the extent to which the contract was performed therein.

Paragraph 10 of the Case also refers to s. 21 (2) of the Act and the Finance Act, 1937, sched. V, pt. II, para. 1, giving a right of appeal in connection with excess profits tax, and then sets out s. 21 (2) (a) of the Act of 1939, which again is of importance for the purpose of this case :

C . . . no appeal shall lie to the General or Special Commissioners in respect of any matter with respect to which an appeal lies to the Board of Referees, or which is by this Part of this Act to be decided by that board, or is left to the discretion of the Commissioners [of Inland Revenue].

D It is conceded that, in the absence of a direction by the commissioners, para. 11 of pt. I of sched. VII, providing for what I will call the spread-over, would apply to this agreement and the lease granted in pursuance of it, and the amount properly attributable to each and every year, if that paragraph applies, is, as the Case has stated, £189,911.

E At some time before Feb. 15, 1946, correspondence took place between the company and the inspector of taxes for the City of London 17th District with reference to the question of the company's liability to excess profits tax. The company claimed that the provisions of the said para. 11 should be applied and that the profit from the lease should be spread evenly over the period of the lease. On Feb. 15, 1946, a letter was written by the inspector dealing with this contention, and it reads :

F I am to refer to your correspondence with H.M. Inspector of Taxes for the City 17th District concerning the claim put forward by you on behalf of the London and National Property Co., Ltd., that an adjustment should be made for excess profits tax purposes under the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 11, in respect of the rent receivable under the agreement of Feb. 6, 1931, between the company and Shell-Mex, Ltd. After careful consideration of this matter, the Commissioners of Inland Revenue have directed that, owing to the special circumstances that the rent of £200,000 a year has no reference to any matter performed during any part of the period in which the rent of £160,000 a year was paid, the provisions of the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 11, shall not be applied in relation to the Shell-Mex lease in question.

G On May 30 notice was received of an assessment based on that direction, which, of course, in substance means that the rent or the income for the standard period is taken as £160,000 and for the years subsequent to 1940 at £200,000, with practically the whole of the £40,000 going in excess profits tax. On June 26, 1946, the company gave notice of appeal against this assessment on the grounds that it was wrong, that there were no special circumstances, and that the assessment was erroneous in principle and excessive in amount. Now, in fact, that letter of Feb. 15, 1946, must have been written under a misapprehension. In fact, there had been no consideration, careful or otherwise, nor any direction by the commissioners, and when the assessment was made it was a bad one and appealable. Apparently this was discovered by the Inland Revenue, and on Oct. 24, 1946, nearly four months after the notice of appeal, the Commissioners of Inland Revenue held a meeting and the following minute is in evidence :

The Commissioners of Inland Revenue, at a meeting held on Oct. 24, 1946, considered the facts and circumstances relating to an agreement made on Feb. 6, 1931, between

the London and National Property Co., Ltd., and Shell-Mex, Ltd., and directed that, owing to the special circumstances that the rent of £200,000 payable under the said agreement for certain periods has no reference to any matter performed during the period or any part thereof during which the rent of £160,000 was paid under the said agreement, the provisions of the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 11, should not be applied to the said agreement in computing the liability to excess profits tax of the London and National Property Co., Ltd. Signed by order of the Commissioners of Inland Revenue, G. R. East, assistant secretary.

The Case adds: "The direction of the Commissioners of Inland Revenue relied on by the respondents at the hearing was the direction which was recorded in the minute set out above." One of the grounds relied on in this appeal is that a direction so given nearly four months after notice of appeal had been given against a direction which was obviously bad is of no effect, and that that in itself is sufficient, or ought to have been sufficient, to have induced the Special Commissioners on the appeal to them to have varied the direction. I am told by counsel for the commissioners that, if I decide that the direction was bad because it was the work, so he informs me, of only one commissioner, and that the resolution during the pendency of the appeal does not put matters right, all that will happen will be another similar resolution and another similar direction. Well, it may be so, but I should doubt it very much. If this court or a higher court indicated that the decision of the commissioners was plainly wrong but not appealable except on the technical irregularity to which I have referred, I believe the commissioners on a fresh consideration of the matter would give effect to the view of the court. It is unnecessary for me to decide this very far from easy point in the view I take on the main question, so I say no more about it, save that I have the greatest difficulty in seeing how anything done pending an appeal can affect the legality of the direction under appeal. The point, of course, remains open to the company.

When a question such as that arising in this case is brought to the Commissioners of Inland Revenue for consideration, the first question must necessarily be: Is the agreement within para. 11? If the answer is in the negative, there is an end of the matter. If the answer is in the affirmative, the next question must be: Are there any reasons for depriving the taxpayer of the benefit of that paragraph? Are there any circumstances which make it more just as between the Crown and the taxpayer that the taxpayer should be deprived of the right of spread-over? The circumstances have first to be ascertained. There may be questions of fact to be determined, and there may be questions of construction, *i.e.*, questions of law, as here, to answer. Having collected all the relevant matter, it is then for the commissioners to determine which, in their view, is the fairer course to take. It is, I think, plain that, if the commissioners took the view that the agreement under consideration was not within the paragraph and the taxpayer was assessed on that basis, he would have a right of appeal against his assessment. Having come to the conclusion that the agreement was within the paragraph in question, it would then fall to the commissioners to ascertain the relevant facts, and, in so ascertaining, the commissioners would not be exercising a discretion, nor would they in construing the agreement, but when they come to consider what, in their view, is the right course to take in view of the facts found and the construction arrived at, they would, in my view, then be exercising a discretion. Commissioners may make mistakes at various stages of this inquiry. They may jump to conclusions of fact unsupported by the evidence. They may include in the material on which they exercise their discretion facts which are wholly irrelevant, for example, that the taxpayer is an ex-enemy subject, or, to take the example suggested by counsel for the commissioners, the fact that he has got red hair. They may misconstrue the agreement. In this case the only material on which the commissioners formed their discretionary view was their construction of the agreement. It is, I think, plain, and the contrary has scarcely been argued, that the special circumstance alleged in this case is either a mistaken construction of the agreement or a mistake of fact. The lease was for 40 years. The company did not grant one lease for ten years at a rent of £160,000 a year and a separate lease for 30 years at £200,000 a year. The lease for the first ten years was in consideration of a rental of £160,000 a year and of an agreement to pay £200,000 a year for the next 30 years and of the other undertakings set out in the agree-

ment. The £200,000 a year during the last 30 years was part of the consideration for the first ten years. The further circumstance was in evidence that the lessees had to provide the money for the sinking fund for the debentures, namely, £1,200,000, and that the extra £40,000 rent was attributable to that obligation which was to be discharged during the last 30 years and was so designed to secure equality of dividends paid by the company.

Questions similar to this arose in *Inland Revenue v. Dickson's Executors* (1) where the rental of certain premises had been fixed at £425 for three years, £450 for the next two years, and £475 for the last two years, and no other consideration was payable. Additional assessments were made for each of the years 1923/1924, 1924/1925 and 1925/1926—those were the first three years of the lease—in a sum equivalent to the difference between the amount of the original assessment which had been based on the lower rent and the average annual rental payable during the currency of the leases. In other words, there the Crown had taken precisely the opposite view to that taken by the Commissioners of Inland Revenue in this case. In that case Dickson's executors appealed, contending that the property in each period must be deemed to have been let at a rack rent and ought to be assessed accordingly. The General Commissioners accepted that contention, but for the Crown it was argued that where the rent reserved by a lease fluctuated in that way the rack rent could only be arrived at by averaging, and the Court of Session upheld that view. The LORD PRESIDENT (CLYDE) said (14 Tax Cas. 76) :

The question we have to answer is whether that finding was right, and I cannot think it was. There is no reason to suppose that when the property was let for a period of six or seven years at an increasing rent the parties to the bargain regarded the initial rent as the full commercial rent either for the whole period of the let, or for the initial years of the lease. The higher rents payable in the later years were part of the consideration for the lease as a whole, just as much as the lower rents in the initial years. The property was not let for the six or seven years at £425 "by the year," and it is not legitimate for the purposes of sched. A, No. 1 (1), to break up a single location for six or seven years into a series of separate locations for shorter periods with different rents.

That is a very good guide to the proper interpretation to be put on this lease, and, in my view, following the view there laid down, the direction in this case was based on a fallacy. It was based on an alleged special circumstance which did not, in fact, exist.

The Crown contends, however, that, be that as it may, mistake or no mistake, the question whether there are special circumstances is exclusively a matter for the Commissioners of Inland Revenue; further, that it is a matter of discretion and, therefore, not appealable, and, even if not strictly discretionary, none the less it is a matter solely for them. The company's first contention is that the question whether there are special circumstances is one of law or fact or mixed law and fact and that a finding of special circumstances is appealable like any other finding of law or fact by the commissioners, the finding of fact, of course, being only vulnerable if there is no evidence to support it. They contend that the actual existence of special circumstances, not merely the opinion of the Commissioners of Inland Revenue on the matter, is a condition precedent to the exercise of their discretionary power. Speaking apart from authorities, it seems to me quite impossible to say that the determination of a question of fact or of law can be a matter of discretion. A discretion connotes a choice of one of two or more courses of action, whether to do one thing or another. This can be tested by reference to any first-class dictionary. Looking at the definition of "discretion" in WEBSTER'S DICTIONARY, it says: "Freedom to act according to one's own judgment, an unrestrained exercise of choice or will." The commissioners cannot be exercising a discretion when they hold that black is white or when they say an agreement means A when it means B, and, unless a finding is an exercise of a discretion, there is no provision in any Finance Act that I know of depriving the taxpayer of his right of appeal to the Special Commissioners. This seems to have been the view taken by the Court of Appeal in *Jenkins Productions, Ltd. v. Inland Revenue Comrs.* (2). The company's alternative contention is that if, contrary to their main contention, the Commissioners of Inland Revenue have a discretion to decide (1) whether there are special circumstances or not, and (2) whether to make a direc-

tion or not, their discretion must be exercised judicially and on relevant and proper material, so that, if it can be shown that the special circumstance relied on cannot possibly be a special circumstance, the commissioners have misdirected themselves, and have, in fact, no jurisdiction.

The Special Commissioners on the appeal felt bound by certain authorities to hold that the question whether any special circumstances existed, and, if so, whether a direction should or should not be made, were matters left to the absolute discretion of the Commissioners of Inland Revenue, and that, therefore, no appeal lay. As to the second contention, they said that, although they took the view with some hesitation, they held that the provision applicable to appeals on matters of discretion precluded them from considering the point. Before considering the cases on which the Crown mainly relied, I want to refer to three cases which illustrate and define the extent to which higher courts have reviewed the exercise of a discretion vested in a lower court. It is also worth remembering that, although it is provided that there shall be no appeal from a county court judge or official referee on any question of fact, it is, of course, common practice for higher courts to hear and allow appeals when it can be shown there was no evidence to support the judge's findings on the facts. In *Sharp v. Wakefield* (3) LORD HALSBURY, L.C., seems to me to lay down ([1891] A.C. 179) a very broad principle which is not limited, I think, to an exercise by justices of a discretion:

An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's case* (4); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself. . . . So a discretion which empowered justices to grant licences to innkeepers as in the exercise of their discretion they deemed proper would not be exercised by coming to a general resolution to refuse a licence to everybody who would not consent to take out an excise licence for the sale of spirits.

Again, justices were authorised to alter the hours for the sale of intoxicating liquors in any particular district, but it was held that, though this was a general discretion given to them, they had no right by virtue of a general resolution to alter the time in every case. They were required judicially to determine (although according to their discretion) what places, in the honest exercise of their judgment, required other hours for opening and closing than those specified.

The next relevant authority was *Jones v. Curling* (5), of which the headnote says (13 Q.B.D. 262):

Where an action is tried with a jury the judge before whom it is tried has no jurisdiction under Ord. 65, r. 1, to make an order by which the costs will not follow the event unless there exist "good cause" within the meaning of that rule, and consequently there is an appeal with respect to the existence of the facts necessary to give the judge jurisdiction to make such order. To be "good cause" within that rule there must be facts shewing that it would be more just not to allow the costs to follow the event, as for example, oppression or misconduct of either of the parties by which costs have been unnecessarily increased.

BRETT, M.R., says (*ibid.*, 267):

It seems to me, according to the meaning of Ord. 65, r. 1, that on the trial of an action by a jury unless there is good cause shewn the learned judge has no discretion as to costs, and that they must follow the event, that is, according to the ordinary mode of taxation, but that if there is a good cause then the judge has a discretion as to costs; and if he has, then the mode in which he exercises that discretion (unless perhaps where it has been exercised in such a way that a court must say it is absolutely wrong) is not the subject of appeal. Therefore the condition which gives the judge upon a trial before himself and a jury jurisdiction to make an order as to costs is, whether there was a good cause or not existing, and I am of opinion that that is a subject-matter of appeal. Whether there was a good cause or not is a question of fact, and the Court of Appeal must consider whether in their judgment that fact did exist, and if they disagree as to this with the judge who tried the action they must allow the appeal. . . . Taking that as the groundwork of what should constitute good cause within this order, it seems to me that the facts must shew the existence of something having regard either to the conduct of the parties or to the facts of the case, which make it more just that an exceptional order should be made than that the case should

be left to the ordinary course of taxation. For example, if the facts shew that there has been misconduct on the part of the plaintiff to this extent, that the fact of his bringing the action is oppressive, or that he has made an exorbitant claim by carelessness or recklessness, they would, to my mind, be such as would be a good cause for a judge interfering.

BOWEN, L.J., says (*ibid.*, 271) :

A It appears to me that these latter words restore costs to the discretion of the judge, provided a condition precedent is fulfilled ; that is to say, provided there is good cause. But unless there are facts from which a reasonable man might think the exceptional order was one which was more just than allowing the costs to take the ordinary course, there can be no good cause, and if there is no good cause then the judge had no jurisdiction.

Substitute the words "special circumstances" for "good cause" and every word said in that case would be applicable to the matter I have got to consider.
B I find it difficult to draw any distinction in principle between the existence of good cause which founds jurisdiction, and the existence of special circumstances which found jurisdiction. Both are conditions precedent to the exercise of a discretion.

In *Donald Campbell & Co., Ltd. v. Pollak* (6) much relied on by the company, the question was as to the power of a higher court to interfere with an order
C made by a judge as to the costs of a trial without a jury, because the rule is that these are in the absolute discretion of the trial judge-and that there shall be no appeal except by leave of the court or judge making the order. That case decided that, notwithstanding these explicit provisions, even an absolute discretion must be exercised judicially and not on grounds which it is illegitimate to take into consideration. LORD DUNEDIN ([1927] A.C. 757), for instance, said :

D . . . if . . . he had no proper material on which his discretion was exercised.

LORD HALDANE (*ibid.*, 752) :

. . . where a discretion . . . has been exercised on material which is illegitimate or is non-existent, or in violation of some . . . substantive right . . .

LORD CAVE, C. (*ibid.*, 809), approving LORD STERNDALÉ, M.R., in *Ritter v. Godfrey* (7) ([1920] 2 K.B. 53) :

E . . . a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge. . . .

LORD ATKINSON ([1927] A.C. 814) also approved that citation and said that a matter such as a right to costs is left to the discretion of the judge who tried the case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. It is conceded here that these opinions as to when an exercise of discretion shall be reviewed must apply to a discretion vested in the Commissioners of Inland Revenue if the discretion is exercised capriciously, which means, as I understand it, on some wholly immaterial and irrelevant ground such as, to take the example of counsel for the Crown, the colour of a taxpayer's hair. I can see no difference in principle between such an extreme case and any other case where the discretion has been exercised on grounds which were either
F non-existent or wholly illegitimate to consider. It seems to me that the principle as to the finding of special circumstances being open to review is unassailably expressed by LORD SUMNER in *Donald Campbell & Co., Ltd. v. Pollak* (6) (*ibid.*, 766) :

The structure of the proviso [that is dealing with costs where the trial is by a jury] is that, where the matter has been tried by a jury, the costs shall follow the event and be independent of the judge's order, unless the occasion arises, which alone gives him
H jurisdiction to intervene, that is the existence of "good cause." The question of its existence, since his jurisdiction depends on it, must be appealable ; a judge cannot give himself jurisdiction by finding that he has it when, in fact, he has not.

Put in very terse language, there is a principle which surely must apply with equal force to the jurisdiction of the Commissioners of Inland Revenue as it does to judges.

Port of London Authority v. Inland Revenue Comrs. (8) was an excess profits duty case, and it turned on the proper construction of s. 40 (2) of the Finance (No. 2) Act, 1915, which provided :

The pre-war standard of profits for the purposes of this part of this Act shall, subject to the provisions of this Act, be taken to be the amount of the profits arising from the trade or business on the average of any two of the three last pre-war trade years, to be selected by the taxpayer . . . Provided that if it is shown to the satisfaction of the Commissioners of Inland Revenue that that amount was less than the percentage standard as hereinafter defined, the pre-war standard of profits shall be taken to be the percentage standard.

The appellants were claiming to have the percentage standard of pre-war profits applied to their assessment, but the commissioners had determined otherwise. They appealed to the Special Commissioners and those commissioners held that they had no authority to adjust the amount of the assessment by reference to the percentage standard—in other words they held that the decision of the Inland Revenue Commissioners on that point was conclusive and final and was not open to review by them. On the point whether the decision arrived at by the Commissioners of Inland Revenue was appealable, the words being “provided that if it is shown to the satisfaction of the commissioners . . .”, LORD STERN-DALE, M.R., said (12 Tax Cas. 138) :

They appealed to the Special Commissioners under the provisions of s. 45 (5), and those commissioners held that they had no authority to adjust the amount of the assessment by reference to a percentage standard : in other words they held that the decision of the Inland Revenue Commissioners on that point was conclusive and final and was not open to review by them. It seems to me clear that it ought to be so open to review but it does not seem so clear that it is. I think it should be open to review, first, on this ground. An appeal is given against the amount of the assessment. One very important element in such an assessment is the basis on which it is made, and if the basis be wrong it is difficult to see how the amount of the assessment can be right. There are two possible bases for the assessment : post-war profit minus pre-war profits standard and post-war profits minus pre-war percentage standard ; and the first element the assessing authority has to determine is which is the basis to be adopted. When that is determined the amount of the pre-war and post-war profits have to be ascertained, the one deducted from the other and the assessment completed. I can see no reason why on an appeal against the amount of the assessment, the decision of the Inland Revenue Commissioners on what is only one element of their assessment, though a most important one, should be final any more than their decision upon the other elements of the amount of the pre-war and post-war profits.

SCRUTTON, L.J., said (*ibid.*, p. 143) :

The respondents reply that which standard should be applied is a matter to be decided by the Inland Revenue Commissioners, the assessing authority, without appeal. If they are not satisfied, no appeal lies, however wrong they may be in their calculations or in their construction of sched. IV, pt. III. This contention of the respondents involves such startling consequences that I should be slow to accede to it unless compelled to do so by perfectly clear words. In the first place, the contention involves the result that a government department, as an assessing authority, can fix the amount of tax to be recovered from a taxpayer without any appeal as to a vital part of the assessment. This is in my experience quite novel as a taxing principle, and contrary to the language of the sub-s. (5) of s. 45 . . . The question seems to me to be whether the words used in s. 40 (2), enabling the commissioners to decide if a certain fact is proved, that a certain basis of assessment should be applied, are sufficiently clear to exclude from the right of appeal given by s. 45 (5), that part of the assessment of amount which consists in finding facts leading to the adoption or rejection of that basis of assessment. It is to be observed that the matter which determines the basis of assessment is a fact, not an opinion ; it is the result of a calculation according to the rules in the schedule . . . This question of fact is to be decided by the commissioners on certain principles, and affects vitally the amount of the assessment. That the Act, instead of using the phrase “if the commissioners decide that,” or “if it is proved before the commissioners,” uses the phrase “if it is shown to the satisfaction of the commissioners,” does not seem to me enough to make their decision final in a case where no satisfactory reason should be given why their decision should be final, and on a point which, raised in another way, *i.e.*, in an appeal on an assessment based on the percentage standard, would clearly be the subject of appeal. Their decision is one of fact by an assessing authority, vital to fix the amount of assessment, and as such seems to me under s. 45 a proper subject of appeal.

Those statements, laying down general principles, apply to this case just as forcibly, indeed more forcibly, than to the case with which the court was dealing, because it is to be noticed that in that case the statute conferred no right independently of the satisfaction of the Commissioners of Inland Revenue until they were satisfied the taxpayer had no right. Here it is the other way

round. The company starts with the right conferred by the statute already in its pocket. It is the company's unless and until it is taken away from them by the commissioners, and certainly their position can be no weaker than that of the Port of London Authority.

A If the principle to be extracted from these cases applies to the subject-matter of this appeal, in my opinion the position is as follows. Necessarily it is for the commissioners to decide whether there are or are not special circumstances connected with an agreement within para. 11. If they decide that there are and what they are, it is then for them in the exercise of their discretion to determine whether it is, in view of these special circumstances, more just to direct that para. 11 shall not be applied. Their decision as to what the circumstances are and whether they are special is open to review on appeal. If their findings as to special circumstances cannot be successfully assailed, their decision whether or not para. 11 shall apply is a matter of discretion. It is unnecessary for me B to say when and how far an exercise of that discretion based on relevant special circumstances truly found can be reviewed. If this appeal succeeds, as I think it does, it succeeds because there were no special circumstances on which to found an exercise of discretion. The special circumstance relied on did not exist, and it was, in fact, a misconstruction of the agreement.

C Is there anything in the two cases relied on which is inconsistent with this view? I think not. *R. v. Inland Revenue Comrs.* (9) dealt with the proper construction of para. 5 of sched. IV to the Finance (No. 2) Act, 1915, which provides:

D Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year or a proportionate part thereof as the case requires.

E What had happened was that before the war the three managing directors received a salary of £5,000 a year each and ten per cent. of the net profits, and they made in the standard year in that way £12,056 each. For the accounting period in respect of which the assessment had been made the remuneration, based entirely on the same basis, amounted to £23,098, and the commissioners had refused to allow more than an increase of £6,000—in other words, they were ready to allow an expenditure on remuneration of £18,056 as against the actual payment of over £23,000. There was an appeal, and the only point raised on the appeal was that it was said that, if the remuneration of the managers or managing directors depended on the profits of the trade or business, there was no discretion vested in the commissioners to disallow any part of the remuneration. F They contended that, if the remuneration, in fact, depended on profits, the commissioners were bound to allow the full amount. The case did not start by way of appeal from the commissioners. A rule for a *mandamus* had been obtained to bring the assessment up to be quashed. It had been discharged by the Divisional Court, and there was an appeal from that discharge to the Court of Appeal and they affirmed it. What the court decided, and the only point the court decided, was that there was a discretion vested in the commissioners, not merely when there were special circumstances but also if the G remuneration depended on the profits of the trade or business, but there was no consideration, and there was no need for consideration of anything at all connected with special circumstances. It just did not come into the case. SWINFEN-EADY, L.J., said ([1918] 1 K.B. 147):

H ... I am satisfied that taking the words in their natural and ordinary sense and meaning they confer a discretion upon the commissioners where there are special circumstances or where the directors' remuneration depends on profits, to direct what sum, if any, is to be allowed in respect of an additional deduction ...

But he had said earlier in his judgment (*ibid.*, 146), and it was this casual reference to a discretion in connection with special circumstances of which so much has been made:

In my opinion the words between brackets are free from any reasonable doubt. They confer a discretion upon the commissioners with regard to the amount as well as to determining whether there are any special circumstances ...

With regard to that latter sentence, the argument is that there SWINFEN-EADY, L.J., says that it is a matter of discretion whether there are special circumstances and that, if it is true of that paragraph, it is equally true of the paragraph with which I have got to deal. WARRINGTON, L.J., said (*ibid.*, 148) :

... there are specified two conditions under which the Commissioners of Inland Revenue may otherwise direct. In the case of one of those two conditions, the existence of special circumstances, the discretion of the Inland Revenue Commissioners is clear. . .

That does not mean a discretion as to the finding of special circumstances, A but that, if there were special circumstances, the discretion as to what course should be taken is clear. He continues :

... in my opinion it is wrong to say that there are two discretions one upon the other : it is one discretion ; they are to determine whether there exists special circumstances on which they think fit to give that direction. That is the one discretion which in that case they have to exercise.

It is not very clear, but I think the true meaning of that passage is that they are exercising a discretion when they come to say what is to be done. *Williamson Film Printing Co., Ltd. v. Inland Revenue Comrs.* (10) was an appeal on precisely the same point which came before SANKEY, J. He said simply the same thing, but nothing about discretion in connection with special circumstances. Therefore, to my mind these cases are quite unhelpful. The point was not argued. The argument was not directed to the question of how a finding of special circumstances can be dealt with. It was simply that, if managers have always been paid on a percentage basis, they have a right to continue to be so paid, and the Revenue had to allow the remuneration, however much it was. It was decided that that was wrong. It is interesting to see that in an Irish case, *Inland Revenue Comrs. v. Auld, Pemberton & Co., Ltd.* (11), where the court had to deal with the right of appeal from a finding of special circumstances under the Act of 1915, it was said ([1919] 2 I.R. 69), with reference to *R. v. Inland Revenue Comrs.* (9) :

Under the negative words of para. 5, apparently the commissioners are the body to determine the existence of special circumstances and the allowance to be made. There appears to be no authority either in England or Ireland as to the finality of the conclusions of the commissioners. The case of *R. v. Inland Revenue Comrs.* (9) [*i.e.*, the Court of Appeal decision] does not directly settle the point.

They held that there was no right of appeal from a decision as to special circumstances under that section, but they said (*ibid.*, 69) :

Inasmuch as a decision as to "special circumstances" relates to the determination of the pre-war standard, it might be reasonable that an appeal should lie as regards the existence of special circumstances or as to the allowance made. The matter is one of difficulty. The words of the enactment are negative. Several sections of the statute are affirmative ; possibly such affirmative provisions imply negatives, but express negative words always possess special force.

They were dealing with a case where there were express negative words. I am dealing with the opposite. I am dealing with the case where the right is affirmatively given and remains unless taken away, and, therefore, to my mind, that case is not an authority which has any binding effect on me.

In my view, an appeal lies against this finding of a special circumstance. There was no special circumstance. The finding of the commissioners was wrong. It was based on a fallacious construction of the agreement and it is open to review.

Appeal allowed.

Solicitors : *Waltons & Co.* (for the company) ; *Solicitor of Inland Revenue* (for the Crown).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

ABBEY PANEL & SHEET METAL CO., LTD. v.
BARSON PRODUCTS (a firm).

[COURT OF APPEAL (Scott, Somervell and Evershed, L.JJ.), November 25, 26, December 3, 1947.]

Practice—Judgment by default—Interlocutory judgment—“Liquidated demand” —Writ claiming price of goods and damages for breach of contract—Value of goods and damages claimed in statement of claim—R.S.C., Ord. 13, r. 7.

A The writ in an action was indorsed: “The plaintiffs’ claim is for (i) damages for breach of contract; (ii) the price of goods sold and delivered; (iii) the price of goods sold,” and the statement of claim, after setting out the contract, claimed in respect of certain goods alleged to have been delivered and others appropriated to the contract, and damages for refusal by the defendants to accept further deliveries. The sum claimed B in respect of the goods delivered and appropriated was not the price, but a sum exceeding the price and claimed as the value. The defendants failed to appear and the plaintiffs signed an interlocutory judgment. The defendants contended that the judgment was irregular because the claim was for pecuniary damages and a liquidated demand and the plaintiffs should, therefore, have signed final judgment, under R.S.C., Ord. 13, r. 7:—

C HELD: (i) in neither the writ nor the statement of claim did any sum appear for which final judgment could have been properly signed; the case fell within the terms of R.S.C., Ord. 13, r. 5, rather than R.S.C., Ord. 13, r. 7; and the plaintiffs had rightly signed an interlocutory judgment only.

D (ii) where a plaintiff was claiming pecuniary damages plus a liquidated demand and did not exercise his right to sign final judgment in respect of the latter, but signed an interlocutory judgment in respect of the whole claim, the defendant could not claim to have the final judgment which was subsequently given set aside as irregular.

[AS TO INTERLOCUTORY AND FINAL JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 206-210, para. 508; and FOR CASES, see DIGEST, Vol. 30, pp. 128-130, Nos. 61-81.]

E Case referred to:

(1) *Rosenthal v. Alderton & Sons, Ltd.*, [1946] 1 All E.R. 583; [1946] K.B. 374; 115 L.J.K.B. 215; 174 L.T. 214; Digest Supp.

INTERLOCUTORY APPEAL by the defendants from an order of LYNKEY, J., dated Nov. 4, 1947, setting aside a judgment on conditions.

F In an action by the plaintiffs claiming (i) damages for breach of contract, (ii) the price of goods sold and delivered, and (iii) the price of goods sold, the sum claimed in respect of the goods delivered and those appropriated to the contract was not the price, but a sum exceeding the price and claimed as the value. The defendants failed to appear and the plaintiffs signed an interlocutory judgment. The defendants claimed to have the judgment set aside unconditionally on the ground of irregularity, because the claim (they contended) was for a liquidated demand, and, under R.S.C., Ord. 13, r. 7, the plaintiffs should G have signed final judgment. The Court of Appeal held that the plaintiffs had rightly signed an interlocutory judgment and dismissed the appeal. The facts appear in the judgment of SOMERVELL, L.J.

Morle for the defendants.

Pearl for the plaintiffs.

H Dec. 3. The following judgments were read.

Cur. adv. vult.

SOMERVELL, L.J.: This is an appeal by the defendants from an order of LYNKEY, J., setting aside a judgment on conditions. The defendants submit that the judgment was irregular and that they are, therefore, entitled to have it set aside unconditionally.

The writ was served on Feb. 14, 1947, and with it was served a statement of claim. The writ was indorsed:

The plaintiffs’ claim is for (i) damages for breach of contract; (ii) the price of goods sold and delivered; (iii) the price of goods sold.

The statement of claim, after setting out a contract for baby chairs, claimed damages in respect of chairs alleged to have been delivered and others appropriated to the contract and for refusal by the defendants to accept further deliveries. The sum claimed in respect of the chairs delivered and appropriated was not the price, but a sum somewhat exceeding the price claimed as the value. The defendants did not appear. R.S.C., Ord. 13, deals with a plaintiff's rights to judgment in default of appearance and R.S.C., Ord. 27, deals with a plaintiff's rights to judgment in default of defence. On Mar. 6 the plaintiffs signed an interlocutory judgment. The main submission of counsel for the defendants is that the plaintiffs' claim here was for pecuniary damages and a liquidated demand and, whether one looks at R.S.C., Ord. 13, r. 7, or R.S.C., Ord. 27, r. 6, the judgment is irregular in that the plaintiffs have not signed final judgment for the liquidated demand. R.S.C., Ord. 13, r. 7, reads as follows :

Where the writ is indorsed with a claim for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, and is further indorsed for a liquidated demand, whether specially or otherwise, and any defendant fails to appear to the writ, the plaintiff may enter final judgment for the debt or liquidated demand, interest and costs against the defendant or defendants failing to appear, and interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in such of the preceding rules of this Order as may be applicable.

If a plaintiff, instead of signing a final judgment, signs an interlocutory judgment, the defendant has a further opportunity of appearing and disputing the amount.

In my opinion, this submission fails on two grounds. If one looks at the writ, one sees that there was no "liquidated demand," though one would expect to find items (ii) and (iii) materialising as such in the statement of claim. In fact, the statement of claim does not claim the price, but the value. In neither document, therefore, as it seems to me, does any sum appear for which final judgment could have been properly signed. I am not myself clear as to the legal basis of the plaintiffs' claim for value, which is all the more reason why an interlocutory judgment only should have been signed. In the second place, where a plaintiff is claiming pecuniary damages plus a liquidated demand and does not exercise his right to sign final judgment in respect of the latter, but signs an interlocutory judgment in respect of the whole claim, I do not think the defendant can claim to have the final judgment which is subsequently given set aside as irregular. Under the rules, the plaintiffs are entitled to final judgment against the defendants in respect of the liquidated demand covered *ex hypothesi* by the final judgment. It may be that the court could itself take the objection when the inquiry takes place and make the plaintiffs sign a separate final judgment in respect of the liquidated demand, but, if the court includes the liquidated demand in the final judgment, I can see no grounds for allowing the defendants to challenge the judgment in respect of an amount included in it for which, under the rules, the plaintiffs were clearly entitled to a final judgment against them.

A further objection was taken to the form of the interlocutory judgment which was as follows :

It is this day adjudged that the plaintiff recover against the defendant the value of the goods and damages to be assessed.

It was said that in the rules the references to "value of goods" are confined to claims in detinue. This may be so, but, as the plaintiffs were rightly or wrongly claiming the value of the goods in their statement of claim, I think they were right in embodying in their judgment the two claims which they were making. Counsel for the defendants did not dispute the conditions imposed if his submission with which I have dealt failed. In my opinion, the appeal fails and must be dismissed with costs.

EVERSHED, L.J. : I agree. The judgment challenged in this appeal was an interlocutory judgment following Form 2 in Appendix F of the Appendices to the Rules of the Supreme Court. The material parts of that form are as follows :

No appearance having been entered to the writ of summons [or no defence having been delivered by the defendant] herein, it is this day adjudged that the plaintiff

recover against the defendant the value of the goods or damages, or both, as the case may be, to be assessed.

In the present case both alternatives in the second sentence were preserved, *i.e.*, the judgment was for both the value of the goods and for damages, regard in this respect being, no doubt, had to the terms of the statement of claim, but in the first sentence reference was only made to default in appearance although the plaintiff company was also entitled to judgment in default of defence. Counsel for the defendants—who, as hereafter appears, has sought to set aside the judgment on the ground of its irregularity—has, however, conceded that he must fail in this appeal if the form of the interlocutory judgment that was signed could be justified either under R.S.C., Ord. 13, (*i.e.*, in default of appearance) or under R.S.C., Ord. 27 (*i.e.*, in default of defence). There is no doubt that the defendants were duly served with the writ and statement of claim. Neither the interlocutory nor the final judgment subsequently entered can be said to have gone in any respect beyond the substance of the plaintiff company's claim. Moreover, the defendants, in accordance with the usual practice under R.S.C., Ord. 36, r. 57, were given an opportunity of attending the appointment before the master when the whole amount of the claim was assessed. Counsel for the defendants has, nevertheless, argued that the judgment obtained was, strictly, irregular in form having regard to the terms of the writ and statement of claim, and must, therefore, be treated as ineffective. According to the argument, the plaintiff company should have signed judgment either under R.S.C., Ord. 13, r. 7, or under R.S.C., Ord. 27, r. 6, for (a) the debt or liquidated demand in respect of the unpaid price of chairs delivered or appropriated (*i.e.*, £601 8s.) and (b) damages in respect of the remaining breaches of contract. Alternatively, it is said that the incorporation of the term "value of the goods" in the interlocutory judgment presupposed a claim in the writ and statement of claim for detainee, and there was, in fact, no such claim.

In my judgment, the argument ought not to prevail. The intended scope and purpose of R.S.C., Ord. 13, rr. 3-7 inclusive, appear to me to be reasonably plain. They provide that where a plaintiff has in his writ made a claim against a defendant for one or more of the following, *viz.*, (a) a debt or liquidated demand, (b) detainee, and (c) pecuniary damages, and such defendant, though properly served, does not choose to appear to the writ, then the plaintiff may, without having to take any further steps against that defendant, obtain judgment against him for his claim—in the case of a liquidated demand, a final judgment; in the other cases, an interlocutory judgment subject to assessment by the court of the monetary amount he is entitled to recover. R.S.C., Ord. 27, rr. 2-6 inclusive, make corresponding provision in the case of a defendant who makes default in delivering a defence. It is also plain, in my judgment, that the present action by the plaintiff company falls within the class of cases to which I have referred so that by the terms of the rules the defendants by their neglect and default rendered themselves liable to have judgment entered against them for the claims of the plaintiff company. It cannot, in other words, be suggested, in my view, that the judgment sought to be impeached purported to go outside or beyond the scope of the relevant rules. Next, if the indorsement of the writ is examined, there is not on the face of it any claim for a debt or liquidated sum, and this is made more clear by the language of the statement of claim which asks for the "value" rather than the price (*i.e.*, the contract price) of the chairs. In my view, when the writ and statement of claim are examined together, it is plain that, on its whole claim, if proved or taken as proved, the plaintiff company was entitled to ask for damages for breaches of contract. So far as the breaches consisted of failure to pay for chairs delivered or appropriated, those damages would, no doubt, *prima facie* at least, be assessed by reference to the prices provided for in the contract. Similarly, a claim for the "value" of those chairs (as it was pleaded in the statement of claim) must mean and can only mean, in the circumstances, a claim for compensation in respect of the chairs made by the plaintiff company and delivered or appropriated pursuant to the contract, but unpaid for by the defendants according to the contract, *i.e.*, damages for the defendants' breach of their contract. Even if it is true that in the present case the plaintiff company could have sued for a liquidated sum, being the contract price for

those chairs, I cannot see that the plaintiff company was not equally entitled to puts its case (as it did) as one for damages for breach of contract—though the practical result might be the same and the effect was certainly less disadvantageous to the defendants.

In my judgment, therefore, the case properly falls within the terms of R.S.C., Ord. 13, r. 5 (or R.S.C., Ord. 27, r. 4) rather than under R.S.C., Ord. 13, r. 7 (or R.S.C., Ord. 27, r. 6) and the interlocutory judgment was correctly based on Form 2 in Appendix F of the Appendices to the Rules of the Supreme Court. I think it might well have been sufficient for that judgment to have been confined in terms to damages. The addition of the words "value of the goods" was, perhaps, convenient in making clear that both heads of the plaintiff company's claim were covered, but were, perhaps, in strictness, surplusage. They do not, however, in my judgment, import that any part of the plaintiff company's claim was a claim for detainue. No doubt, in a claim for detainue the plaintiff may recover the value of the goods detained if those goods are not returned, but I do not think that every claim for "the value of goods" must be founded on a claim for detainue. For example, the value of the goods will be the appropriate measure of damages in a claim for conversion of goods. It is, indeed, pointed out in the ANNUAL PRACTICE, 1946-1947, p. 164, in the notes to R.S.C., Ord. 13, r. 5, that the terms of that rule and of rr. 6 and 7 are somewhat misleading as to actions for detainue:

They provide for interlocutory judgment, but do not indicate the form, nor is any statutory form prescribed.

The proper form of judgment in an action for detainue has been recently considered by this court in *Rosenthal v. Alderton & Sons, Ltd.* (1), and I do not, for my part, consider that R.S.C., Ord. 13, r. 5, and the other relevant rules, limit the rights of the parties in an action for detainue so as in effect to preclude the plaintiff from recovering, or the defendant from restoring, the goods detained where judgment in default of appearance or defence has been obtained. However that may be, I am satisfied for the reasons I have given that the judgment obtained by the plaintiff company in the present case was not irregular and I see no reason for disturbing the order appealed from.

SCOTT, L.J. : I agree with the two judgments which have been delivered, but I would like to add this observation. During the hearing of the case, I had an uncomfortable feeling that the officer in the Action Department of the Central Office who entered judgment pursuant to R.S.C., Ord. 41, r. 1, was not called on to exercise any discretion. I thought at first that some question of discretion of a judicial character might be involved in this case. For the reasons given by my brethren I am satisfied that that is not so. I would like to add the additional word that in the Chancery Division the person entering a judgment is a registrar who is qualified to exercise judicial discretion, but, so far as I know, no such qualification is necessary in the King's Bench Division. With that comment, I simply agree with the judgments of my brethren and the order will be as they have directed.

Appeal dismissed with costs.

Solicitors: *Callingham, Griffiths & Bate* (for the defendants); *Stafford Clark & Co.* (for the plaintiffs).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

STEWART v. STEWART.

[COURT OF APPEAL (Tucker and Bucknill, L.JJ., and Roxburgh, J.),
December 2, 3, 1947.]

Husband and Wife—Legal proceedings—Claim for possession of matrimonial home—Wife in peril of physical ejectment—Discretion of court—Married Women's Property Act, 1882 (c. 75), s. 17.

On an application by a husband for possession of the matrimonial home the county court judge found as a fact that the husband was the tenant of the premises. There was evidence that the parties had not cohabited for a considerable period, that they were making counter accusations against each other, and that the husband had filed a petition for divorce on the ground of the wife's adultery. The judge made an order for possession within two months, which might result in the wife being ejected from the matrimonial home, and refused to make that order conditional on the husband providing accommodation elsewhere for the wife. On appeal:

HELD: the county court judge, in the proper exercise of his discretion under the Married Women's Property Act, 1882, s. 17, had jurisdiction to make such an order, and, as in the circumstances he had not exercised his discretion unjudicially, the court would not interfere.

[AS TO SUMMARY PROCEEDINGS BETWEEN HUSBAND AND WIFE REGARDING PROPERTY see HALSBURY, Hailsham Edn., Vol. 16, p. 740, para. 1211; and FOR CASES, see DIGEST, Vol. 27, pp. 260, 261, Nos. 2296-2303.]

APPEAL by the wife from an order of His Honour DEPUTY JUDGE GLAZEBROOK, made at Clerkenwell County Court, and dated Mar. 24, 1947, awarding possession of the matrimonial home to the husband under the Married Women's Property Act, 1882, s. 17. The appeal was dismissed.

Stranders for the wife.

Hawser for the husband.

TUCKER, L.J.: This is an appeal by the wife from a decision of DEPUTY JUDGE GLAZEBROOK, sitting at Clerkenwell County Court, on what is called in the county court an original application made under s. 17 of the Married Women's Property Act, 1882, in connection with a dispute as to certain premises, being the Lower Flat, No. 288 Archway Road, N.6. In the husband's application under that section he had claimed a declaration that he was the tenant and lawfully entitled to possession of the premises, an order that the wife do forthwith deliver up to him possession of the said premises, and costs.

On the hearing before the county court judge there were two matters in dispute. The first was a question of fact whether the husband or the wife was the tenant of the premises. The parties had not been cohabiting together for some little while before these proceedings, and the husband had been a deserter from the Army. The learned judge has found as a fact that the husband was the tenant of the premises. Counsel for the wife concedes that in this court he cannot go behind that finding, but the point which he raises is that the learned judge did not properly exercise his discretion with regard to the form of order that he made. That order is dated Mar. 24, 1947, and is as follows:

It is declared that the applicant is the tenant and lawfully entitled to the premises known as Lower Flat, 288 Archway Road, N.6, and the order for possession be made on May 24, 1947. Stay of execution for 21 days, on usual terms.

Counsel says that, on the judge's finding, he cannot dispute that the judge would have been entitled to make a declaration not only that the husband was the tenant, but also that he was entitled to the legal possession of the premises, but he says that the actual order for possession by May 24, 1947, which was made, amounts to an order that the wife must necessarily be physically ejected from the premises on that date. It is contended that it was a wrong or an unjudicial exercise of the judge's discretion to make such an order as it necessarily interferes with the wife's enjoyment of the matrimonial home to which, as a wife, she is entitled.

One question which has been discussed is whether it necessarily follows from the form of the order and the consequent warrant for possession which issues

in the event of disobedience to the order that the wife is in peril of being physically ejected from these premises, or whether the order of the court does not go so far as that and it would be a compliance with the order for the wife, still continuing to reside in the premises, to allow her husband to come on the premises and exercise all the rights of the person in law entitled to the possession thereof. Without deciding that matter, which may require consideration in appropriate circumstances in the future, I am going to assume for the purpose of my judgment that the order by the judge would have the effect, in the event of disobedience to it, of the wife being ejected under the warrant for possession in the hands of the county court bailiff. I think that the judge intended that that should be the consequence of disobedience to his order.

The question, therefore, for consideration is whether a judge dealing with an application of this kind under s. 17 of the Married Women's Property Act, 1882, can, in proper circumstances in the exercise of his discretion, make such an order in favour of the husband against his wife. I do not think it necessary to refer in detail to the cases cited by counsel for the wife, because, in my opinion, their effect can be summarised as follows. There is jurisdiction in the county court judge under this section to make an order for possession at the instance of husband or wife against the other spouse, but the cases show that, whether in that or some other form of proceeding, the court will be very slow to make any order dealing with the legal rights of the parties which might have the effect of depriving either the wife or the husband of her or his right to occupy the matrimonial home. The cases show that, whether it is an injunction that is being granted or some other form of relief, great care must be taken in a normal case where there is a subsisting marriage between husband and wife, the parties hitherto living together, and no order having been made by the Divorce Court or by justices giving the one the right to live apart from the other, to see that the rights of the wife or the husband should be safeguarded in the form of the order made. I do not think the cases go beyond that. It must always be a question for the exercise of the discretion of the judge on all the facts before him whether in a particular case he thinks it proper to make the order for possession which he clearly has jurisdiction to do.

In the present case there was evidence before the judge that these parties had not been cohabiting together for some considerable period of time. They were making counter accusations against each other and, most material fact of all, on Sept. 26, 1946, the husband had filed a petition against the wife asking for a dissolution of the marriage on the grounds of the wife's adultery. It is true that those proceedings had not come to trial, and the learned judge was not asked to go into the merits of those proceedings, but, in my view, it was a matter that he was entitled to take into his consideration when he was considering whether in the circumstances he ought to make an order for possession or not. The rights of one spouse with regard to the matrimonial home as against the other may vary with the circumstances of each case, and, although it is, no doubt, the duty of the husband to provide somewhere for the wife to live until a decree is made absolute, it does not necessarily follow (in fact, in many cases it would be very inconvenient and embarrassing) that she should be sharing rooms under the same roof as her husband. In the particular circumstances of the present case it was pressed on the learned judge that he should not make an order for possession except on the terms that it was not to take effect unless and until the husband had provided other accommodation elsewhere for the wife. That is an order which he might very well have made, but I find it impossible to say that, in refusing to make an order in that form, he was not exercising his discretion in a judicial manner. For these reasons I think this appeal fails.

BUCKNILL, L.J. : I agree.

ROXBURGH, J. : I agree.

Appeal dismissed.

Solicitors : *Shaan, Roscoe & Co.* (for the wife) ; *Philip Taylor & Co.* (for the husband).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

CUTLER v. WANDSWORTH STADIUM, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Somervell, L.J., and Singleton, J.), October 29, 30, 31, November 3, 4, 5, 6, 7, December 1, 1947.]

Gaming and Wagering—Dog race track where totalisator maintained—Provision of space for bookmakers—Breach of statutory duty—Competence of civil action at suit of injured bookmaker—Betting and Lotteries Act, 1934 (c. 58), s. 11 (2).

A *Action—Ubi jus ibi remedium—Breach of statutory duty—Civil action by private person—Bookmaker—Breach by occupier of dog racing track of duty to provide space for bookmaking—Betting and Lotteries Act, 1934 (c. 58), s. 11 (2).*

Statutes—Construction—Breach of statutory duty—Civil action by private person—Bookmaker—Breach by occupier of dog racing track of duty to provide space for bookmaking—Betting and Lotteries Act, 1934 (c. 58), s. 11 (2).

B An action does not lie at the suit of a bookmaker against the occupier of a licensed dog-race track on which a totalisator is maintained for breach of the occupier's obligation under s. 11 (2) (a) not to exclude bookmakers, or, under s. 11 (2) (b), to secure that space is available on the track where bookmakers can conveniently carry on bookmaking in connection with the dog races run on that track on any particular day. The occupier properly discharges his duty under s. 11 (2) (b) if the space provided is a "convenient" space. He is not bound to provide the best space.

C [AS TO ACTION FOR DAMAGES BY PRIVATE PERSON FOR BREACH OF STATUTORY DUTY, see HALSBURY, Hailsham Edn., Vol. 1, pp. 11-12, paras. 11, 12; and FOR CASES, see DIGEST, Vol. 42, pp. 758-760, Nos. 1849-1858.

FOR THE BETTING AND LOTTERIES ACT, 1934, s. 11 (2), see HALSBURY'S STATUTES, Vol. 27, p. 283.]

Cases referred to :

D (1) *Vallance v. Falle*, (1884), 13 Q.B.D. 109; 53 L.J.Q.B. 459; 51 L.T. 158; 48 J.P. 519; 41 Digest 253, 943.

(2) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 42 Digest 759, 1858.

(3) *Patent Agents Institute v. Lockwood*, [1894] A.C. 347; 63 L.J.P.C. 74; 71 L.T. 205; 42 Digest 751, 1755.

(4) *Clark and Wife v. Brims*, [1947] 1 All E.R. 242; [1947] K.B. 497; [1947] L.J.R. 853.

E (5) *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 42 Digest 752, 1758.

(6) *Doe d. Rochester (Bp.) v. Bridges*, (1831), 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 42 Digest 750, 1737.

(7) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832; 93 L.J.K.B. 5; 129 L.T. 777; 42 Digest 870, 197.

F APPEAL by the defendants from a decision of OLIVER, J., dated Oct. 30, 1946, and reported on a preliminary point of law at [1946] 2 All E.R. 187, awarding the plaintiff, a bookmaker, £150 damages, a declaration, and an injunction, against the defendants, who were the occupiers of a licensed dog-racing track, for breach of their statutory duty, under s. 11 (2) of the Betting and Lotteries Act, 1934, not to exclude bookmakers and to secure that space was available for bookmaking purposes. The Court of Appeal now allowed the appeal.

G *Sir Valentine Holmes, K.C.*, and *Paget, K.C.*, for the defendants.
Pritt, K.C., and *Platts Mills* for the plaintiff.

Cur. adv. vult.

Dec. 1. The following judgments were read.

H LORD GREENE, M.R. : This litigation arises out of a dispute between a bookmaker named Alfred Cutler and the proprietors of the Wandsworth Greyhound Stadium. By his statement of claim Mr. Cutler, who was plaintiff in the action, claimed five declarations, two injunctions, a mandatory order, and damages. The case was founded on the allegation that the defendants had committed breaches of certain statutory duties imposed on them by s. 11 (2) of the Betting and Lotteries Act, 1934, whereby the plaintiff had suffered damage and the contention that the plaintiff as an individual had the right to sue the defendants for damages and other relief in respect of those breaches. OLIVER, J., held by way of a preliminary decision that the plaintiff was so entitled to sue, and by his judgment he awarded him the sum of £150 as damages. He also made one declaration and granted one injunction.

The question which falls first for consideration may be thus stated. Assuming that the defendants committed a breach of their statutory duties and that the plaintiff thereby suffered damage, has he a right to sue the defendants in respect of that breach? If the answer to it is in the negative, the action is misconceived and must fail and it becomes unnecessary to consider any other question. It is, I think, unfortunate that OLIVER, J., was persuaded to decide this question as a preliminary point before he had a full opportunity of considering the nature of the statutory duties in question. These two matters cannot be considered separately from one another. As will be seen, the question which I have formulated must, in my opinion, be answered adversely to the plaintiff and in favour of the defendants. It must not, however, be supposed that, if this view were wrong, I should agree with the conclusions of OLIVER, J.

The question whether an individual who has suffered damage through the breach of a statutory duty is entitled to maintain an action must in the last resort depend on the true construction of the statute. This question can, of course, only arise where the statute does not in terms confer such a right; only in that case is it necessary to consider whether or not such a right ought to be implied. In the large number of authorities cited to us certain so-called rules of construction have from time to time been enunciated as guides to the correct answer to the question. Nowadays, when "rules of construction" have fallen into some disfavour, I think that the position may be accurately summarised as follows. The so-called rules of construction cannot prevail against the true construction of the statute, and, as the question of construction is: Ought a right to be implied which *ex hypothesi* is not expressed, this question is to be answered by a consideration of the whole statute and such other matters as may legitimately be considered in relation to its interpretation. To my mind, the question can in the present case be solved without need to fall back on any of the so-called rules of construction. The provisions of the Betting and Lotteries Act, 1934, which are more immediately relevant are contained in s. 11 (2). They are as follows:

The occupier of a licensed track—(a) shall not, so long as a totalisator is being lawfully operated on the track, exclude any person from the track by reason only that he proposes to carry on bookmaking on the track; and (b) shall take such steps as are necessary to secure that, so long as a totalisator is being lawfully operated on the track, there is available for bookmakers space on the track where they can conveniently carry on bookmaking in connection with dog races run on the track on that day; and every person who contravenes, or fails to comply with, any of the provisions of this subsection shall be guilty of an offence.

It is alleged that the defendants, as occupiers of the Wandsworth licensed dog racecourse, committed a breach of both paras. (a) and (b), and that the plaintiff thereby suffered damage. The most important question arises in relation to para. (b).

The Wandsworth racecourse consists of an oval track on which the dogs race, surrounded by an enclosing fence on both sides. The accommodation provided for those attending the races lies outside the outer fence and consists partly of covered stands with seats and partly of open ground. It is divided into two parts or sides called, respectively, the senior side and the junior side. The price of admission to the senior side is higher than that charged in respect of the junior side. In the case of each "side" the stands occupy the greater part of the longer side of the oval. That on the senior side (with which alone we are concerned) includes seats reserved for what are known as club members among whom is to be found the wealthier class of punter. Between the stand on the senior side and the rail there is an open area which is conveniently referred to as the "forecourt." At one end beyond the stand this forecourt opens into a wider open area extending in depth for some distance from the rail. What I may call the rearward portion of this latter area is conveniently referred to as "the corner." In the first half of 1944, for reasons which, whatever they were, appear to me to be immaterial, the defendants were minded to move the bookmakers (some twelve in number) who had previously carried on business in the "forecourt" into "the corner," which the defendants allege, but the plaintiff denies, is a space where "bookmakers can conveniently carry on bookmaking." In his statement of claim the plaintiff alleged that the only place on the senior side where bookmakers could conveniently carry on bookmaking was the fore-

court, and, indeed, the whole of the forecourt. This contention was accepted to its fullest extent by OLIVER, J., who held that the plaintiff was entitled to a declaration and injunction and damages on the basis, explained in a reasoned judgment, that he as an individual had the right to carry on his business in the "forecourt," that he had been effectively excluded from the "forecourt" and compelled to carry on his business in the "corner," that he had thereby suffered damage, and that under the statute an implied right to sue as a person injured by breach of statutory duty was conferred on him.

A Before I examine the sub-section in detail there are some general considerations to be borne in mind. In the long title the Betting and Lotteries Act, 1934, is described as an Act to (among other things) amend the law with respect to betting on tracks where sporting events take place "and to authorise, subject to restrictions, the establishment of totalisators on dog racecourses." It is not described as an Act to confer new rights on bookmakers. Previously to the

B passing of this Act it was unlawful to operate totalisators on dog racecourses although their use on horse racecourses had been legalised by the Racecourse Betting Act, 1928. It was, however, permissible to allow bookmakers to carry on their business on a dog racecourse subject to the restrictions contained in the Betting Act, 1853, but the proprietors of such a racecourse could, if they pleased, take steps to prohibit it. The decision whether or not bookmaking

C should be permitted on a dog racecourse was for the proprietors of the racecourse alone. If, therefore, the Act of 1934 confers on individual bookmakers the rights which the plaintiff claims, they are being presented by the legislature with a civil right which they did not possess before. Section 11 (1) of the Act authorised the operation of a totalisator on a licensed track being a dog racecourse. The licensing authorities are the councils of certain local authorities and the licence is referred to in the Act as a licence "authorising the provision

D of betting facilities on tracks": see, *e.g.*, s. 5 (1). The position of bookmakers is affected in various ways of which the following are particularly important :— (i) Subject to certain exceptions which are not relevant, bookmaking is prohibited on any track unless the occupier is the holder of a licence. (ii) The provisions of the Betting Act, 1853, are, with certain exceptions, not to apply to book-making operations on a licensed track. (iii) The duties mentioned in s. 11 (2) are imposed on the occupier of the track. (iv) Under s. 17 the occupier is entitled

E to prohibit betting on the track at times when no totalisator is being operated there. Thus far the Act legalises the operation of a totalisator on a dog track, but only on condition that, so long as it is being operated, the occupier of the track is not to enjoy a monopoly of betting as he would do if he were entitled at one and the same time to operate a totalisator and to exclude bookmakers and prohibit bookmaking. That the legislature considered that such a monopoly

F of bookmaking in the hands of the occupier of the track would be against the interests of the public does, I think, also appear from the provisions of s. 14 which forbid him to have any interest in bookmaking on the track. I shall refer presently to the matter of the penalties prescribed by the Act for breaches of the obligations which it imposes on occupiers, but it may here be pointed out that the penalties prescribed for a contravention of s. 14, a section clearly

G dictated by a purely public interest, are heavy penalties although not so heavy as those prescribed for a breach of s. 11 (2) which is alleged to confer civil rights of action on individual bookmakers. The only sanctions expressly provided by the Act for breach of s. 11 (2) (a) and (b), are (i) criminal proceedings under s. 30 (1); (ii) the provision in s. 7 (1) (b) that conviction of an offence entitles the licensing authority to refuse to grant a licence; (iii) the provision in s. 16 (1) (b) that a licence may be revoked if a conviction has taken place. If the

H plaintiff is right, the finding by a civil court in an action by a bookmaker that s. 11 (2) (a) or (b) has been disobeyed is not a ground entitling the licensing authority to withhold a licence: see s. 7 (2); or to revoke a licence. The fact that a conviction by a magistrate is sufficient to lead to such grave consequences, but that a decision by, *e.g.*, the House of Lords in a civil action produces no such result is, to my mind, a ground for thinking that no such action was regarded by the legislature as competent. This view is further supported by the nature of the penalties imposed by s. 30 (1) of the Act. The severity of the penalties that may be inflicted—including in the case of a second offence imprisonment for three months on summary conviction or for one year on con-

viction on indictment—appears to me to be a clear indication that the offences referred to are regarded by the legislature as offences against the public interest and nothing more. It is hardly likely that penalties of this nature would be provided for an offence consisting in whole or in part of the violation of private rights of bookmakers.

These considerations of a general nature, in the absence of clear indications to the contrary, do, in my opinion, help to negative the proposition that the Act is concerned to confer private civil rights on individuals who fall within the definition of bookmakers. I can find no such indication. On the contrary, my view is confirmed when I come to consider the actual language of s. 11 (2). I will consider first of all para. (b). Under that paragraph the only obligation is to take steps to secure that there is "available for bookmakers space on the track where they can conveniently carry on bookmaking" in connection with the races. OLIVER, J., if I understand his reasoning aright, found it possible to construe these words as giving an individual bookmaker the right to require the provision of the best space and the right to select any space on the track for his operations. This, with respect, is not what the paragraph says. If the space provided by the proprietors is a "convenient" space, they properly discharge their duty and cannot be prosecuted. They are not bound to provide the best space. In the present case the best "space" on the senior side of the track with which we are concerned appears to be in the forecourt immediately in front of the club premises where the most wealthy punters are to be found and bets can be called out through the windows of the club by such punters to the bookmakers. The whole object of this litigation is really to establish a right for the plaintiff (and by implication for other bookmakers) to carry on business in this particular place where the largest profits are to be earned. The language of the paragraph does not, in my opinion, impose any such duty on the proprietors, much less does it confer any such right on individual bookmakers. There must be room for bookmakers, *e.g.*, in a special "enclosure" (to use the word applied to horse racecourses by the Racecourse Betting Act, 1929), in which they can carry on their business. This cannot mean that there must be room in the "space" for every bookmaker who chooses to come to the track on a particular occasion. The wide definition of "bookmakers" in s. 20 (1) makes that obviously impossible. This by itself seems to show that no civil right is conferred on individuals. If one individual bookmaker can sue, I can see no reason why every bookmaker in London who wishes to attend a race meeting on a particular track and finds no space provided of sufficient capacity to hold such a multitude cannot sue for the loss incurred by his inability to carry on his business on that particular occasion. I can see no ground why this suggested civil right should have been given to bookmakers. If it is given to bookmakers, a corresponding right must surely be implied in favour of the public. Where a totalisator is operated the public are not to find themselves compelled to bet by means of that instrument. They are to be entitled to choose between the totalisator and the bookmakers who are admittedly regarded by large numbers of the frequenters of dog tracks as a preferable medium for betting. The licence authorises the "provisions of betting facilities" on the track. This, in my opinion, means facilities for the public to bet and not facilities for the bookmaker to carry on the business of bookmaking. The totalisator and the bookmakers are both comprised in the phrase "betting facilities." Both of them exist for the public; the public does not exist for them. The whole scope of the Act is designed to provide the public with what it wants, including facilities to bet either with the totalisator or with bookmakers according to taste. It is, in my opinion, no object of the Act to confer on individual bookmakers a privilege in furtherance of their business interests which they never possessed before. If, however, the plaintiff is right, there must admittedly be a corresponding right in members of the public to require that space be provided for bookmakers. The idea that an individual member of the public who is deprived of the opportunity of making a profitable bet with a bookmaker by reason of the failure of the management to provide a convenient space for bookmakers could sue for damages on the ground of breach of statutory duty appears to me to be an extravagant one. The truth, in my opinion, is that neither bookmaker nor members of the public have any individual civil rights to

require the observance of these obligations. They are imposed in the general public interest and the failure to observe them is punishable by the methods expressly laid down in the Act and not otherwise. I should, perhaps, add a word with special reference to para. (a) of s. 11 (2). At first sight it might be thought that an individual bookmaker excluded from the track in breach of that paragraph had an individual right to complain. The considerations which I have set out above appear to me, however, to apply equally to this paragraph as they do to para. (b), and the penal consequences of a breach are the same. I cannot think that an individual can sue for damages for breach of para. (a) when he clearly cannot do so for breach of para. (b). Paragraph (a) merely means, in my view, that a bookmaker cannot be refused admission to the track. It was necessary as a matter of drafting so to provide since the obligation to provide a convenient space could be frustrated if the proprietors were allowed to refuse admission to bookmakers at the turnstiles or to pick and choose between them. This is all that para. (a) appears to me to be aimed at and it is merely part of the machinery designed to secure that the public shall have the benefit of, so to speak, free trade in betting and should not be compelled to bet either with the totalisator or with such bookmakers only as the proprietors of the track might choose to admit.

It is, I think, relevant to consider the earlier Act which legalised the use of totalisators on horse racecourses, *viz.*, the Racecourse Betting Act, 1928. The Racecourse Betting Control Board set up under that Act and any person authorised by it (but no other person) were authorised to operate a totalisator on any approved racecourse. The Control Board is made the authority to give certificates of approval of racecourses and by s. 3 of the Act certain powers and duties given to and imposed on the board are set out. Sub-section (2) directs the board to make it a condition of the grant of a certificate of approval that the managers of the racecourse "shall provide a place . . . where bookmakers may carry on their business and to which the public may resort for the purpose of betting," and it limits the amount that may be charged to a bookmaker "for admission to an enclosure on the racecourse for the purpose of the bookmaker's business." It is, in my view, impossible to read these provisions as conferring on individual bookmakers a civil right of action either if the Control Board fails to impose the condition or if the managers of the racecourse fail to obey it by providing a "place." The Act was not designed to create privileges by way of civil rights for the benefit of bookmakers. No such right existed on horse racecourses before the Act when the managers could exclude bookmakers if they chose to do so. The real object of the provision with regard to a "place" for bookmakers was, in my view, to enable the public to have what they always had in practice had on horse racecourses before the Act, *viz.*, the opportunity of betting with bookmakers. They were not to be forced to bet by means of a totalisator. If this view of the Act of 1928 is right, it appears to me that it may properly be taken into account in considering the Act of 1934. If it is right and if the plaintiff in this litigation is also right, the policy of the legislature in relation to bookmakers must have undergone a radical change in the intervening six years. The legislature must have placed bookmakers on dog racecourses in a privileged position as compared with their brethren on horse racecourses. If this had been the intention, it is difficult to think that the legislature would not have taken steps to make it clear. Instead of doing so, it has inserted the provisions already mentioned which, as I have said, point clearly in the opposite direction. If the plaintiff is right, the legislature has not only provided for the infliction of severe penalties, but has created a new civil right in favour of the bookmaker on dog tracks. The bookmaking fraternity could say with satisfaction that the legislature had at last decided to encourage their business rather than merely to tolerate its existence.

On the footing that the plaintiff had an individual right, OLIVER, J., as I have said, framed a declaration and an injunction. I shall not take up time by giving my reasons for thinking that, even if there had been substance in the plaintiff's contention, this relief would have been wholly unsuitable both in substance and in form. What is, however, of importance to my mind is that neither OLIVER, J., nor counsel for the plaintiff in the argument before us succeeded in expressing the alleged civil right in the form of a declaration.

The reason for this, in my opinion, is that there is no such civil right, and anything claiming to be a declaration of any such alleged civil right can only be framed by doing violence to the language of the subsection and by implying in it matters which cannot be reconciled with its language.

Lastly, if further argument be needed, I may refer to the argument based on convenience. The mere fact of a breach of s. 11 (2) on a particular occasion or a series of particular occasions is capable of being established without much difficulty in a criminal court, but once a civil claim can be raised very different considerations apply. Then the substantive relief asked for would be based on damage actual or (if an injunction were sought) apprehended. If the plaintiff is right, anyone who falls within the very wide definition of book-maker contained in s. 20 (1) of the Act would be entitled to bring his action in a civil court if he could show that he had suffered damage or would suffer damage if no convenient space were provided or if he was, in effect, to his damage prevented from frequenting the track for the purpose of his business owing to the non-provision of such a space. Counsel for the plaintiff contended, and in order to be consistent was bound in my view to contend, that any person who presented himself at the turnstiles with the intention of making a book was entitled to demand the provision of space and to sue for damages if it was not provided for him. The result would be that if, *e.g.*, one hundred London bookmakers presented themselves and found that the space provided was only large enough to accommodate twenty—that being, let me suppose, the usual number attending—the remaining eighty could sue in respect of damage suffered by their inability to carry on their business on the track on that occasion. The subsection, however, in my opinion, means what it says. The space to be provided is a convenient space for “bookmakers,” not “a convenient space for a series (apparently unrestricted in point of numbers) of individual bookmakers.” Counsel endeavoured to escape from the difficulty in which he found himself by suggesting, as an alternative, that only persons who have, in fact, been in the habit in the past of resorting to the track in question can sue. There is, in my opinion, no warrant for any such construction which would create a vested interest in favour of a limited number of bookmakers. The ascertainment of damage and its probability might in some cases be a fairly easy matter. In other cases, *e.g.*, that of a newly opened track, it would be very difficult. To say the least of it, I think it is unlikely that the legislature would have imposed on the courts the duty of solving such delicate problems, particularly when I remember that it would be possible for a bookmaker to operate for six years in an inconvenient space and then to bring his action for damages for failure to provide a convenient space during that period.

Much argument was directed to an attempt to place a breach of s. 11 (2) of the Betting and Lotteries Act, 1934, on the same level and in the same class as a breach of the Factory Acts. In view of what I have already said, I do not think that I need take up time in explaining my reasons for rejecting this argument. Having regard to the view which I take of the preliminary question in the case, no useful purpose will be served by examining the other criticisms to which the judgment of OLIVER, J., was submitted before us or to go further into the facts of the case. The appeal must be allowed and the action dismissed.

SOMERVELL, L.J.: The first question in this appeal is whether the provisions of the Betting and Lotteries Act, 1934, which have been read, in addition to imposing, as they expressly do, a duty sanctioned by a penalty, also by implication confer rights which might be the subject of an action. A similar point has come before the court more than once on different statutes. Various so-called rules of construction were suggested and are to be found formulated in the text books. I have sympathy with the manner in which a point of this kind was dealt with by STEPHEN, J., in *Vallance v. Falle* (1). At the conclusion of his judgment he says (13 Q.B.D. 112):

I do not wish to say anything against the general rules that have been laid down for the construction of statutes in relation to the question whether a penalty is intended to be the only remedy for breach of a statutory duty, but I always think that after all the best way of finding out the meaning of a statute is to read it and see what it means.

So, reading this statute, I have come to the conclusion that no such right as is contended for by the plaintiff can be implied into it. The provision to be implied could be formulated as follows: "Any bookmaker who suffers any loss by reason of any failure to comply with the provisions of s. 11 (2) shall be entitled to claim in civil proceedings damages, a declaration and an injunction."

- A There are various matters, no one of which is in itself conclusive, which it is relevant to consider in this class of case. Their consideration, in my view, leads to the conclusion which I have stated. First, are the provisions for the benefit of a particular class of persons? If provisions are of this kind it is, no doubt, easier to imply a civil right of action. The class suggested here is bookmakers. Where, as here, an Act regulates the way in which a place of amusement is to be managed, I would expect the interests and wishes of those who resort to it to be the primary consideration. Indeed, the bookmakers' case, if one imagines them making a case to the legislature, would be based on representations that the public, or a section of the public, attending dog races would want to bet with them rather than with the totalisator. Although these provisions clearly benefit bookmakers, I think the intention of the legislature was to ensure that the public should have what it was presumed to want, *viz.*, the choice of betting either with a bookmaker or with the totalisator. It cannot, therefore, be said that the primary purpose is the protection of bookmakers. The best example of a statute under which a civil right of action has been implied is the Factory and Workshop Act, 1878. This was decided in *Groves v. Wimborne* (2). A. L. SMITH, L.J. ([1898] 2 Q.B. 406) described this Act as a "a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit." It is clear from what I have said that I do not regard the provisions with which we are concerned as passed in order to compel occupiers of dog tracks to do certain things for the "protection and benefit" of bookmakers. The severity of the penalties is, I think, relevant. If the intention of the legislature had been merely to protect bookmakers and if, as the plaintiff contends, any bookmaker suffering loss could recover that loss and get an injunction in civil proceedings, there would seem to be no reason for severe penalties, and I am not sure that I could see any reason for making it a criminal matter. Under the Factories Acts it was essential that the law could be sent in motion before an accident, which might be fatal, had happened. Here, if the public are disregarded, bookmakers would be sufficiently protected if they had on the lines suggested a right in civil proceedings to recover damages and get an injunction laying down what space was to be available for them. In the present case the task of assessing damages would have been comparatively simple if the plaintiff had produced his books, because up to a certain date the plaintiff was operating in what he admits was convenient space and then he had to operate in the space complained of. It would seem more likely that a complaint would arise at the time when a new track was opened or a totalisator installed in an old track. The court, assuming they found a breach, would then have to try to assess what profit a particular plaintiff would have made if he had been allowed into a space where neither he nor any other bookmaker had ever operated in competition with a totalisator. This would be a very difficult task. This is not conclusive, but I should more readily imply a private right when the resulting claim for damages, as in the Factories Act cases, would be assessed on familiar, or, at any rate, simple, lines.
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- When one passes to the other relief claimed the "inconvenience" becomes considerable. The injunction which counsel for the plaintiff invited the court to make is as follows: "An injunction restraining the defendants their servants and agents from excluding the plaintiff from the said track by reason only that he proposes to carry on bookmaking on the said area represented by the said hatching in red." This is asking the court not only to find that the space available was not in accordance with the Act, which would be a sufficient finding to support a claim for damages, assuming such a right exists, but to lay down how the provisions of the Act are to be carried out. This is open to more than one objection, and, I think, is clearly not maintainable. It would, in effect, impose on the courts the task of controlling in this matter the administration of all the dog tracks in the country. Further, the court's decision
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on this matter would be binding only on the particular bookmaker who was plaintiff. Another bookmaker might start proceedings with other evidence designed to show that the space alleged by the first plaintiff to be convenient was not in accordance with the statute. Finally, any form of injunction would be open to the objection stated by LORD HERSCHELL in *Patent Agents Institute v. Lockwood* (3). In that case the plaintiffs were seeking an interdict in a matter which, under the statute, was subject to a penalty. LORD HERSCHELL said ([1894] A.C. 361) :

The legislature, having created that new offence, has prescribed the punishment for it, namely, a penalty of £20. Can it possibly under these circumstances be open to bring the individual, not before the summary court at small expense to determine the question of his liability to a £20 penalty, but to bring him before the Court of Session with its attendant expense and to ask the Court of Session to make a declaration that he has been breaking the law in a manner which the legislature has said subjects him to a penalty and, then, having proved that he has rendered himself liable to a penalty, to ask the Court of Session to interdict him, with this result, that if he were to offend again he would not be subject to the summary procedure and the £20 penalty, but would be liable to imprisonment for breach of the interdict ?

There are other difficulties which have already been referred to. I only want in conclusion to give my reasons for thinking that the penalties imposed are an adequate and sufficient "protection" for bookmakers without implying the additional right asked for. One does not imply a provision unless its absence will at least create substantial injustice or inconvenience.

If a bookmaker or a group of bookmakers think the provisions of the Act are not being carried out, no doubt the matter would in the first instance be taken up with the management. Managements will be extremely anxious to avoid a conviction which would jeopardise their licence under s. 7. This again is an indirect, but fairly effective, protection of the bookmakers' position. Finally, a bookmaker can himself initiate criminal proceedings and the matter will be determined in a comparatively short period. If those responsible have failed to carry out their duties, some bookmakers will have lost for a short period the chance of making some profit. This seems to me a wholly insufficient reason for implying a civil cause of action. I, therefore, think that this appeal succeeds and the action fails on the point which was decided by OLIVER, J., in the plaintiff's favour as a preliminary point. In coming to this conclusion OLIVER, J., in the first place, construed the section as one framed for the benefit of bookmakers. I have already given my reasons for thinking this is the wrong approach. Secondly, he, I think, construed the section as imposing an obligation on the occupier to see that bookmakers were, in effect, given access to the public wherever there was an office at which totalisator bets could be made unless some special reason made this impracticable. This seems to me to be reading into the general words a detailed context which is not justified. They may in certain cases lead to that result, as a matter of application of the general words used to the particular lay-out and other facts, but not as a matter of construction applicable in all cases. I agree that the appeal should be allowed.

SINGLETON, J. (read by SOMERVELL, L.J.): The most important question before the court is whether the plaintiff, a bookmaker, has a right to sue the defendants, who are the occupiers of a licensed track. His case is that s. 11 of the Betting and Lotteries Act, 1934, placed the defendants under a duty to him, that they were in breach of that duty, and that by reason of such breach he suffered damage, and that, consequently, he had a right of action against them. He succeeded before OLIVER, J., and was awarded damages, a declaration, and an injunction. The defendants appeal against that judgment.

The Act, by s. 30, provides penalties for offences against s. 11 (2) by way of heavy fines on summary conviction or on conviction on indictment, and in the case of a second conviction to both fine and imprisonment. The defendants rely on these provisions and contend that the plaintiff has no individual right to sue even if it be established that they have committed any breach of statutory duty. Questions of this kind have been the cause of much litigation and a large number of authorities were cited to us the last of which

was a judgment of MORRIS, J., in *Clark v. Brims* (4). In *Pasmore v. Oswaldtwistle Urban District Council* (5), LORD HALSBURY, L.C., said ([1898] A.C. 394):

A The principle that where a specific remedy is given by statute, it thereby deprives the person who insists on a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think LORD TENTERDEN accurately states that principle in the case of *Doe v. Bridges* (6). He says (1 B. & Ad. 859): "Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

B Counsel for the plaintiff did not question this as an accurate statement of the law, but he submitted that it ought not to be read as limiting the rights of a plaintiff in a case in which the only remedy provided by the statute is a prosecution. I do not find in the authorities cited any ground for limiting the general rule in the way suggested by counsel. It is true to say that the rule is subject to exceptions one of which was exemplified in the same year in *Groves v. Lord Wimborne* (2). That was an action to recover damages for breach of the statutory duty imposed on the defendant, under s. 5 (4) of the Factory and Workshop Act, 1878, to fence dangerous machinery and it was brought by an employee who had sustained personal injury by reason of the defendant's breach of statutory duty. The Act provided, as later Factory
C Acts have done, a penalty for breach of its provisions. It was held by the Court of Appeal that the Act gave the workman a right of action on the statute for injury caused by breach of the statutory duty imposed. It is to be observed that in that case the plaintiff was a workman employed by the defendant and was one of those persons the possibility of injury to whom through neglect to fence machinery the section contemplated, and the reasons given
D by all the Lords Justices were that "looking at the purview of the whole Act" it was not reasonable to suppose that the legislature intended the penalty imposed to be the only remedy for injury occasioned by breach of the absolute statutory duty imposed by the Act, but, on the contrary, the intention of the legislature, from the reading of the statute as a whole, must be taken as giving a right of action to the injured workman. VAUGHAN WILLIAMS, L.J., said ([1898] 2 Q.B. 417):

E In making these observations on the particular case I do not wish to be considered as going back in the slightest degree from the general proposition that no hard and fast line can be drawn as to what provisions in an Act will indicate that the intention of the legislature was that the remedy provided by the statute should be the only remedy. In each case one must look at the whole of the statute, and gather from all its provisions the answer to the question whether that was the intention. This view of the matter is very clearly laid down by STEPHEN, J., and MATHEW, J., in the case
F of *Vallance v. Falle* (1).

This, indeed, stands out clearly from the long line of authorities cited to us—one must have regard to the Act as a whole and not merely to the section which creates the duty; one must look to see what is "the scheme of the Act": see *Phillips v. Britannia Hygienic Laundry Co.* (7).

G I have looked again and again at the different sections of the Act with which we have to deal and I find nothing to indicate that a civil action by a bookmaker who complains of a breach of s. 11 (2) (b) of the Act was within the contemplation of the legislature. Counsel submitted that the plaintiff as a bookmaker was one of a class for whose protection s. 11 (2) (b) was passed, and that, as he had suffered damage through the failure of the defendants to take such steps as were necessary to secure that there was available for bookmakers space on the track where they could conveniently carry on
H bookmaking, he had a right of action against them. Accepting, as I do, the plaintiff's allegation that he suffered damage because the facilities were not so good as he would have liked, there are still many difficulties in his way. The definition of "bookmaker" in s. 20 is extraordinarily wide and any individual who occasionally made a book might be said to be within the "class" whether he went regularly to the defendants' stadium or not, and I suppose a bookmaker who thought of going but did not do so because he was told the defendants had not fulfilled their statutory duty under s. 11 (2) (b) would be entitled to sue if the plaintiff has a right of action, though it might not

be easy for him to prove damage. This shows how different the case is from the Factory Acts cases in which there is a clearly indicated class of persons for whose protection the duty is created. Counsel for the defendants submitted that s. 11 (2) (b) of the Act was passed, not for the benefit of bookmakers, but for the benefit of the public or of those members of the public who preferred to bet with bookmakers rather than on the totalisator. Whether this is so or not, it is, I think, extremely difficult to say how far the "class" extends if one assumes that the section was passed for the benefit of bookmakers, and that of itself negatives any intention on the part of the legislature to give an individual right of action. Again, the statute provides heavy penalties on conviction for an offence against s. 11 and those penalties are much more likely to secure protection for bookmakers than any civil action, the more so as a conviction may lead to revocation of licence under s. 16 (1) (d). The more I think of this case the more I return to the words of LORD MACNAGHTEN in *Pasmore's case* (5) ([1898] A.C. 397):

Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience. It would be difficult to conceive any case in which there could be less reason for departing from the general rule than one like the present.

This litigation has already lasted about three and a half years. The writ was issued on May 31, 1944, and the judgment of OLIVER, J., was given on Oct. 30, 1946. In the meantime there were several journeys to the Court of Appeal on interlocutory matters. It is not out of place to draw attention to the inconvenience which would result if a large number of bookmakers brought actions or to the difficulties of assessing damages if that question arose—and each day on which dog races were run on the track would give a right of action for breach of statutory duty if the plaintiff's contention is correct. The statute [by s. 11 (2)] gives a simple remedy—" . . . every person who contravenes, or fails to comply with, any of the provisions of this subsection shall be guilty of an offence"—and s. 29 provides that where the person convicted is a body corporate a person who was a director at the time of the offence shall also be deemed to be guilty unless he proves the offence was committed without his knowledge. If an information had been laid, the matter could have been dealt with long ago. If it had been decided that the case should go for trial to the Central Criminal Court, it might well have been heard within two or three months. On such a trial it would have been for the presiding judge to direct the jury on s. 11 (2) (b) to the effect that it was for them to determine whether the prosecution had proved to their satisfaction that the accused had failed to take such steps as were necessary to secure that there was available for bookmakers space on the track where they could conveniently carry on bookmaking, and he would point out to them that they might well consider whether the space available was also convenient to the public, for it could not well be space convenient for bookmakers to carry on the business of bookmaking unless it was also convenient for those members of the public who wished to bet with bookmakers. It may well be thought that the issue is one eminently suitable for the decision of a jury; it is a question of fact. If there had been a conviction, a further question would have arisen as to revocation of the licence. This was the method envisaged by the legislature. For the reasons I have given I have come to the conclusion that the legislature did not intend to confer on any bookmaker an individual right to sue for breach of statutory duty arising from s. 11 (2) (b) of the Act. In any event, I consider that it is not open to the plaintiff in such a case to ask for and to obtain a declaration that a certain part (the whole of the forecourt) is space convenient within the meaning of s. 11 (2) (b). The plaintiff alleged breach of statutory duty. If he was entitled to succeed, he might recover damages and possibly other relief, but it cannot be for the court to declare what is space convenient for bookmaking or for any other purpose. So to do would be taking from the occupier the management of the licensed track which is entrusted to him by the statute.

There are two other matters with which I ought to deal. I do not think that OLIVER, J., applied the right test in considering whether the defendants had taken such steps as were necessary to secure that there was space on the

track available for bookmakers where they could conveniently carry on book-making. He appears to have thought that the space provided must be just as convenient for bookmakers as for operators of the totalisator and that the facilities must be equal for both, and he indicated that he thought the space provided must be the most convenient space. The Act lays down no such tests. This view of the learned judge affects the judgment both on the question whether there was a breach of statutory duty and also on the issue as to damages. I do not see that the evidence given established any ground for the granting of an injunction. Indeed, it appears from the transcript that counsel for the plaintiff was not inclined to ask for this. The appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Wilkinson, Howlett & Moorhouse* (for the defendants); *Seifert, Sedley & Co.* (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

HINDLE AND ANOTHER v. HICK BROTHERS MANUFACTURING CO., LTD.

[COURT OF APPEAL (Tucker and Bucknill, L.JJ. and Roxburgh, J.),
November 26, 27, 28, 1947.]

Landlord and Tenant—Recognition of landlord's title—Payment of rent—Payment in ignorance of true state of title—Onus of proof.

Where a person claiming to be assignee of the reversion obtains payment of rent from a tenant by fraud or misrepresentation, such payment is no evidence of title, but where there is no such fraud or misrepresentation receipt of the rent is *prima facie* evidence of title.

Where rent is paid by a tenant in such circumstances as to amount to *prima facie* evidence of title, the person receiving the rent is in as good a position as if he were actually in possession, and, although it is open to the tenant to prove, if he can, that he paid the rent in ignorance of the true state of the title and that some third person is the real assignee of the reversion, he must show such a title in that third person as would entitle him to a verdict in ejectment. It is not sufficient to show that the person to whom the rent is paid has no title, his receipt of the rent being sufficient until a better title is shown. After payment of rent the onus to show mistake or ignorance of the facts relating to the title shifts to the tenant.

Carlton v. Bowcock, (1884), (51 L.T. 659) *approved*.

Per TUCKER, L.J.: If a tenant establishes the *prima facie* case that the legal title to the reversion is in one or other of two persons, it is doubtful whether that would be sufficient compliance with the principles enunciated in *Carlton v. Bowcock* (*supra*).

[AS TO PAYMENT OF RENT AS RECOGNITION OF TITLE, see HALSBURY, Hailsham Edn., Vol. 20, p. 168, para. 180; and FOR CASES, see DIGEST, Vol. 30, pp. 355-357, Nos. 167-190.]

Cases referred to:

(1) *Carlton v. Bowcock*, (1884), 51 L.T. 659; 30 Digest 356, 187.

(2) *Batten Pooll v. Kennedy*, [1907] 1 Ch. 256; 76 L.J.Ch. 162; 30 Digest 357, 189.

APPEAL by the defendants from a decision of His Honour JUDGE STEWART given at Leeds County Court, and dated Mar. 3, 1947, whereby judgment was given to the plaintiffs for possession and arrears of rent of premises occupied by the defendants. The appeal was dismissed. The relevant facts appear in the judgment of TUCKER, L.J.

Salt, K.C., and *Haggen* for the defendants.

Christie, K.C., *A. C. Nesbitt* and *Hurwitz* for the plaintiffs.

TUCKER, L.J.: This is an appeal by the defendants from a decision of His Honour JUDGE STEWART given in the Leeds County Court on Mar. 3, 1947, whereby he gave the plaintiffs, Clifford and Wilfred Hindle, judgment for possession of premises known as the Great Wilson Street Mills, situated in Great Wilson Street in the city of Leeds, and for rent and mesne profits.

The plaintiffs claimed as the assignees of the reversion to those premises under a conveyance dated Apr. 24, 1944, made to them by persons who purported to convey as trustees for sale. The sale comprised a considerable block of property in the city of Leeds, and the premises in question were one building forming part of this block. The defendant company was incorporated in 1933, and from that time onwards had been in occupation of the premises in dispute, paying rent quarterly to a firm of estate agents on behalf of the landlords, whoever they might be, down to 1944. After the purported conveyance of Apr. 24, 1944, the defendant company paid rent down to Jan. 1, 1945, to the plaintiffs. Before making the last of those payments one of the directors of the defendant company had received a letter dated July 12, 1944, from the estate agents, in these terms:

I regret very much having to serve the enclosed notice to quit . . . No doubt you will recollect that when it was suggested selling the property to Messrs. Hindles you raised the point as to whether you are likely to be turned out and I told you Hindles would certainly not do that, so long as the rent was paid promptly. It is now over three months in arrear . . . I will do my utmost to get the notice withdrawn and think I should succeed if I can only report the rent has been paid up to date.

The result of that letter was that a further payment of rent was made. Thereafter the defendant company ceased to pay rent with the result that a subsequent notice to quit was given, as to which no question arises in this case. A final notice to quit was treated at the trial as being an effective notice, provided the plaintiffs were in a position to give notice. It seems to have been left uncertain on the evidence how the original tenancy, which existed before 1933, ever came into existence, but the case was dealt with in the court below on the basis that there was a quarterly tenancy existing before 1933 and that the defendant company, on incorporation, became entitled to the benefits of it.

This action was begun by a plaint dated Dec. 2, 1946. The defence was that the plaintiffs had no title to claim rent or recover the premises because they were not the assignees of the reversion and had no title to the premises. One of the answers made to that defence was that the mere payment of rent is *prima facie* evidence of an existing tenancy between the payee and the payer, and, on such payment being proved, the onus shifts to the tenant to show that the rent was paid by mistake or in ignorance of the true state of the title and that there was, and is, existing at all material times some other person in whom is vested the legal title to the reversion who would be entitled to eject the tenant and, consequently, puts him in peril. On that second part of the case, the county court judge gave judgment in favour of the plaintiffs, having dealt with it in this way. He said:

The sale was made by the parties recited in [the conveyance of Apr. 24, 1944]—which, I think, resulted so far as the tenants were concerned in a valid transfer of property. The question is whether there has been payment of rent since the change. The answer to that is, yes. Has there been payment of rent since the change was made known to the people who paid it? The answer to that is, yes. The defendants not only knew this fact, but they had known personally a good deal about these matters in the past . . . Correspondence took place . . . before the sale on the question as to how much should be got for the property . . . and after all that had happened and after the actual amount had been divided (a director of the company received a share) . . . the rent continued to be paid until January, 1945. So that we come to the question whether, rent having been paid in the circumstances indicated, it is open to the tenant to prove if he can that he paid the rent in ignorance of the true state of title. I think there was a very great deal of knowledge about these matters in this particular case . . . In all the circumstances, apart from the other aspects of the case, the defendants cannot be heard before me to deny their landlords' title. It seems, therefore, that the plaintiffs are entitled to succeed.

That judgment, in my view, has to be interpreted in the light of the decision of CAVE, J., in *Carlton v. Bowcock* (1), on which, in my view, the decision on this part of the present case depends. That authority, so far as I know, has not been criticised and we should accept it as correctly stating the law where a tenant pays rent to the assignee or the purported assignee of the reversion to premises. The headnote is as follows (51 L.T. 659):

Where a person claiming to be assignee of the reversion receives rent from the tenant by fraud or misrepresentation, such payment is no evidence of title; but where there is no fraud or misrepresentation, such payment is *prima facie* evidence of title, and the

tenant can only defeat that title by showing that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion and entitled to maintain ejectment. Hence, in an action for rent by the alleged assignee of the reversion, where rent had been paid by the tenant to the agent of the alleged assignee, it was held to be no defence for the tenant merely to show that the alleged assignee had no title to the reversion.

A CAVE, J., having dealt with the facts and said that for the purpose of his judgment he was going to assume that the title of the plaintiffs was bad, proceeded as follows (*ibid.*, 660) :

B I do not think it necessary to decide whether there was or was not an attornment, or whether there was or was not a new tenancy. It cannot be denied that the defendants paid and the plaintiff received rent for the premises in question for nearly two years after Watson's death ; and this fact, in the view I take of the law, is enough to decide the case. A tenant of a house who pays rent to one who claims to be assignee of the reversion is not estopped from denying the title of the assignee in the same way that he is estopped from denying the title of his lessor by whom he has been let into possession. Receipt of the rent is *prima facie* evidence of the title as assignee of the reversion of the person to whom it is paid ; but the tenant may show, if he can, that there is a third person who is in fact the assignee of the reversion, and that he paid rent by mistake or in ignorance of the facts relating to the title.

C The learned judge goes on to refer to several previous cases, to some of which our attention has been drawn, and he summarises them towards the end of his judgment as follows (*ibid.*, 661) :

D I think the conclusions to be drawn from these cases are : (1) That where a person claiming to be assignee of the reversion obtains payment of rent from the tenant by fraud or misrepresentation, such payment is no evidence of title, but that receipt of the rent is *prima facie* evidence of title where there is no such fraud or misrepresentation ; (2) that where rent is paid by the tenant under such circumstances as to amount to *prima facie* evidence of title, the person receiving the rent is in as good a position as if he were actually in possession ; and that, although it is open to the tenant to prove, if he can, that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion, yet he must show such a title in that third person as would entitle him to a verdict in ejectment, and that it is not enough to show that the person to whom the rent was paid has no title, his receipt of the rent being sufficient until a better title is shown. Applying these principles to the case
E in hand, it is clear that there was no fraud or misrepresentation by the plaintiff or his agents, Messrs. Bridgford and Son, and that, as the plaintiff was in actual receipt of the profits for nearly two years down to Michaelmas 1873, he has a *prima facie* title entitling him to demand and receive the rents until some claimant appears who can make out a better title. No such claimant exists in this case, and therefore I hold that the plaintiff is entitled to judgment for £450, being six years' rent, with costs.

F That case clearly lays down that, after payment of rent, the onus to show mistake or ignorance of the facts relating to the title shifts to the tenant. I find it impossible to say not only that the county court judge was wrong in his finding of fact on this matter, but also that the evidence was so overwhelmingly in the opposite direction that we should be bound to hold that the tenant had discharged that burden. [His LORDSHIP then dealt with the evidence and continued :] It is perfectly true, as counsel for the defendants has pointed
G out, that the actual decision in *Carlton v. Bowcock* (1) can be justified by the fact that the tenant had failed to prove the existence of the person in whom the legal title was vested, but, none the less, I think that we should take the general statement of the law by CAVE, J., as being correct, and also that it has been properly interpreted and applied by the county court judge.

H That really disposes of the matter, in my view, but it is necessary to say a word of explanation with regard to the question of title. Even assuming that counsel for the defendants has established a *prima facie* case that the legal title to the reversion is in one or other of two persons, I feel considerable doubt whether that would be a sufficient compliance with what CAVE, J., said in *Carlton v. Bowcock* (1). I do not think it is necessary to state a concluded view about this matter, but I merely enter a *caveat*, because, were it necessary to consider a position of this kind, I am far from satisfied that it would be sufficient to show that the estate may be in A or may be in B, neither of whom have made any kind of claim to that right or to the rent which would result therefrom. I think this appeal fails.

BUCKNILL, L.J.: The county court judge at the conclusion of his judgment says this: "These particular defendants cannot be heard before me in this case seeking to deny their landlords' title." He came to that conclusion after hearing the evidence and considering carefully the judgment in *Carlton v. Bowcock* (1). In my view, the learned judge was justified in coming to that conclusion on the facts, and I think he applied the law correctly to the circumstances. Counsel for the defendants, in his argument, relied on the judgment of WARRINGTON, J., in *Batten Pooll v. Kennedy* (2), in the concluding words of which the learned judge says that estoppel is "a doctrine to which it is not too much to say the court will not resort except in the last extremity." As against that, as my Lord has pointed out, the judgment in *Carlton v. Bowcock* (1) has stood now for 60 years and has never been disapproved or adversely commented on, so far as I know. In the present case it seems to me that, if the defendants were to succeed, it would be manifestly unfair and unjust. They paid rent until January 1945 and then they stopped paying. I can see no reason for that. In my view, they ought to have paid the agents and let them decide who was entitled to the rent. I think the judgment was right.

ROXBURGH, J.: I agree. Counsel for the plaintiffs submitted that, even if it were shown by the tenant that the legal estate was vested in a third person, and even if that third person made a claim as legal owner, it would be open to him to set up an equitable title to show that in fact the beneficiaries could prevent that legal owner from making his legal claim. So far as I am concerned, I cannot believe that in an action for ejectment the court is entitled to investigate the equitable title in the absence of many persons who may be interested in it.

Appeal dismissed.

Solicitors: *Manches & Co.*, agents for *Henry Hyams*, Leeds (for the defendants); *Ward, Bowie & Co.*, agents for *J. Wurzal & Co.*, Leeds.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re SANDERS, *Ex parte* BENTLEY.

[CHANCERY DIVISION (Vaisey, J.), November 17, December 1, 1947.]

Bankruptcy and Insolvency—Judgment debt—Committal—Order for committal to lie in office so long as debtor pays instalments—No previous order for payment by instalments—Bankruptcy Rules, 1915, r. 379.

On a judgment summons, where the judgment debtor has been cross-examined as to his means and there is evidence that he has the means to pay, an immediate order for committal may be made to lie in the office and not to issue so long as the debtor pays by instalments, notwithstanding that no previous order for payment by instalments has been made.

Stonor v. Fowle (1887) 13 App. Cas. 20, *R. v. Brompton County Court Judge*, (1886), (18 Q.B.D. 213) and *Re Judgment Debtor* ([1935] W.N. 128), considered.

[AS TO COMMITTAL FOR NON-PAYMENT OF JUDGMENT DEBTS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 448-457, paras. 615-631, and Supplement; and FOR CASES, see DIGEST, Vol. 5, pp. 1038-1043, Nos. 8490-8514, and Supplement.]

Cases referred to:

- (1) *Stonor v. Fowle*, (1887), 13 App. Cas. 20; 57 L.J.Q.B. 387; 58 L.T. 1; 52 J.P. 228; *revisg. S.C. sub nom. R. v. Brompton County Court Judge*, (1886), 18 Q.B.D. 213; and *sub nom. Reeves v. Fowle*, 56 L.J.Q.B. 49; 5 Digest 1040, 8501.
- (2) *Re A Judgment Debtor*, [1935] W.N. 128; Digest Supp.
- (3) *Dillon v. Cunningham*, (1872), L.R. 8 Exch. 23; 42 L.J.Ex. 11; 27 L.T. 830; 5 Digest 1037, 8480.
- (4) *Howe v. Smale*, (1888), 5 T.L.R. 24; 5 Digest 1039, 8492.

JUDGMENT SUMMONS.

On Oct. 17, 1947, judgment was signed in default of appearance against the defendant, the judgment debtor, in an action in the King's Bench Division in which the plaintiff, the judgment creditor, claimed £300 on a dishonoured cheque given by the judgment debtor as the price of a motor car sold to him by the judgment creditor. Nothing having been paid on the judgment, the creditor issued a judgment summons for hearing on Nov. 17. The summons

was served personally on the debtor, but on the return day he did not appear. The judge, after reading the affidavit of means, stated that he was minded to make an order for payment of £50 in 7 days. He abstained, however, from so doing at the express request of counsel for the judgment creditor who asked the judge simply to adjourn the matter till the next judgment summons day on the ground that he desired the opportunity to examine the debtor as to his means, and, if the facts disclosed on that examination warranted it, he proposed

A at the adjourned hearing to ask the judge there and then to make an immediate committal order without previously making any instalment order. On Dec. 1, the debtor attended the adjourned hearing and was cross-examined. He admitted that he was still trading as a motor dealer, that he had vehicles and other stock in trade of at least £200 in value, and that he had had large sums passing through his hands in cash, and he stated that he had no books because he had suffered several burglaries, and that he was unmarried and living with

B his parents to whom he paid nothing for his keep.

L. F. Sturge for the judgment creditor: I ask for a committal order although there has been no previous order for payment by instalments. I ask, not for the debtor's imprisonment forthwith, but for a *Stonor v. Fowle* (1) order, that is to say, for the order of committal to lie in the office and not to issue so long as the debtor pays off the debt by instalments. There is said to be a rule

C of practice that this court will never make a committal order "save in the most exceptional cases" without having previously made an order for payment by instalments: see the practice note, in *Re A Judgment Debtor* (2). This is expressly said to be founded on what was said by LORD ESHER, M.R. (18 Q.B.D. 217) in *R. v. Brompton County Court Judge* (1), but when one looks at that judgment, LORD ESHER, M.R., was not so definite. He does not appear to mention "exceptional cases." Moreover, the judgment of the Court of Appeal

D in that case was reversed by the House of Lords on appeal (*sub nom. Stonor v. Fowle* (1)). Clearly what LORD ESHER, M.R., was referring to was a committal order "immediate" in the sense that it ordered the debtor forthwith to be imprisoned with no *locus penitentiae*, an order which was only redeemed on payment of the whole debt. The House of Lords approved a third kind of order which was neither "immediate" in the sense used by LORD ESHER, nor a bare

E instalment order without committal. One may regret the over-subtlety of the contrast between an "instalment order" proper (*i.e.*, a more order to pay without committal) and the *Stonor v. Fowle* (1) order (*i.e.*, an immediate committal, but suspended so long as the debtor mitigates his past default by making payments of stated so-called "instalments," and it is, perhaps, confusing to call them "instalments"). In the present case I do not want an ordinary "instalment order" which would merely work to the debtor's advantage as

F it would prevent the creditor making him bankrupt. The case calls for a *Stonor v. Fowle* (1) order. Neither *Dillon v. Cunningham* (3) [*per KELLY*, C.B. (L.R. 8 Exch. 25)] nor *R. v. Brompton County Court Judge* (1) forbids such an order being made. On the other hand, it is expressly authorised by the County Court Rules, Ord. 25, r. 54 (2), which is made applicable to the High Court "with any necessary modifications" by the Bankruptcy Rules, 1915, r. 379, and there is no rule forbidding the High Court to make an order for

G immediate committal: see *per LORD ESHER*, M.R., (18 Q.B.D. 217) in *R. v. Brompton County Court Judge* (1): "I have known such orders made." See also *Howe v. Smale* (4) *per CAVE*, J. (5 T.L.R. 24). It is submitted that the practice direction in *Re A Judgment Debtor* (2) did not purport, when rightly understood, to lay down otherwise. In any case a practice direction (on which the court has not heard argument) cannot modify the law or limit in advance

H the court's discretion.

VAISEY, J.: I propose to make an immediate order of committal to lie in the office provided the debtor pays £75 on Dec. 15, 1947, £75 on Jan. 15, 1948, £75 on Feb. 15 and the balance on Mar. 15.

Order accordingly.

Solicitor: *Harold Button* (for judgment creditor).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re BISCHOFFSHEIM, CASSEL v. GRANT AND OTHERS.

[CHANCERY DIVISION (Romer, J.), October 30, 31, November 4, 26, 1947.]

Conflict of Laws—Legitimacy—Will—Succession to personal property in England—Child illegitimate by English law, but legitimate by law of domicile of origin.

By his will the testator gave his residuary estate to his trustees on trust for sale and conversion and settled a share in the residuary trust fund on his granddaughter N. for life with remainder to her children. In 1908, N. married R.W. by whom she had two children. R.W. died in 1914, and in 1917 N. married his brother, G.W., in New York. There was one child of that marriage, the defendant R., who was born in 1920. The domicile of origin of both N. and G.W. was English and by the law of England their marriage would have been void under the Marriage Act, 1835, but it was a valid marriage by the law of New York. Both G.W. and N. had relinquished their English domicile and acquired a domicile of choice in New York before the birth of R., and, accordingly, R. at birth received the status of legitimacy by the law of New York. N. died in 1946, and the question was whether R. was entitled to a beneficial interest in the testator's residuary trust fund as being a child of N. :

HELD: where succession to personal property depended on the legitimacy of the claimant, the status of legitimacy conferred on him by his domicile of origin (*i.e.*, the domicile of his parents at his birth) would be recognised by the courts in England, and, therefore, since R. received at birth the status of legitimacy by the law of New York, he was entitled to share as a child of N. in the share of the residuary trust fund settled on her by the testator's will.

Re Goodman's Trusts, (1881), (17 Ch.D. 266) followed.

Shaw v. Gould, (1868), (L.R. 3 H.L. 55) distinguished.

Per curiam: To the general rule that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicile of origin, the only exception is that which relates to claims to succession to real estate (including titles of honour and dignity) in England: *Re Goodman's Trusts*, (1881), (17 Ch.D. 266); *Re Andros, Andros v. Andros*, (1883), (24 Ch.D. 637); *Fenton v. Livingstone*, (1859), (3 Macq. 497) considered.

[AS TO LEGITIMACY, see HALSBURY, Hailsham Edn., Vol 6, pp. 314-316, paras. 366, 367; and FOR CASE, see DIGEST, Vol. 3, p. 372, No. 135.]

Cases referred to :

- (1) *Fenton v. Livingstone*, (1859), 3 Macq. 497; 33 L.T.O.S. 335; 23 J.P. 579; 3 Digest 374, 143.
- (2) *Re Goodman's Trusts*, (1881), 17 Ch.D. 266; 50 L.J.Ch. 425; 44 L.T. 527; 3 Digest 372, 135.
- (3) *Dalrymple v. Dalrymple*, (1811), 2 Hag. Con. 54; *on appeal* (1814), 2 Hag. Con. 137, n; 22 Digest 625, 6396.
- (4) *Birtwhistle v. Vardill*, (1840), 7 Cl. & Fin. 895; *sub nom. Doe d. Birtwhistle v. Vardill*, 6 Bing. N.C. 385; West, 500; 1 Scott, N.R. 828; *previous proceedings sub nom. Doe d. Birtwhistle v. Vardill* (1835), 2 Cl. & Fin. 571; 18 Digest 6, 24.
- (5) *Shaw v. Gould*, (1868), L.R. 3 H.L. 55; 37 L.J.Ch. 433; 18 L.T. 833; 11 Digest 428, 929; *affg. S.C. sub nom. Re Wilson's Trusts*, (1865), L.R. 1 Eq. 247.
- (6) *Re Andros, Andros v. Andros*, (1883), 24 Ch.D. 637; 52 L.J.Ch. 793; 49 L.T. 163; 3 Digest 375, 151.
- (7) *Brook v. Brook*, (1861), 9 H.L. Cas. 193; 4 L.T. 93; 25 J.P. 259; *affg.* (1858), 3 Sm. & G. 481; 11 Digest 414, 806.

ADJOURNED SUMMONS to determine whether the defendant, Richard Wellesley, was entitled, as a child of the testator's granddaughter N., to a beneficial interest in the share of the testator's residuary trust fund settled on N. with remainder to her children. In 1917, N. married G.W., her deceased husband's brother, in New York, the marriage being valid by the law of New York, though void by the law of England. The domicile of origin of both N. and G.W. was English, but they had relinquished their English domicile and acquired a domicile of choice in New York before Richard Wellesley was born, so that he received at birth the status of legitimacy by the law of New York. ROMER, J., held that, since the status of legitimacy had been conferred on

him by the law of his domicile of origin, he was entitled to share as a child of N. in the share of the residuary trust fund settled on her. The facts appear in the judgment.

Geoffrey Cross for the plaintiff.

Neville Gray, K.C., and *J. H. A. Sparrow* for Pamela Grant and Mary Wellesley (children of the first marriage).

Sir Cyril Radcliffe, K.C., and *Ungoed-Thomas, K.C.*, for Richard Wellesley (child of the second marriage).

Cur. adv. vult.

Nov. 26. **ROMER, J.**, read the following judgment. By his will the testator, Henri Louis Bischoffsheim, who died on Mar. 11, 1908, devised and bequeathed his residuary real and personal estate to trustees on the usual trusts for sale and conversion. I need not state the trusts affecting the proceeds of such sale and conversion in detail. It is sufficient for present purposes to say that a share therein was given (subject to certain prior interests) to one of the testator's grandchildren, Nesta Pamela FitzGerald, for life with remainder to such of her child or children as being male should attain the age of 21 years or being female should attain that age or marry. The question for determination on the present summons is whether the third defendant, Mr. Richard Wellesley, is entitled to a beneficial interest in the testator's residuary trust fund as being a child of Nesta Pamela FitzGerald. This question ought, in my judgment, to be answered in the affirmative.

On Apr. 30, 1908, Nesta Pamela FitzGerald married Lord Richard Wellesley. There was issue of this marriage two children and no more, namely, the defendants, Mrs. Pamela Grant and Miss Mary Wellesley. On Oct. 29, 1914, Lord Richard Wellesley was killed in action. On Mar. 12, 1917, his widow married Lord George Wellesley, a brother of Lord Richard, in New York. The defendant, Mr. Richard Wellesley, is the only child of that marriage and was born on June 22, 1920. Lady George Wellesley died on Feb. 21, 1946. The domicile of origin both of Lord George Wellesley and his wife was English, and by the law of England a marriage between them would have been void under the Marriage Act, 1835. Such a marriage was, on the other hand, unimpeachable by the law of New York, and the evidence plainly discloses that it was the definite aim both of Lord George Wellesley and of his bride to relinquish their domicile of origin and acquire an American domicile of choice before the marriage was celebrated. Whether or not they succeeded in doing so was one of the subjects discussed before me. Whatever be the truth of that matter, however, it was fairly and rightly conceded by counsel for the children of the first marriage that Lord George and his wife had unquestionably acquired a domicile of choice in New York by the time their son was born there in June, 1920. From this fact sprang a different way of founding Mr. Wellesley's claim to share in the testator's estate, and I propose to consider this aspect of the matter first.

The argument on his behalf was briefly as follows. Admitting that only a legitimate child could take under the gift to Nesta FitzGerald's children, legitimacy is a question of status. That status is conferred or withheld, as the case may be, by the law of the domicile of origin, which is the law of the domicile of the parents at the time when the person whose legitimacy is in question was born. The status, once conferred, remains with the person concerned throughout his or her life and will be recognised and given effect to by our courts, save only in cases where that person claims to succeed to real estate in England. It is established by the evidence that Mr. Wellesley received at birth the status of legitimacy by the law of New York and, accordingly, it was contended, his claim, as a child of his parents, to a fund of English personalty will be recognised by the courts of this country. There can be no doubt as to the general criterion of a person's legitimacy. In *Fenton v. Livingstone* (1) LORD BROUGHAM said (3 Macq. 531, 532):

... in most cases the legitimacy of a party is to be determined by the law of his birthplace and of his parents' domicile.

Mr. Richard Wellesley undoubtedly received at birth the status of legitimacy from the law of his domicile of origin, and such status is, in general, accorded international recognition. It is said, however, on behalf of the first and second

defendants that our courts will not accord universal recognition to a status of legitimacy conferred by a foreign domicile of origin. The acceptance by our law of the status so conferred is, it is contended, subject to exceptions, and the particular exception relied on in the present case is that an English court will not recognise as legitimate the child of a marriage which is incestuous or which is otherwise contrary to religion or sound morality, notwithstanding that the child is legitimate according to the law of his domicile at birth. In such cases, it is said, our courts are not content to act merely on the fact that the standing of legitimacy was bestowed by the law of the birthplace. They will, on the contrary, fasten their attention on the marriage of the parents, and, finding that incestuous, treat the issue as bastards here, however full the measure of legitimacy that may be conferred on them in the foreign land of their birth.

So far, at all events, as a court of first instance is concerned, I am of opinion that on the authorities, and especially having regard to the majority judgments in *Re Goodman's Trusts* (2), the contentions which were advanced on behalf of Mr. Wellesley, and which I have already summarised, must prevail. In *Re Goodman's Trusts* (2) the question arose whether a child born before wedlock of parents who were at her birth domiciled in Holland, but who was legitimated according to the law of Holland by the subsequent marriage of her parents, was or was not entitled to a share in the personal estate of an intestate dying domiciled in England as one of her next of kin under the Statute of Distribution, 1670. The Court of Appeal held by a majority (LUSH, L.J., dissenting) that she was so entitled. COTTON, L.J., expressed his view as to the status of legitimacy, and its acquisition, as follows (17 Ch.D. 291, 292):

It was urged . . . that the law of England recognises as legitimate those children only who are born in wedlock. This is correct as regards the children of persons who at the time of the children's birth are domiciled in England. But the question as to legitimacy is one of status, and in my opinion by the law of England questions of status depend on the law of the domicile. For this proposition there is authority. It is stated by STORY, J., in his book on the CONFLICT OF LAWS, para. 93, that "foreign jurists generally, though not universally, maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicile of origin," and in para. 93e, he states that "the same general doctrine is avowedly adopted by the courts of England." And he refers to the opinion expressed by LORD STOWELL [2 Hag. Con. 58] in *Dalrymple v. Dalrymple* (3), that by the law of England "the status or condition of a claimant must be tried by reference to the law of the country where that status originated." Moreover, in the case of *Doe v. Vardill* (4), when it first came before the House of Lords in the year 1830, ALEXANDER, C.B., when giving the unanimous opinion of the judges who were consulted, refers with approval to the opinion so expressed by LORD STOWELL as applicable to a question of legitimacy. In *Fenton v. Livingstone* (1) LORD WENSLEYDALE . . . expressed himself thus [3 Macq. 548]: "The laws of the state affecting the personal status of the subjects travel with them wherever they go, and attach to them in whatever country they are resident."

COTTON, L.J., then addressed himself as follows (17 Ch.D. 292, 293) to the question of recognition by our courts of the status of legitimacy conferred by the law of a foreign state:

If as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth, that is, on his domicile of origin, I cannot understand on what principle, if he be by that law legitimate, he is not legitimate everywhere, and I am of opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognises and acts on the status thus declared by the law of the domicile . . . in my opinion, in deciding questions of legitimacy, that is of status, the law of England looks to the law of the actual, not of an hypothetical, domicile. I am of opinion on principle, that since by the law of Holland, where the parents of Hannah Pieret were in fact domiciled at the time of her birth, she is legitimate, the law of England, for the purpose of succession to personal estate, ought to hold her to be legitimate.

COTTON, L.J., then examined in some detail *Doe v. Vardill* (4) which was before the House of Lords twice, namely, in 1830 and 1840, and pointed out that all that was actually decided in that case was that the eldest son born in Scotland before marriage of parents domiciled there, though by Scottish law legitimate by reason of the subsequent marriage of his parents, was not capable of taking land in England as heir of his father. After referring to the statement by TINDAL, C.J., who delivered the unanimous opinion of the judges

when consulted by the Lords in 1840, that the ground of their opinion was that they held it to be a rule or maxim of the law of England with respect to the descent of land in England from father to son that the son must be born after actual marriage between his father and mother, COTTON, L.J., said (17 Ch.D. 294) that in his opinion :

A ... they [the judges] did intend to express their opinion that the claimant, being legitimate by the law of Scotland, where his parents were domiciled at his birth and at the date of their marriage, must be considered as legitimate in England, except for the purpose of succession to real estate, and that this depended on a special rule of the feudal law as adopted in England.

B COTTON, L.J., added that this, in his opinion, was the view taken by LORD CRANWORTH in *Shaw v. Gould* (5). JAMES, L.J. [in *Re Goodman's Trusts* (2)], propounded the question (17 Ch.D. 296) : "What is the rule which the English law adopts and applies to a non-English child ?" and then proceeded to answer it as follows (*ibid.*, 296, 297) :

C This is a question of international comity and international law. According to that law as recognised, and that comity as practised, in all other civilised communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority clear and distinct, to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilised world. On principle, it appears to me that every consideration goes strongly to shew, at least, that we ought not so to stand. The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilised country, should be respected and acknowledged by every other member of the great community of nations.

D After elaborating this theme, JAMES, L.J., turned to *Doe v. Vardill* (4) and said (17 Ch.D. 299) :

E What the assembled judges said in *Doe v. Vardill* (4), and what the Lords held, was, that the case of heirship to English land was a peculiar exception to the rights incident to that character and status of legitimacy, which was admitted by both judges and Lords to be the true character and status of the claimant. It was only an additional instance of the many anomalies which at that time affected the descent of land. Legitimate relationship in the first degree was of no avail if the claimant were an alien, or if he were of the half-blood, or in the direct ascending line, which, *pace* Professor BLACKSTONE, were precious absurdities in the English law of real property. But in this particular case, the exception is, at all events, plausible. The English heirship, the descent of English land, required not only that the man should be legitimate, but as it were *porphyro-genitus*, born legitimate within the narrowest pale of English legitimacy. Heirship is an incident of land, depending on local law, the law of the country, the county, the manor, and even of the particular property itself, the *forma doni*. Kinship is an incident of the person, and universal. It appears to me that a statement of the law so given, and so accepted nearly 50 years ago, which has been adopted without question by jurists as a correct statement of English adhesion to the universal law and comity of nations, is not to be questioned at this time by any tribunal short of the House of Lords, and I should humbly think not by them.

G In *Re Andros, Andros v. Andros* (6) the question in issue was whether a son of A., born before wedlock, but legitimated according to the law of Guernsey by the subsequent marriage of A. with that son's mother, was entitled to share with the sons of A. born after the marriage under a bequest in an English will to the testator's "great nephews the sons of his deceased nephew A." KAY, J., held that he was, and in the course of his judgment said (24 Ch.D. 638, 639) :

H It must now be treated as settled that any person legitimate according to the law of the domicile of his father at his birth is legitimate everywhere within the range of international law for the purpose of succeeding to personal property. The well known case of *Doe v. Vardill* (4), which introduced a distinction in this respect in the case of a person claiming to succeed as heir to real property in England by requiring such a person to establish his legitimacy according to English Law—that is, as though the father had been domiciled in England at the time of the birth of the child—treats this as an exceptional case and recognises that the rule of succession to personal estate is otherwise, and this has been recently more expressly decided by the Court of Appeal in *Re Goodman's Trusts* (2).

Later in his judgment KAY, J., pointed out that the matter was not really one of construction. The only relevant rule of construction is that a bequest

in an English will to the children of A. means to his legitimate children and that rule does not carry the matter very far, for the question remains who are his legitimate children and that is not a question of construction but a question of law. In the last paragraph of his judgment KAY, J., said (*ibid.*, 642) :

The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognised in this country, those children are legitimate whose legitimacy is established by the law of the father's domicile. A

Now, it is quite clear that in *Re Goodman's Trusts* (2) both COTTON, L.J., and JAMES, L.J., recognised only one exception to the general rule that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicile of origin, and that exception relates to claims to succession to real estate (a term which would, of course, include titles of honour and dignity) in England. That, also, was the only exception referred to by KAY, J., in *Re Andros* (6). I was referred to no authority which, in my judgment, compels me to entertain the further exception which was contended for in the present case. In *Fenton v. Livingstone* (1) the House of Lords held that a person born of an English marriage between a man and his deceased wife's sister was not legitimate in Scotland as to the succession to real estate. LORD BROUGHAM said (3 Macq. 531, 532) : B

Now, it must be granted that the general rule is to determine the validity of a marriage by the law of the country where the parties were domiciled, and in most cases the legitimacy of a party is to be determined by the law of his birthplace and of his parents' domicile. But to this application of the *lex loci contractus* there are exceptions, from the nature of the case in which the question arises. C

It is true that LORD BROUGHAM there used the word "exceptions" in the plural. He proceeded, however (*ibid.*, 532) : D

Thus, in deciding upon the title to real estate, the *lex loci rei sitae* must always prevail . . .

He then discussed the principles on which that exception is founded. He did not, however, refer to any other exception to the general rule apart from claims to real estate. The other speeches in *Fenton v. Livingstone* (1) were consonant with the views expressed by COTTON, L.J., and JAMES, L.J., in *Re Goodman's Trusts* (2) except that LORD CHELMSFORD did not wish to commit himself without further consideration. He said (3 Macq. 557) : E

It seems to have been assumed throughout the argument before your Lordships, that if the claim in this case had been to moveable property, the respondent would have succeeded ; but I am not disposed, without further consideration, to concede that if the marriage is regarded in Scotland as an incestuous marriage, and it had become necessary, in order to make out the title to be next of kin, to prove such a marriage, that result would have followed. It is, however, unnecessary to consider that question, as we are dealing with a different description of property. F

At what conclusion LORD CHELMSFORD would have arrived on this question had he given it further consideration I cannot, of course, say, but in *Re Goodman's Trusts* (2) the matter was amply considered by the Court of Appeal, to whom *Fenton v. Livingstone* (1) was cited. *Brook v. Brook* (7) does not really bear on the point which I am now considering. The question before the House was (as stated by LORD WENSLEYDALE (9 H.L. Cas. 239)) whether a marriage celebrated in 1850 in Denmark between a widower and the sister of his deceased wife, both being then and subsequently British subjects domiciled in England and contemplating England as their future matrimonial residence, was valid in England, such a marriage being permitted by the law of Denmark. The right of the children of that marriage to succeed to property (apparently consisting of, or, at least, including, real estate in England : see *per* LORD ST. LEONARDS (*ibid.*, 230)) was in issue, but obviously their case could not be, nor was it, founded on a status of legitimacy conferred on them by a foreign domicile of origin, for their domicile at birth was English. Their right to succeed to property here in the capacity of children of their parents accordingly depended, and depended solely, on their being able to establish the validity of their parents' Danish marriage, and in this attempt they failed. G

H

I should next, I think, refer to the much debated case of *Shaw v. Gould* (5). In that case in 1828 one Buxton, a domiciled Englishman, fraudulently procured a young girl, Elizabeth Hickson, to marry him in Manchester. Immediately after the marriage (indeed, on the same day) members of the bride's family intervened and carried the girl away and she never thereafter lived with her husband. Buxton was prosecuted for his fraud and convicted and sentenced to a period of imprisonment. After his release he apparently made some unsuccessful attempts to induce his wife to return to him. He was eventually persuaded, for a financial consideration, to enter into a deed of separation, and this was executed in 1838. In 1844 Mrs. Buxton received a proposal of marriage from one John Shaw, who was then a student of Gray's Inn and was reading for the English Bar. This proposal, agreeable though it was to her, could not in England proceed to its normal fruition on account of her already subsisting marriage. A scheme was, accordingly, devised under which all three parties concerned should remove themselves to Scotland with a view to obtaining a dissolution of the marriage by a sentence of the Court of Session. Buxton, for further payment, lent himself to this scheme. He proceeded to Scotland, and after living there long enough to acquire the requisite residential qualification, was duly divorced by his wife, the decree, which was founded on adultery, being pronounced by the court on Mar. 20, 1846. In June, 1846, John Shaw and Elizabeth Buxton were married in Edinburgh and thenceforth lived together as man and wife in Scotland, and three children were born of their union, all during the lifetime of Buxton. John Shaw abandoned his original intention of a legal career in England and practised, for the rest of his life, at the Scottish Bar instead. Buxton died in 1852, and John Shaw and Elizabeth both survived him. Under the will of Elizabeth's great-uncle, John Wilson, a domiciled Englishman, real and personal property in England was devised and bequeathed, as to the real estate to Elizabeth's "first and other sons lawfully begotten," and as to the personalty to her "children." The question for the decision of the court was whether Elizabeth's children, of whom John Shaw was the father, were entitled to succeed under these provisions of John Wilson's will. The case came before SIR RICHARD KINDERSLEY, V.-C., and he dismissed the children's claim. He held that at the time of the Scottish divorce (which was 11 years before the passing of the Matrimonial Causes Act, 1857) the marriage between Buxton and Elizabeth Hickson was not only indissoluble by an English court but was indissoluble by any court at all, and that, accordingly, the Scottish decree was wholly inoperative to bring that marriage to an end. He also considered and rejected an alternative argument advanced on their behalf that they were entitled at all events to be treated under the law of Scotland as legitimate children of a putative marriage. When the case came before the House of Lords on appeal, the main point which was argued and debated was the validity of the Scottish proceedings and decree. LORD CRANWORTH said (L.R. 3 H.L. 69): "The whole [question] . . . turns on the validity of the divorce," and he held that it was invalid on the ground that Buxton was a domiciled Englishman at the time of the divorce, and that, accordingly, the Court of Session had no jurisdiction to grant it. LORD CHELMSFORD also addressed himself primarily (for he also considered the "putative marriage" point, which is irrelevant for present purposes) to inquiring into the validity of the proceedings in Scotland. He said (*ibid.*, 72, 73):

Whether the appellants answer the descriptions respectively of "sons lawfully begotten," and of "children," depends upon whether their parents were lawfully married; and this again depends upon the effect of a divorce in Scotland dissolving the marriage of their mother with Thomas Buxton in England.

On this point he did not agree with the view of KINDERSLEY, V.-C., that: ". . . the law of this country did not recognise the right or authority of any court, whether domestic or foreign, to dissolve an English marriage for any cause or upon any pretext whatever." LORD CHELMSFORD, however, held that the Scottish court had no power, in the circumstances which were established, to make the decree which it did, because the parties to the marriage were not domiciled in Scotland at the time. He said (*ibid.*, 79):

My opinion in this case is founded entirely upon the peculiar circumstances attending it; the first marriage having taken place in England between parties having an English

domicil which they never changed, and the divorce in Scotland having been obtained by preconcerted arrangement, the parties resorting to the Scotch courts for the sole purpose of making it instrumental to the attainment of their objects.

So also LORD WESTBURY, who commenced his speech by observing (*ibid.*, 80) :

... this case depends on the answer to the question, whether a marriage solemnised in England between two English subjects, domiciled in England at the time, can be dissolved by the decree of a foreign tribunal.

He expressed his conclusion on the point by saying (*ibid.*, 87) :

It follows that the marriage of Mr. and Mrs. Buxton was legally subsisting at the time of the second marriage between Mrs. Buxton and Mr. Shaw ; and that the second marriage was therefore void, and the issue of it cannot claim to be entitled by English law to the benefit of the trust previously declared for the children of Elizabeth Hickson.

LORD COLONSAY with some reluctance accepted the view (*ibid.*, 96, 97) that the validity of the divorce was a relevant subject for inquiry, notwithstanding that the legitimacy of the appellants might be recognised in the land of their birth. The other noble Lords, however, expressed no views of their own on this aspect of the matter. They approached the case, as also had KINDERSLEY, V.-C., on the footing that the legitimacy of the appellants depended on the validity of their parents' marriage which in its turn depended on the validity of the Scottish divorce. If the validity of the divorce was regarded as a legitimate subject for inquiry and if it was invalid, as the Lords held it to be, it necessarily followed as a result of those considerations, when taken by themselves, that the appellants' domicil of origin was English, as their mother's domicil remained that of her lawful husband, Buxton. Accordingly, on the sequence of reasoning which was adopted by the House in their approach to the case as a whole, a claim founded on international acceptance of a status conferred by what was certainly the domicil of origin, if the validity of the divorce was disregarded as irrelevant, namely, by the law of Scotland, could not succeed or, indeed, arise. It was, so to speak, still-born. It is not altogether surprising that, having regard to the very peculiar circumstances of the case, and to the fact that the important Matrimonial Causes Act, 1857, had so recently been passed, the attention of the Lords (except, perhaps, LORD COLONSAY) was attracted primarily to a consideration of the proceedings in Scotland. These proceedings were clearly relevant to the question whether John Shaw and Elizabeth were lawfully married, but this was not the question before the House. The point in issue was not the status of the parents, but the status of the children, and that, as it seems to me, gave rise to different considerations. The relevance of the Scottish proceedings and of the decree which resulted therefrom appears to me to have been a matter rather of assumption by the House than one of direct decision. It is, however, to be noted that the claims under consideration were not confined to personal estate in England, for there was a claim to English real estate as well, and this may have had some effect on the line which was adopted both in the argument and in their Lordships' opinions. In view of the very special circumstances affecting *Shaw v. Gould* (5) I do not regard it as necessarily opposed to the majority view in *Re Goodman's Trusts* (2) nor did COTTON, L.J., (17 Ch.D. 295) so regard it.

I, accordingly, propose to follow the view which prevailed in *Re Goodman's Trusts* (2), namely, that, where succession to personal property depends on the legitimacy of the claimant, the status of legitimacy conferred on him by his domicil of origin (*i.e.*, the domicil of his parents at his birth) will be recognised by our courts, and that, if that legitimacy be established, the validity of his parents' marriage should not be entertained as a relevant subject for investigation. It is true that in *Shaw v. Gould* (5), (as in the present case) the status in question was that of original legitimacy, whereas *Re Goodman's Trusts* (2) and *Re Andros* (6) were cases of legitimation (*i.e.*, original bastardy converted into legitimacy through the subsequent marriage of the parents), but, in my judgment, there is no real distinction between the two classes of case. If, in fact, the status of legitimacy is conferred by the law of the domicil of origin, the time of, as also the reason for, its conferment are surely immaterial. The conclusion which I have formed and expressed on the legitimacy at birth of Mr. Wellesley relieves me of the necessity of inquiring

into the domicile of his parents at the time of their marriage in New York. The question is one which is not altogether easy of solution, and I will express no concluded opinion on it. I will declare, in answer to question 1 of the summons, that, on the true construction of the will of the testator and in the events which have happened, the defendant, Richard Wellesley, is entitled to share as a child of Nesta Pamela Wellesley deceased in the share of the residuary estate of the testator settled by his will on his granddaughter, the said Nesta Pamela Wellesley, for her life with remainder to her children.

Declaration accordingly. Costs of all parties, as between solicitor and client, to be paid out of the fund in issue.

Solicitors: *Freshfields* (for the plaintiff); *Farrer & Co.* (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

TARTELIN v. BOWEN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Atkinson, JJ.), December 9, 1947.]

Firearms—Unlawful possession—Member of His Majesty's forces—Firearm not held "in his capacity as such"—Firearms Act, 1937 (c. 12), ss. 1, 5.

A member of His Majesty's forces who, otherwise than in his capacity as such, is in possession of a firearm and ammunition without a certificate in force at the time is, notwithstanding the provisions of s. 5 of the Firearms Act, 1937, guilty of the offence of unlawful possession under s. 1 of the Act.

[FOR THE FIREARMS ACT, 1937, ss. 1, 5, see HALSBURY'S STATUTES, Vol. 30, pp. 908, 913.]

Case referred to:

(1) *Heritage v. Claxton*, (1941) 85 Sol. Jo. 323; Digest Supp.

CASE STATED by Lincolnshire (Parts of Lindsey) Justices.

An information was preferred by the appellant, a superintendent of police, before a court of summary jurisdiction sitting at Gainsborough, charging the respondent with unlawfully having in his possession a firearm and ammunition to which Pt. I of the Firearms Act, 1937, applied, when not holding a firearm certificate then in force, contrary to s. 1 of the Act. The justices, being of opinion that s. 5 of the Act permitted the possession of the firearm and ammunition by the respondent as a member of His Majesty's forces without a firearm certificate, whether or not held in such capacity, dismissed the information. The Divisional Court now allowed an appeal by the appellant on the ground that s. 4 applied only where the firearm and ammunition were held by a member of His Majesty's forces in his capacity as such.

James MacMillan for the appellant.

The respondent did not appear.

LORD GODDARD, C.J. : This is a Case Stated by justices for the Parts of Lindsey before whom an information was preferred against the respondent that he "unlawfully did have in his possession a certain firearm to which Pt. I of the Firearms Act, 1937, applied, he not then holding a firearm certificate in force at the time, contrary to s. 1 of the said Act," and also with unlawfully having in his possession certain ammunition to which the Firearms Act applied and not holding a certificate in force at the time. The respondent was a flight-lieutenant in the Royal Air Force, and the firearm in question had not been issued to him as a member of His Majesty's forces or possessed by him as a member of His Majesty's forces. It had been purchased by him privately.

Section 5 of the Act, which is a little obscurely worded, is in these terms:

Notwithstanding any rule of law whereunder the provisions of this Act do not bind the Crown, so much of the foregoing provisions of this Act as relates to the purchase and acquisition, but not so much thereof as relates to the possession, of firearms and ammunition to which this part of this Act applies shall apply to persons in the service of His Majesty in their capacity as such . . .

The justices have said they were of opinion "that the exemption under s. 5 permitted the possession of the firearm and ammunition by the respondent

as a member of His Majesty's forces without a certificate whether or not held in such a capacity." That seems entirely to overlook the words "in their capacity as such." In the opinion of the court, the justices were clearly wrong. If their attention had been called to *Heritage v. Claxton* (1) their decision would, no doubt, have been different. It is just as much an offence for a member of the armed forces to be in possession of a firearm without a certificate as it is for any other subject of the Crown, unless it has been issued to him or acquired by him in his capacity as a member of the armed forces, in other words, unless he is carrying his arms in the way in which an armed soldier ordinarily does carry them. The exemption does not apply to private purchases which a member of the armed forces makes, for whatever purpose he makes them. The case must go back to the justices with an intimation that the offence was proved.

HUMPHREYS, J.: I agree.

ATKINSON, J.: I agree.

Appeal allowed with costs.

Solicitors: *Patersons, Snow & Co.*, agents for *Langley, Phillips & Coleman*, Lincoln, for the appellant.

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. WILLESDEN JUSTICES. *Ex parte* UTLEY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Hilbery, JJ.), December 8, 1947.]

Crown Practice—Certiorari—Excess of jurisdiction—Error on face of proceedings—Fine in excess of statutory maximum for offence.

Where a person is properly convicted by justices of an offence, but, in error, is fined a sum in excess of the statutory maximum for that offence, the conviction will be quashed on *certiorari* as being in excess of jurisdiction, the Divisional Court having no power, on an application for *certiorari*, to amend the conviction and substitute a proper penalty.

[AS TO ERROR ON THE FACE OF THE PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 9, p. 887, paras. 1491, 1492; and FOR CASES, see DIGEST, Vol. 16, pp. 427-430, Nos. 2870-2908.]

Cases referred to:

- (1) *R. v. Hobson*, (1942), 29 Cr. App. Rep. 30; Digest Supp.
- (2) *R. v. Slade*, *Ex p. Saunders*, *R. v. London JJ.*, *Ex p. Saunders*, (1895), 64 L.J.M.C. 273; 72 L.T. 568; 59 J.P. 279; 16 Digest 429, 2885.
- (3) *R. v. Kay*, (1873), L.R. 8 Q.B. 324; *sub nom.*, *R. v. Key*, 37 J.P. Jo. 309; 16 Digest 428, 2880.
- (4) *R. v. Cridland*, (1857), 7 E. & B. 853; 27 L.J.M.C. 28; 29 L.T.O.S. 210; *sub nom.*, *R. v. Bacon*, *R. v. Cridland*, 21 J.P. 404; 16 Digest 428, 2883.

MOTION for an order of *certiorari*.

The applicant was convicted by Willesden justices of failing to stop a motor vehicle when requested to do so by a police constable, contrary to the Road Traffic Act, 1930, s. 20 (3), and was fined £15. The justices believed that the maximum penalty for the offence was £20, whereas it was, in fact, £5. On a motion for *certiorari* to remove the conviction for the purpose of quashing it, the Divisional Court held that, since the conviction was bad on the face of it, *certiorari* must issue, the court having no power, on an application for *certiorari*, to amend the conviction.

Rhys-Roberts for the applicant.

Vernon Gattie for the justices.

LORD GODDARD, C.J.: The applicant, George Truelove Utley, has been given leave to apply for an order of *certiorari* to quash a conviction whereby he was fined £15 for failing to stop a motor vehicle when requested so to do by a police constable, contrary to the Road Traffic Act, 1930, s. 20 (3). The defendant did not appear before the court, but he wrote a letter to the court admitting the offence. The court, misreading s. 20 of the Act, and evidently regarding it as a bad case, imposed a fine of £15, in the belief that an

offence under s. 20 (3) carried with it a maximum penalty of £20. In fact, the fine that can be imposed by the court for this offence is no more than £5. Therefore, the applicant applies to have the conviction quashed on the ground that it is bad on its face. Our attention has been called to several cases, but, having considered them all, my opinion remains as it was at the outset, that, if a court imposes a sentence which is not authorised by law for the offence for which the defendant is convicted, the conviction is bad on its face and can be brought up here to be quashed. That is because this court has no power, and has never had any power, on *certiorari* to amend the conviction. If such a power existed, it would enable the court to sit as a court of appeal on justices, and we have no such jurisdiction. The only appellate jurisdiction we have over justices is when they state a Case for our opinion. This is a question whether or not a conviction is good in law, and, to determine that, we must look at the conviction as it stands. If a man has had a penalty imposed on him which the law does not permit him to suffer, the conviction is bad. It would, perhaps, be a good thing if the position was altered by legislation and power was given to this court on a *certiorari* to substitute for the penalty which was, in fact, imposed, a penalty which could be rightly imposed, or to order the case to go back to the justices to consider what the proper penalty should be. The Court of Criminal Appeal is given express power to substitute one conviction for another if it thinks the conviction ought to have been for another offence, or, if they think an excessive penalty, or a wrong penalty, has been imposed, to substitute a proper penalty, as they did in *R. v. Hobson* (1). We have considered *R. v. Slade* (2), *R. v. Kay* (3), *R. v. Cridland* (4) and various other cases cited to us, but we are of opinion that *certiorari* must go and the conviction must be quashed.

ATKINSON, J. : I agree.

HILBERY, J. : I am of the same opinion. In my view, the justices recorded against the applicant a conviction which they had no jurisdiction to record, since they had no jurisdiction to fine him the sum imposed for the offence of which they found him Guilty. Their power to fine and their jurisdiction were limited by the section of the Act under which they were purporting to act, and they acted in excess of that jurisdiction. I am, therefore, of the opinion that the *certiorari* must issue.

Appeal allowed.

Solicitors : *Rhys Roberts & Co.*, agents for *Graeme Kemp*, Cardiff (for the applicant); *C. W. Radcliffe* (for the justices).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

KOHN v. RINSON & STAFFORD (BROD), LTD.

[KING'S BENCH DIVISION (Denning, J.), November 19, 1947.]

Practice—Costs—Security for costs—Plaintiff resident out of jurisdiction—Palestine—Judgments Extension Act, 1868 (c. 54)—Administration of Justice Act, 1920 (c. 81)—Foreign Judgments (Reciprocal Enforcement) Act, 1933 (c. 13).

The process introduced by the Administration of Justice Act, 1920, for reciprocal enforcement of judgments between various parts of His Majesty's dominions, including mandated territories, and by the Foreign Judgments (Reciprocal Enforcement) Act, 1933, in respect of foreign judgments, is so different from the process provided by the Judgments Extension Act, 1868, for the automatic registration and enforcement of English judgments in Scottish and Irish courts, that, in regard to a country such as Palestine, an order for security for costs should be made, as a matter of course where the plaintiff is resident in one of those countries and has no assets within the jurisdiction of the English court.

Raeburn v. Andrews, (1874), (L.R. 9 Q.B. 118) distinguished.

[EDITORIAL NOTE.] The distinction between the procedure under the Act of 1868 and that under the Acts of 1920 and 1933 should be noted. The first is administrative; the second is judicial.

AS TO SECURITY FOR COSTS WHEN PLAINTIFF RESIDENT OUT OF JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 26, p. 64, para. 108; and FOR CASES, see DIGEST, Practice, pp. 908-913, Nos. 4496-4559.]

Cases referred to :

- (1) *Raeburn v. Andrews*, (1874), L.R. 9 Q.B. 118 ; 43 L.J.Q.B. 73 ; 30 L.T. 15 ; 22 W.R. 489 ; Digest Practice, 909, 4502.
- (2) *Corner v. Irwin*, (1874), 8 Ir. R. C.L. 504.

APPEAL against a decision of a master refusing an order for security for costs to be given by a plaintiff resident in Palestine and without assets in England. The master held that, in view of the provisions for reciprocal enforcement of judgments contained in the Administration of Justice Act, 1920, and the Foreign Judgments (Reciprocal Enforcement) Act, 1933, and applicable to Palestine, the case was governed by the decision in *Raeburn v. Andrews* (1), where it was held that no security for costs should be ordered against a plaintiff resident in Scotland or Ireland owing to the provision for registration and automatic enforcement of English judgments there under the Judgments Extension Act, 1868. DENNING, J., however, now distinguished the procedure provided for in the Acts of 1920 and 1933 from that applicable under the Act of 1868 on the ground that enforcement under them was not automatic, and he held that security for costs might be ordered.

H. C. Leon for the defendants.

J. Foster for the plaintiff.

DENNING, J. : The defendants apply for security for costs on the ground that the plaintiff, who is resident in Palestine and has no assets in this country, is resident out of the jurisdiction. The master has refused to order security, and I understand that in a previous case of a Palestine resident another master also refused to make an order. It is said that Palestine, and indeed, not only Palestine but a large number of places throughout the world are in this respect on the same footing as Scotland and Ireland.

It is plain that it is in the discretion of the court to order security for costs, and it does so as a matter of course when a plaintiff is out of the jurisdiction, the reason being that, if a judgment is obtained by the defendant against the plaintiff for costs, such an order cannot be enforced by the direct process of those courts. To enforce a judgment in the old days a party had to sue on the judgment in the foreign country, and, having got his judgment, then enforce it. In these days there is a simpler process introduced, and the question is whether by reason of that process the old rule is altered. In 1874 it was held by the Court of Queen's Bench in *Raeburn v. Andrews* (1) that the rule had been altered as regards Scotland and Ireland because the Judgments Extension Act, 1868, enabled a judgment obtained in this country to be automatically registered in Scotland and Ireland and immediately enforced as if it were a judgment of a Scottish or Irish court. The connection between the countries was so close and the mode of enforcement so rapid and simple that the Court of Queen's Bench held that, in effect, there was no further reason to order security for costs in the case of a plaintiff in Scotland or Ireland. In the same year PALLES, C.B., in *Corner v. Irwin* (2) in Ireland, did not take the same view. In this country, however, at all events since 1874, *Raeburn v. Andrews* (1) has been followed so far as plaintiffs in Scotland and Ireland are concerned, and no order for security has been made.

In the present case the master thought that the same rule applies to Palestine by reason of the Administration of Justice Act, 1920, s. 9. This Act does provide a process for the reciprocal enforcement of judgments between various parts of His Majesty's dominions, including a mandated territory such as Palestine. By the Foreign Judgments (Reciprocal Enforcement) Act, 1933, provision is made for the reciprocal enforcement of judgments in the case of certain foreign countries, it always depending on whether the law of the foreign country and our law is substantially the same. If it is, an Order in Council is made to that effect. In my judgment, however, the process which is introduced by the Acts of 1920 and 1933 is very different from that under the Judgments Extension Act, 1868. It is a process which involves a judicial officer being put in motion, and which may be the subject of dispute and even of trial in some case between the parties. It is not automatic in any sense whereas the process under the Judgments Extension Act, 1868, is automatic. Approaching the matter as I think it right to do as a matter ultimately one of discretion, I am satisfied that the process in regard to countries other than Scotland and

Ireland is so different that *Raeburn v. Andrews* (1) does not apply in a case relating to them, but that the old rule still applies, and as a matter of course security for costs should be made where the plaintiff is resident out of the jurisdiction and has no assets here. I shall, therefore, direct that the plaintiff is to lodge security. There will be a stay until security is given.

Appeal allowed with costs.

Solicitors: *Buckeridge & Braune* (for the applicant); *Hardman, Phillips & Mann* (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

In the Goods of SCHULHOF.

In the Goods of WOLF.

B [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), December 3, 1947.]

Executors—Administration—Presumption of death—Declaration of death by competent foreign court—Independent evidence.

Where a declaration of death was followed, in accordance with Czechoslovak law, by an order vesting the estate of the presumed deceased:

HELD: the court could accept the grant as sufficient proof of death without requiring it to be proved by independent evidence.

In the Goods of Spenceley, ([1892] P. 255) followed.

Where, however, a declaration of death in accordance with Czechoslovak law was not followed by any vesting order owing to the fact that there was no property of the deceased in Czechoslovakia:

HELD: the court could not presume the death or make a grant until satisfactory evidence was produced that the presumed deceased was in fact dead.

In the Goods of Spenceley, ([1892] P. 255) distinguished.

[AS TO ACCEPTANCE OF GRANT OF FOREIGN COURT MADE ON PRESUMPTION OF DEATH, see HALSBURY, Hailsham Edn., Vol. 14, p. 212, para. 353; and FOR CASES, see DIGEST, Vol. 23, p. 86, Nos. 753-755.]

Case referred to:

(1) *In the Goods of Spenceley*, [1892] P. 255; 61 L.J.P. 133; 23 Digest 86, 755.

MOTIONS for administration on presumption of death. The presumed deceased were Czechoslovak nationals who were presumed to have died in German concentration camps and the applicants were the only persons entitled to their estates under Czechoslovakian law. In the case of Schulhof, there being a declaration of death by a competent Czechoslovakian court followed by an order vesting the estate of the presumed deceased in the applicant, a grant of administration was made without proof of death by independent evidence, but in the case of Wolf, there being no estate in Czechoslovakia, and, consequently, no vesting order, a grant of administration was made only after independent evidence of death had been tendered.

G *Clifford Mortimer* for the applicants.

WILLMER, J.: In the case of Schulhof, the first of the two cases before me, there is a declaration of death of the person whose death I am asked to presume, followed, in accordance with the provisions of the Czechoslovak procedure, by an order of court vesting the estate of the presumed deceased. It seems to me that the situation which has arisen in that case is exactly within the decision in *In the Goods of Spenceley* (1). There a grant had been made in a state in America, based on the presumed death of the deceased, and SIR FRANCIS JEUNE, P., felt himself bound to follow the American grant as it stood without requiring any evidence of the death of the presumed deceased. On the evidence which I have heard as to the Czechoslovak law, and on the orders of the Czechoslovakian court which I have seen, it appears to me that in the case of Schulhof the applicant is entitled to the order asked for.

In the case of Wolf, which, because of its similarity and dissimilarity, I had called on at the same time, the situation is different to this extent. There is

a declaration of death in accordance with the Czechoslovak law, but, owing to the fact that in this case there is said to be no property in Czechoslovakia, the declaration of death has not been followed by any vesting order, so that there is nothing in existence by way of order of the court which has anything to do with succession or grant of administration or vesting of property. There is nothing but the declaration of death, a declaration arrived at, it is true, in accordance with the procedure laid down by the Czechoslovak Code, but which remains a declaration of death and no more. In my view, that case is far from being brought within the principle laid down in *In the Goods of Spenceley* (1). The manner in which death may be proved is a matter of pure procedure. A certain procedure is permissible in Czechoslovakia which enables a declaration of death to be made, but it does not, in my view, follow that the court in this country is bound to accept such a declaration of the Czechoslovak court as conclusive. In my judgment, before this court can be asked to presume the death in the case of Wolf, and before it can be asked to make a grant, there must be evidence satisfactory to this court to show that the presumed deceased is in fact dead.

[Counsel then tendered further evidence in the case of Wolf, and, having read the affidavits, the learned judge made the order as prayed in the motion.]

Orders accordingly.

Solicitors: *Pritchard, Englefield & Co.* (for the applicants).

[Reported by R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

MOLESWORTH v. MOLESWORTH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Wallington, J.), October 20, 21, 22, 1947.]

Husband and Wife—Desertion—Res judicata—Amendments Applied. *CLARKE v. RICHARDS* [1952] 2 All E.R. 904.

of desertion substituted for wilful neglect to maintain—

—Further summonses alleging desertion and wilful neglect to maintain—

In March, 1947, a summons issued by a wife charging her husband with wilful neglect to maintain her was before justices, but that charge was not proceeded with, being replaced by one of desertion, which was dismissed. In June, 1947, the wife issued two further summonses against her husband, alleging desertion and wilful neglect to maintain. The justices, in dismissing these summonses, proceeded on the basis that the history of the case as it stood before the hearing in March was irrelevant.

HELD: (i) the withdrawal in March of the charge of wilful neglect to maintain did not estop the wife from making a similar allegation in June, because the withdrawal was made on the implied condition that the court was then and there prepared to deal with the major charge of desertion, and the charge of wilful neglect to maintain had never been adjudicated on.

Pickavance v. Pickavance, ([1901] P. 60), *distinguished*.

(ii) the justices were wrong in excluding from their deliberations in June the facts preceding the hearing in March, as the charge of desertion should have been considered in the light of the matrimonial history which had not become *res judicata* by the March decision.

Stokes v. Stokes, ([1911] P. 195) *distinguished*.

[AS TO SUMMARY JURISDICTION IN RELATION TO DESERTION, see HALSBURY, *Hailsham Edn.*, Vol. 10, pp. 835-838, para. 1338; and FOR CASES, see DIGEST, Vol. 27, pp. 555, 556, Nos. 6094-6119, and p. 562, No. 6182.]

Cases referred to:

(1) *Pickavance v. Pickavance*, [1901] P. 60; 70 L.J.P. 14; 84 L.T. 62; 27 Digest 562, 6182.

(2) *Stokes v. Stokes*, [1911] P. 195; 80 L.J.P. 142; 105 L.T. 416; 75 J.P. 502; 27 Digest 561, 6173.

APPEAL by the wife against a decision of the Surrey Justices dismissing on June 16, 1947, her two summonses against her husband in respect of his alleged desertion and wilful neglect to maintain her. The wife also applied for leave to appeal out of time against a dismissal by the justices of a summons for desertion issued by her and heard in March. At the hearing in June the justices

excluded the matrimonial history prior to the March hearing as *res judicata*. The Divisional Court now held that exclusion to be erroneous, and remitted the summonses, including the March summons, to the justices for rehearing. The court also held that the withdrawal in March of a charge of wilful neglect to maintain, and the substitution therefor of a charge of desertion, did not estop the wife from making a subsequent charge of wilful neglect to maintain.

The facts appear in the judgment of LORD MERRIMAN, P.

A *Rees-Davies* for the wife.

F. Wynne Davies and De Piro for the husband.

LORD MERRIMAN, P.: This is a wife's appeal against a decision by Surrey justices on June 16, 1947, dismissing two summonses taken out by her against her husband whereby she alleged that he had been guilty of desertion and of wilful neglect to maintain her. In view of the course we are asked to take (in effect, we are only asked to order a rehearing of the summonses), I do not propose to go into the merits of the case beyond what is necessary to show its nature. An important point to note at the outset is that these two summonses, returnable and dealt with in June, had been preceded by another summons issued by the wife and dealt with in March. It is clear from the original documents (indeed, there is no dispute about it), that the summons in March was for wilful neglect to maintain, but that at the hearing that summons was not proceeded with, but was altered to one for desertion, the alteration being pencilled in by the solicitor or by the justices' clerk. Everybody is agreed that the case proceeded from that moment on the basis of a charge of desertion, and the charge of wilful neglect to maintain, as such, was not proceeded with. The justices dismissed the charge of desertion, and we have before us the reasons for their doing so. I am not going to criticise those reasons, nor am I going into them in detail, but it is certain from the notes of the evidence that certain letters which had passed between the parties were not read to the court. They were alluded to, and passages from them were put to the wife in cross-examination. These letters have been read to us in full. Counsel have agreed that they are clearly relevant (as they obviously are), and it is plain that justice cannot be done without the contents of these letters being fully considered in the context of other facts and other letters. At the first hearing the husband, in face of the court, made an offer to provide the wife with a home. At the second hearing various letters were read which passed between the parties or their solicitors on this topic. On the face of those letters there was an expression of readiness and willingness on the part of the wife to accept the offer, but I express no opinion about that. The justices saw the parties, and I do not suggest that the mere fact that either the wife or her solicitor wrote to say that she was ready and willing to accept an offer so made in open court is of itself conclusive, because it is not. The justices have ultimately to come to a conclusion whether the wife was ready and willing to resume cohabitation and equally whether the husband was ready and willing to resume cohabitation, and, according to their findings on one or other or both of these topics, to decide whether or not the wife has made out the charge of desertion. It is clear that the justices decided this case on the basis that there was nothing else to consider, and that the old history, as it stood before the first hearing, was irrelevant. Indeed, that is the argument which has been addressed to us, namely, that the wife was adjudged not to have been deserted in March, that nobody can go behind that curtain, and that the sole issue is whether she was deserted between March and June. It is argued that up to March the matter is *res judicata* (thus shutting out everything that went before), and, secondly, that this is a satisfactory decision on the issue presented in June. We have listened to a very interesting and forceful argument by counsel for the husband on that topic, but, realising that there is a formidable point here to be dealt with, we suggested that justice could only be done if, whatever difficulties are set in the way of the wife by the dismissal of her first summons, somehow or other some court were put into the position in which it can decide the merits of the case unhampered by any such limitation. Taking the hint, counsel for the wife applied for leave to appeal against the dismissal of the first summons, and we have that matter before us now.

It is said, first, that on the issue of wilful neglect to maintain, there was a complete estoppel because the wife deliberately withdrew the complaint of wilful neglect to maintain on the first hearing and substituted a charge of desertion. I do not think that this is a case in which it is necessary for us to consider whether *Pickavance v. Pickavance* (1) stands with full force and effect in spite of the criticisms which have been directed to one or more passages in the judgment. Speaking for myself, I think that, even assuming that *Pickavance v. Pickavance* (1) is to be read with all its implications untouched by subsequent criticism, it does not cover the present case, because it is clear that this was not an unconditional withdrawal of the charge of wilful neglect to maintain. On the contrary, the charge was withdrawn on the implied condition that the court then and there should deal with the major charge of desertion. It is clear to my mind that the question of wilful neglect to maintain has never been adjudicated on.

I return to the real point, the charge of desertion. I have already indicated enough of the facts to justify the assertion, which I now make, that on any view of this case it is impossible to say that the issue of desertion raised in June was *res judicata* by any decision made in March. The only question which the justices dealt with in June was whether the wife had expressed herself ready and willing to resume cohabitation on the lines suggested by the husband at the first hearing. I can only assume that they held, on the evidence before them, that the husband had been ready and willing to resume cohabitation and his wife was not so ready and willing, limiting themselves to such facts as had occurred since he made that offer in open court on the first hearing. The question is whether the decision on the issue of desertion is to be made on facts so limited, or whether the new facts are to be read in the light of the previous history. Assuming that we order a rehearing, is the court which rehears this case to be confined rigidly to the few facts and incidents which occurred in a short period of three months, or is it to consider the charge of desertion in light of the real matrimonial history? It is said that the limited consideration, as a matter of law, must be all that is open to this court and to any court which we may direct to rehear the matter because everything which occurred before March is covered by the dismissal on the merits of the charge of desertion. I do not propose to take this opportunity of making such very small contribution as I could hope to make to the extremely difficult topic of *res judicata*, but we have been pressed with an observation of SIR SAMUEL EVANS, P., in *Stokes v. Stokes* (2). That, like this, was a case in which a charge of desertion had been dismissed on a previous occasion, but that, unlike this, was a case in which the evidence which the wife sought to bring related solely to the original charge. There was no new issue at all. What she was seeking to adduce was evidence which had not been obtained (I need not consider whether or not it could have been obtained) on the issue on which she had failed at the first hearing, and it was to these circumstances that SIR SAMUEL EVANS, P., was addressing himself in the passage on which reliance has been placed by counsel for the husband. It reads ([1911] P. 199):

If a wife makes a complaint of desertion, places her case before the justices, adduces the evidence on which she relies, and asks for their decision, and they decide against her, she cannot afterwards, whatever further evidence she may obtain, issue another summons for the same cause of complaint.

"The same cause of complaint." I pause on those words. That, of course, cannot mean that the complaint is desertion in both cases as distinct from desertion in one case and (say) cruelty in another. It means the same cause of complaint in substance and in fact. SIR SAMUEL EVANS, P., continues (*ibid.*):

The fact that desertion is a continuing offence makes no difference; because the desertion must be referable to some particular time when it began.

Applied to the facts with which the President was dealing, no exception whatever could be taken to those observations. If, however, it is sought to apply them to all possible cases of desertion, then they go much too far, I could not assent to the proposition that in no circumstances does the fact that desertion is a continuing offence makes no difference. It makes all the difference in the world in certain circumstances for precisely the same reason that in a charge of persistent cruelty the conduct which is alleged, within the

period of the summons which is being dealt with, to amount to persistent cruelty can only be judged in the light of the whole course of conduct, and the mere fact that at an earlier stage, when the conduct was only partly completed, a court has adjudged that at that point it does not amount to persistent cruelty, does not shut that evidence out for ever, any more than it does in certain cases of desertion. I am not laying down any general rule, but it is open to a court to say: "You have not quite driven it home on this occasion. We are not sure whether your offers to resume cohabitation have had a reasonable time to elapse and we are not prepared to hold that desertion is proved today." That does not mean that for all time nobody can refer in such a case as the present to the fact that there have been earlier attempts to bring about a reconciliation, when further time has elapsed and fresh overtures have been made by which, taken cumulatively, the issue of desertion falls to be decided.

I am going to deal with this case now on two alternatives. Either the issue of desertion has been finally adjudicated on up to March, in which case I say that we must give leave to appeal against that decision, or it is not so, in which case anything we may say about it is academic, but, whichever is right, I am determined that this matter shall be tried by a court which does not sit, if I may be colloquial, in blinkers. The whole case is going to be decided between this wife and this husband by a court which is unhampered by any decision hitherto given and has with full knowledge of all the relevant facts, about which something can be said if any advantage is to be gained by criticising the points noted as the grounds for such decision. The result, in my opinion, is that the proper course will be to grant the application for leave to appeal against the first dismissal, and, having granted that application, to order that both complaints be remitted for rehearing, both dismissals being set aside.

WALLINGTON, J.: I agree, and desire to say only two things:—(i) that to deal with the matter in issue between these two parties piecemeal does not tend to do justice between them, and (ii) that, having studied the notes of evidence in both cases and the reasons for the dismissal of each of these two summonses, it is plain to my mind that there has not been a trial on either of these summonses that can be held to be satisfactory. The criticisms that could be made of the reasons for the decision in March, and those that could be made of the reasons for the decision in June, are not matters into which I desire to enter. It may never be necessary to consider them, because on the order that my Lord has indicated it seems to me that it should be possible for a bench of justices to whom the two summonses are to be sent for rehearing to be in a position to consider all the material, without being barred by any objections such as *res judicata*. I hope and believe that they will be able to consider the whole of this case unfettered in any way and by that means to do justice between these two parties by deciding whether or not on the whole of the material the wife has a right to the relief she claims.

Case remitted.

Solicitors: *Edward Davis, Nelson & Co.*, agents for *Edmund Evans*, Kingston (for the wife); *How, Davey & Lewis* (for the husband).

[Reported by **R. HENDRY WHITE, Esq.**, Barrister-at-Law.]

McCULLOCH v. LEWIS A. MAY (PRODUCE DISTRIBUTORS), LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), November 25, 26, 27, 28, 1947.]

Trade Marks and Trade Names—Passing-off—No common field of activity—“Uncle Mac” of “Children’s Hour” broadcasting programme—“Uncle Mac’s Puffed Wheat.”

The plaintiff was well-known as a broadcaster over a period of many years in the “Children’s Hour” programme of the British Broadcasting Corporation, using the name “Uncle Mac.” Other activities of the plaintiff, in connection with which he was known as “Uncle Mac,” included the broadcasting of charity appeals, the writing of children’s books, the making of gramophone recordings, association with the road “Safety First” campaign and the National Savings Movement, the giving of lectures

and the opening of fetes. In 1944 the defendants, as agents for an associated company called Macline Foods, Ltd., began distributing puffed wheat under the name "Uncle Mac's Puffed Wheat." The puffed wheat was sold in cartons bearing that name and also the words "Uncle Mac loves children—and children love Uncle Mac; Uncle Mac has a wonderful way of brightening any table to which he has been invited . . . So introduce Uncle Mac to your family, and when you see how popular he is, be neighbourly and recommend him to your friends . . ." In an action for fraudulent passing-off, the plaintiff claimed an injunction and nominal damages. The allegation of fraud having been withdrawn,

HELD: as the plaintiff was not engaged in any degree in producing or marketing puffed wheat, there was no field of activity common to the plaintiff and the defendants, and the defendants, in using the fancy name used by the plaintiff, could not be said to have invaded any proprietary right of the plaintiff, and, therefore, to have passed off the goods or the business of the plaintiff.

[AS TO WHEN PROCEEDINGS LIE FOR PASSING OFF see HALSBURY, Hailsham Edn., Vol. 32. pp. 652-660, paras. 961-970; and FOR CASES, see DIGEST, Vol. 43, pp. 296-305, Nos. 1218-1286.]

Cases referred to:

- (1) *A.-G. & General Council of Medical Education of United Kingdom Registration v. Barrett Proprietaries Ltd.*, (1932), 50 R.P.C. 45; Digest Supp.
- (2) *Clark v. Freeman*, (1848), 11 Beav. 112; 17 L.J.Ch. 142; 11 L.T.O.S. 22; 12 Jur. 149; 43 Digest 281, 1120.
- (3) *British Medical Association v. Marsh*, (1931), 48 R.P.C. 565; Digest Supp.
- (4) *British Legion v. British Legion Club (Street), Ltd.*, (1931), 48 R.P.C. 555; Digest Supp.
- (5) *Hall of Arts and Sciences Corpn. v. Hall*, (1934), 51 R.P.C.; 398.
- (6) *Clock, Ltd. v. Clock House Hotel, Ltd.*, (1936), 53 R.P.C. 269; Digest Supp.
- (7) *Tolley v. Fry (J. S.) & Sons, Ltd.*, [1931] A.C. 333; 100 L.J.K.B. 328; 145 L.T. 1; Digest Supp.

ACTION for nominal damages and an injunction to restrain the defendants, their servants and agents, from selling, offering for sale, or advertising puffed wheat or any other product in such a manner as was calculated to suggest that the plaintiff was responsible for or associated with the production or marketing of such puffed wheat or other product. The action was framed as one for fraudulent passing-off, but the charge of fraud was withdrawn during the hearing. WYNN-PARRY, J., held that, as there was no common field of activity in which the plaintiff and defendants were, however remotely, concerned, there was no cause of action. The facts appear in the judgment.

Shelley, K.C., and *Kenneth R. H. Johnston* for the plaintiff.

Sir Walter Monckton, K.C., *James Mould* and *R. G. Lloyd* for the defendants.

WYNN-PARRY, J.: In this action the plaintiff claims an injunction to restrain the defendants, their servants and agents, from selling, offering for sale or advertising puffed wheat or any other product in such a manner as is calculated to suggest that the plaintiff is responsible for or associated with the production or marketing of such puffed wheat or other product. The case was opened as a case of fraudulent passing off. Towards the end of counsel's speech in reply for the plaintiff, the charge of fraud was unreservedly withdrawn upon the instructions of the plaintiff, who wished it stated through his counsel that, so far as he was concerned, having heard the oral evidence of Mr. May, the managing director of the defendants, he did not wish that charge proceeded with. With that view I am, as I shall indicate in somewhat more detail later, in entire agreement. The relevant facts are that since 1926 the plaintiff has been on the staff of the British Broadcasting Corporation. From the beginning he was associated almost exclusively with broadcasting for children, in the programme known as the "Children's Hour." In those days he was himself active in broadcasting and used the style "Uncle Mac." He either introduced himself or was introduced by the announcer as "Uncle Mac." That is properly to be regarded as a fancy name in an action for passing off. He was a success, with the result that he acquired a very large mail from those who listened to him, particularly children, who wrote either themselves or through their parents, and in this mail he was, and he still is, invariably

addressed as "Uncle Mac." In 1933 he took over full control of the "Children's Hour" programme. This involved, in addition to broadcasting, which he continued to do, the direction and control of the policy of the programme. In 1938 the "Children's Hour" programme, which till then had been what I understand to be called a section, was promoted to the status of a department, of which the plaintiff became the head, with the title of director. He continued to broadcast frequently and so great was the success and popularity of the programme that his mail increased to such an extent that he required the services, not only of a private secretary, but even of a secretariat. In addition to his activities as a broadcaster and director of the department in question, the plaintiff undertook certain other activities, which may be regarded as ancillary. During the last eight or nine years he has annually broadcast appeals for charity and before that period he broadcast charitable appeals several times a year. In connection with those appeals, contributions to the particular charity were invited and contributors were asked to address their contributions to "Uncle Mac," before the war at Broadcasting House and during the war at the address of a charitable organisation in Vauxhall Road. The response in every case was large and thousands of letters were received, all of them addressed: "Dear Uncle Mac." As the plaintiff told me, the appeals have become so important that, when such appeals are made by him, they are regarded as "The Week's Good Cause," with the result that on the Sunday on which they are made no other appeal is made. The plaintiff has also been active as an author in producing books for children, such as "The Children's Hour Annual." In addition, he has written some 12 books, which have been published by various publishers. He has made gramophone recordings, on the labels of which appears the name "Uncle Mac." He has been actively associated in the Safety First Campaign directed to the education of children in using the road and in connection with that he wrote or edited a booklet which has had a very large circulation. Further, he has delivered lectures in various parts of the country on subjects connected with children or subjects particularly attractive to children. In the case of those lectures he has invariably been announced as "Uncle Mac." Further, as a result of his popularity he has been invited on numerous occasions either to open fetes or give away prizes at prizegivings and he has also taken an active part in the National Savings Movement, making appeals to children.

The plaintiff, unfortunately, suffers from physical disability. He has lost one leg and the sight of one eye and is often in considerable pain, with the result that he is unable, out of the number of invitations that he receives to accept many of them and in that connection his secretary has been accustomed to write letters to those who have invited him pointing out the difficulty that he has in getting about—a circumstance which was relied upon on behalf of the plaintiff until the charge of fraud was withdrawn.

The evidence, into which I need not go in greater detail, leads me to the conclusion that by the beginning of 1944, when the events requiring examination began to occur, the plaintiff had acquired a very wide reputation among listeners to the B.B.C. programmes, and, particularly, those, mainly children, who listened to the "Children's Hour" programme. Further, he had acquired a reputation among the less wide circles who read his books and to those to whom he lectured or whom he addressed at fetes and prizegivings.

The defendant company, as their name suggests, carry on the business of distributing food stuffs. At all material times the managing director of the company was and still is a Mr. Lewis May, whose name is incorporated in the name of the defendant company. He was at all material times and he still is also the managing director of an associated company, Macline Foods, Ltd. In 1942 Macline Foods, Ltd., which was then under other control, closed down because of the loss of its personnel through their absorption into the armed forces. This company, prior to closing down, had manufactured and distributed puffed wheat as a breakfast cereal under the name "Ready-Wheat." Mr. May acquired control of Macline Foods, and at the beginning of 1944 proposed that that company should again start active trading. For this purpose it was necessary that the company should rejoin an association known as the Cereal Breakfast Food Manufacturers' (War-Time) Association and should obtain from the Ministry of Food a licence to manufacture and distribute.

The company, Macline Foods, Ltd., was duly readmitted to the association and the necessary licence from the Ministry of Food was obtained to manufacture and sell puffed wheat under the name "Uncle Mac's Puffed Wheat," the defendant company being appointed agents of Macline Foods, Ltd., for the purpose of distribution. It is of this act of marketing under the name "Uncle Mac's Puffed Wheat" and of the language on the cartons in which the puffed wheat is sold that the plaintiff complains. He also complained, by way of an amendment to his statement of claim, which was delivered on Sept. 27, 1945 (the amendment being introduced on Jan. 16, 1946) that in so doing the defendants had acted fraudulently. As I have said, the latter claim has been withdrawn.

The plaintiff's case rested chiefly on the side panels to two of the cartons in question, which are Exhibits P.1 and P.2. The language on the side panel of P.1 reads :

There is no more wholesome or nourishing food than Uncle Mac's Puffed Wheat. The wheat used in its manufacture has been carefully selected to ensure that it responds to a scientific puffing process which enhances the original grains to ten times their normal size. When packed Uncle Mac's puffed wheat is beautifully crisp and crunchy . . .

The side panel of P.2 reads :

Uncle Mac loves children—and children love Uncle Mac ! Uncle Mac has a wonderful way of brightening any table to which he has been invited and of sending folk off to their daily tasks fitter, fresher and happier for having enjoyed his jovial company at meal-times. So introduce Uncle Mac to your family, and when you see how popular he is, be neighbourly and recommend him to your friends. You know the difficulties of travel these days, and will understand that Uncle Mac can't get about as freely as he would like to, but rest assured that all will come right in time and that he will always do his best to please his many friends wherever they may be.

It was originally suggested that those labels, particularly P.2, had been evolved with the plaintiff and his wide reputation in mind for the express purpose of trading upon that reputation. The evidence on the issue of fraud consisted solely, so far as the plaintiff was concerned, of the evidence as to the plaintiff's reputation, which nobody disputes, the cartons and the correspondence.

The evidence on behalf of the defendants consisted of certain correspondence and the oral evidence of Mr. May, who was clearly the moving spirit of both the defendant company and Macline Foods, Ltd., and in control of their day to day activities, with a strong voice in their policy, and, in particular, in regard to the steps by which the cartons were brought into existence and the puffed wheat marketed in them. The correspondence, to sum it up, shows on its face an innocent motive, if genuine negating fraud, and demonstrates that Mr. May, being dissatisfied with the old name "Ready-Wheat," thought, first, of the name "Uncle Mac" as representing, as regards the word "Mac," a contraction of the name Macline Foods, Ltd., and as regards "Uncle," a word in the nature of a prefix likely to be attractive to children, for whom, at that time at any rate, the breakfast food was primarily intended. The correspondence shows that, after some hesitation whether it might not be a better idea to use the fancy name "General Mac" and make use of the circumstance that in the course of manufacture the wheat, in order to puff it, was shot out of a gun, that idea was rejected as having too military an emphasis, particularly having regard to the stage of the war and the feeling that after the war less emphasis from the point of view of children ought perhaps to be placed on the military aspect of matters. There is clearly no indication on the face of the correspondence that in the evolution of the name "Uncle Mac" Mr. May had in mind the plaintiff or any intention to trade on his name. Indeed, there is internal evidence in the correspondence which leads to a contrary view. It appears that it was not until the advertising agents of Macline Foods, Ltd., writing on Aug. 15, 1944, to Mr. May, referred to the possibility that the plaintiff might claim that Macline Foods, Ltd., were trading on the popularity of the plaintiff and naming the product after him without prior arrangement that the plaintiff's name ever came into the picture at all. The correspondence also indicates what one might expect, namely, that after the success of the first issue of cartons, Mr. May was desirous of converting "Uncle Mac" from a mere name into a personality—

a very well-known device used by advertisers—and that it was with that in mind that the side panel of P.2 was evolved, and, further, that the last paragraph of that panel was inserted, as Mr. May said, to indicate in child-like language to children that Macline Foods, Ltd., and the defendant company were faced with the difficulties created by the then system of zoning.

A In view of the course that the matter has taken, the fraud then alleged against the defendants could only have been established if as a result of hearing Mr. May in the witness box I had come to the conclusion that those letters did not mean what they purport to say on the face of them, but that there had been a deliberate intent from the beginning, not merely to use the name of “Uncle Mac” in a dishonest way, but to lay in advance a defence in case challenge should afterwards be made. I found Mr. May a most satisfactory witness. He gave his evidence seriously, carefully, clearly and, for one who has had what appears to me to be such a fantastic charge of fraud held over his head for such a long time, with considerable restraint. I accept his evidence in its entirety and it is only right that, in addition to the unreserved withdrawal of the charge which has been made by the plaintiff, I should say that I entirely acquit him of having in any way acted dishonestly or wrongly in this matter from start to finish.

C It is of the essence of an action for passing off to show, first, that there has been an invasion by the defendant of a proprietary right of the plaintiff, in respect of which the plaintiff is entitled to protection, and, secondly, that such invasion has resulted in damage or that it creates a real and tangible risk that damage will ensue. It is with the first part of that proposition that I am immediately concerned. It is established beyond argument that under the law of England a man is not entitled to exclusive proprietary rights in a fancy name *in vacuo*. His right to protection in an action for passing off must depend on his showing that he enjoys a reputation in that name in respect of some profession or business that he carries on or in respect of some goods which he sells. Further, he must show that the acts of the defendant of which he complains have interfered or are calculated to interfere with the conduct of his profession, business or selling goods, in the sense that those acts of the defendant have led or are calculated to lead the public to confuse the profession, business or goods of the plaintiff with the profession, business or goods of the defendant. The element of confusion is essential, but the element of confusion necessitates comparison. BENNETT, J., in *H.M. Attorney-General and General Council of Medical Education of United Kingdom v. Barrett Proprietaries, Ltd.* (1), said (50 R.P.C. 53):

F The next allegation in para. 12 is: “The use by the defendants of the letters B.P. as aforesaid is calculated to lead to confusion.” One asks oneself, confusion between what? The plaintiff council sells nothing. There is nothing, as far as I know, with which the plaintiff council is connected which, as a result of what the defendants are doing, is or is likely to be or can be confused with what the defendants are selling.

G The authorities covering one hundred years, that is, from *Clark v. Freeman* (2), which was decided in 1848, have been exhaustively canvassed before me. I do not intend to embark on a review of them. This was undertaken recently by MAUGHAM, J., in *British Medical Association v. Marsh* (3), which perhaps represents the high water mark in this type of action. The headnote in that case reads (48 R.P.C. 565):

H The British Medical Association, then an unincorporated body, was in 1874 registered under the Companies Act as a company not for gain. It had a very large number of members and was a body that represented the opinion of the medical profession as a whole. It had published analyses of numerous proprietary articles which it considered useless, if not harmful, and as being sold at an excessive price. The defendant in 1923 formed a company called Public Prescriptions, Ltd. which made proprietary articles from these analyses but sold them at a low price and the company used the letters “B.M.A.” On liquidation, the defendant took over the stock of the company, its labels and its alleged trade mark “B.M.A.” In 1930 he set up certain shops in London and on a window of one had the letters “B.M.A.” and underneath the words “Drug Stores.” In the window was a card and on it the words “We guarantee that all reproductions of patent medicines are prepared strictly to the analyses of the British Medical Association.” There were also other uses of the initials “B.M.A.” The defendant suggested that they were used as the initials of persons who had been connected with the said company. The British Medical Associa-

tion commenced an action to restrain the defendant from (*inter alia*) representing that the defendant was carrying on business as a department of or in connection with or by the authority of the plaintiffs or from otherwise holding out the plaintiffs as the owners of or in any way connected with the defendant's business or from carrying on business or advertising or issuing to the public circulars or exhibiting for sale or selling drugs or medical remedies under the name of the plaintiffs or the description B.M.A., or B.M.A. Drug Store or under any other name or names or description containing the letters B.M.A. in juxtaposition.

MAUGHAM, J., held (*ibid.*):

... that the defendant was carrying on business at two places so as to represent to the public that both those businesses were either carried on by the plaintiffs or were in some way connected with them as businesses in which they had an interest of some kind; that the acts of the defendant tended to injure the plaintiffs in their business both by tending to cause existing members of the Association to leave and to cause qualified medical men not yet members of the Association to abstain from joining it. An injunction was granted as stated above to be claimed with the addition at the end of the words "so as to represent that the plaintiffs are in any way connected with the defendant's business."

In the defence in the action it was alleged in para. 4 (*ibid.*, 567):

The plaintiff association is a non-trading company and does not manufacture or sell and never has manufactured or sold any drugs or medical remedies or other goods and is not and never has been connected or associated with any firm or person who manufacture or sell any such goods. The defendant will contend that the plaintiff as such non-trading company is not entitled to the relief asked in this action or any part thereof.

In the course of his judgment MAUGHAM, J., said (*ibid.*, 569):

The defendant came to the conclusion, in the year 1923, that there was a profitable business to be carried on by taking from the analyses made for the plaintiffs the information necessary for making the proprietary remedies, by advertising to the public the fact that the articles made by him from those analyses were in effect precisely the same as the proprietary remedies, and selling them at a very much lower price. That was a perfectly legitimate idea. What was not legitimate was to pretend, if the defendant has pretended, that the business so carried on was carried on as a branch of or with the assistance of or with the approval in some shape or form of the British Medical Association . . . Now when the shops were set up by the defendant (by which I mean the shop at 186, Walworth Road and the shop at 106, High Street, Borough), he chose to adopt a method of trading as to which I think there can be no doubt at all so far as concerns the conclusions that he wished the public passing his shops or entering them to draw. [His LORDSHIP stated in detail the method and continued (*ibid.*, 571):] . . . it looks as if the British Medical Association were giving a guarantee, though in truth the guarantee is a guarantee by some person unknown, and the words "the British Medical Association" at the bottom are a continuation of the sentence "the analyses of"—"the analyses of the British Medical Association." Other documents are put forward by the defendant which I will not take up time by considering. It is, to my mind, beyond all question that both at 186, Walworth Road and at High Street, Borough, the defendant, by his fascia, by the printed matter placed in his window, by the cards which he places behind the bottles, and by the labels on the bottles, is intending the public to draw the conclusion that these two shops are carried on by or in some connection with the British Medical Association . . . Accordingly, I am quite convinced, upon the evidence before me here, that the defendant, prior to the date of the writ, was carrying on business at the two places I have mentioned so as to represent to the public that both those businesses were either carried on by the British Medical Association or were in some way connected with that Association as businesses in which they had an interest of some kind. The real question that falls to be decided here is the question of law whether, on that finding of fact, the plaintiffs are entitled to an injunction.

HIS LORDSHIP then examined a number of the earlier cases and, having considered *Clark v. Freeman* (2) and cases following it, said (*ibid.*, 574):

I think, therefore, the professional cases are far from establishing the view which some people have held, that *Clark v. Freeman* (2) is an authority for the proposition that a professional man has no remedy if a tradesman chooses to put forward some quack remedy or article of that kind as having been prescribed or been sold for the benefit of or the approval of the medical man in question. What it is necessary in such a case to prove is, either positive injury, or, in a *quia timet* action, a reasonable probability of injury; and if that is done, I, for my part, see no reason why such an action should not succeed.

HIS LORDSHIP discussed other cases, the last of which is *British Legion v. British Legion Club (Street), Ltd.* (4). Then occurs a passage which I think

it is most important to have in mind in considering the scope of this case. The judge says (*ibid.*, 575) :

- A In the present case I find, as an inference of fact, that the acts of the defendant tend to injure the plaintiffs in their business both by tending to cause existing members of the Association to leave the Association and to cause qualified medical men not yet members of the Association to abstain from joining. The plaintiffs as a corporation have, in my opinion, a business : they subsist on subscriptions, and mainly on subscriptions of persons who become members. They are a purely voluntary body, and anybody may leave the Association or join it as they will. I am satisfied that people who may see these shops may come to the conclusion, and ordinary members of the public will come to the conclusion, that the British Medical Association is in some way connected with these shops. I have given my reasons for coming to that conclusion. Accordingly, my opinion is that the acts of the defendant tend to injure and to cause damage to the plaintiffs in their business, and that as a matter of law that is sufficient ground for granting an injunction in the present case.
- B It will, therefore, be observed that MAUGHAM, J., as part of the ground of his decision, clearly felt it necessary to find that the plaintiffs had a business, and that, having regard to all the circumstances, it could properly be said that the acts of the defendant were likely to cause damage to the plaintiffs in that business, thus pointing, as I understand his Lordship's judgment, quite clearly to the necessity of showing connection between the two businesses.
- C I was referred to a number of other cases including *Hall of Arts and Sciences Corpn. v. Hall* (5) and finally, as regards point of time, *Clock Ltd. v. The Clock House Hotel, Ltd.* (6), a decision of the Court of Appeal in 1936. It appears to me to be not without significance that at the end of this very long period, over which the court has again and again had to consider this type of case, ROMER, L.J., found it possible to state the principle underlying all these cases in one sentence. He said (53 R.P.C. 275) :
- D There is really no dispute and can be no dispute as to the principle of law involved in this case. The principle is this, that no man is entitled to carry on his business in such a way or by such a name as to lead to the belief that he is carrying on the business of another man or to lead to the belief that the business which he is carrying on has any connection with the business carried on by another man.
- E I have listened with care to all the cases that have been cited, and on analysis I am satisfied that there is discoverable in all those in which the court has intervened the factor that there was a common field of activity in which, however remotely, both the plaintiff and the defendant were engaged and that it was the presence of that factor that grounded the jurisdiction of the court. With those considerations in mind, I turn again to the relief claimed in this action. It is :
- F An injunction to restrain the defendants, their servants and agents from selling, offering for sale, or advertising puffed wheat or any other product in such a manner as is calculated to suggest that the plaintiff is responsible for or associated with the production or marketing of such puffed wheat or other product.
- G On the postulate that the plaintiff is not engaged in any degree in producing or marketing puffed wheat, how can the defendant, in using the fancy name used by the plaintiff, be said to be passing off the goods or the business of the plaintiff ? I am utterly unable to see any element of passing off in this case. If it were anything, it were libel, as to which I say nothing. Passing off, in my judgment, it certainly is not. If I were to accede to the plaintiff's claim I should, as I see it, not merely be extending quite unjustifiably the scope of the action of passing off, but I should be establishing an entirely new remedy, and that I am quite unprepared to do. I, therefore, conclude that the plaintiff in this case established no cause of action.
- H This is sufficient to dispose of the matter, but, in case the matter should be taken to a higher tribunal and my views should be of any assistance to that tribunal, I would say that I regard the first head of damage, namely, the risk of litigation, as being wholly visionary and illusory, and, as regards the second head, that is, the risk of damage to the professional reputation of the plaintiff as a broadcaster and author and of injury to his means of subsistence and gaining a livelihood, as not being a real or tangible risk. [HIS LORDSHIP referred to the evidence called for the plaintiff, and continued :] All that evidence might or might not be relevant in an action for libel, such as

Tolley v. Fry (7). It amounts, in my view, to little in this case. Even if I had been in the plaintiff's favour on the first point and even though the plaintiff had not limited his claim to damages, I should have been disinclined to regard that evidence as showing any specific damage. The whole matter appears to me much too remote and I should not have awarded him in any case more than 40s. Further, having regard to all those circumstances and having regard to the delay which has taken place between the issue of the writ and the bringing of this matter to trial, during which, as counsel for the defendants pointed out, there has thereby existed a period over which the strength of the allegation of damage or likelihood of damage has been tested, I should have come to the conclusion that this is not a case in which I should have been justified in any event in granting an injunction. A

Action dismissed.

Solicitors: *Turner & Evans*, agents for *Gosling & Wilkinson*, Weybridge (for the plaintiff); *Allen & Overy* (for the defendants). B

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

WEIGHMAN v. WEIGHMAN.

[COURT OF APPEAL (Bucknill and Cohen, L.JJ.), November 21, 1947.] C

Divorce—Petition—Service—Dispensing with service—Petitioner's lack of means—Respondent's probable knowledge of pending proceedings—Matrimonial Causes Act, 1857 (c. 85), s. 42.

In 1926 the husband went to Canada in search of employment. From that date until 1943 he sent numerous letters to the wife, who continued to reside in England, in which he expressed his intention of returning to England when he could afford to do so. On July 7, 1943, however, he wrote a letter, which gave no address, informing his wife that he had left his previous address and that he never intended to return to England. After inquiries through relatives and official channels had failed to trace the husband's whereabouts, an order was made for substituted service by advertisement in a Canadian newspaper, but the cost of the advertisement was beyond the wife's means. The wife applied for service to be dispensed with altogether. D

HELD: mere want of means was not sufficient, but, as it was a fair inference from the facts that the husband knew that there was at least a likelihood of proceedings, it was a proper case for dispensing with service. E

[AS TO DISPENSING WITH SERVICE, see HALSBURY, Hailsham Edn., Vol. 10, p. 706, para. 1060; and FOR CASES, see DIGEST, Vol. 27, p. 396, Nos. 3928-3929.]

Cases referred to:

- (1) *Luccioni v. Luccioni*, [1943] 1 All E.R. 384; [1943] P. 49; 112 L.J.P. 51; 168 L.T. 263; *affg.*, [1943] 1 All E.R. 260; Digest Supp.
- (2) *Read v. Read*, [1942] 1 All E.R. 226; [1942] P. 87; 111 L.J.P. 41; 166 L.T. 153; Digest Supp.

APPEAL by the wife from an order of FINNEMORE, J., in chambers, dated Oct. 29, 1947, refusing to dispense with the service of a petition for dissolution of the marriage on the ground of the husband's desertion. The appeal was allowed. G

J. B. Latey for the wife.

The husband did not appear.

BUCKNILL, L.J.: This is an appeal by the wife, suing as a poor person, from an order of FINNEMORE, J., in chambers. H

The parties were married on Apr. 8, 1922, and there are two children of the marriage. In 1926 the husband, who is a miner, went to Canada in search of work, the wife continuing to reside at the matrimonial home in Cumberland. Between 1926 and 1943 the husband, on numerous occasions, in letters to the wife expressed his intention of returning to England when he could afford to do so, but on July 7, 1943, he wrote saying that he never intended to return. That letter stated that he had left his former address and gave no new address. From that date until the filing by the wife of a petition for dissolution of

the marriage on the ground of desertion, the husband has not communicated with her nor has he returned to her. Attempts were made through relations and official channels to trace the husband's whereabouts, but without result, and, on Aug. 13, 1947, an order was made for substituted service of the petition by one advertisement in the *TORONTO DAILY STAR*. It was discovered, however, that the cost of the advertisement was beyond the wife's means, and she, therefore, applied for leave to dispense with service altogether. FINNEMORE, J., refused the application, but he gave her leave to appeal.

When the case was before FINNEMORE, J., *Luccioni v. Luccioni* (1) was referred to. There has been some doubt what precisely the learned judge said with regard to that case, but the court has had the opportunity of speaking to the registrar who was present at the hearing and his recollection is that the judge said, not that he was absolutely bound by that case, but that, if he was not satisfied that the husband had notice of the proceedings or of the wife's intention to bring them, the mere fact that the wife had not sufficient means to advertise was not enough to justify the court in dispensing with service altogether under the power given by s. 42 of the Matrimonial Causes Act, 1857. Counsel for the wife argues that it is contrary to public policy that the wife should be debarred from her remedy for lack of means, but, as LORD GREENE, M.R., pointed out in *Read v. Read* (2) ([1942] 1 All E.R. 228) :

Service must be personal or it must be substituted, and substituted service can only be ordered on well-established principles where there is a reasonable probability that it will come to the notice of the person to be affected. The system of constructive service, where a defendant can have judgment recovered against him without his ever having any opportunity of knowing that the proceedings are on foot is a thing against which English jurisprudence has always set its face . . .

SCOTT, L.J., said in *Luccioni v. Luccioni* (1) ([1943] 1 All E.R. 386) :

. . . it is a real hardship on a respondent to a divorce petition to be deprived of his status by a decree made in his absence and without his knowledge of the pending proceedings.

The practice in dispensing with service was laid down by LORD MERRIMAN, P., in *Luccioni v. Luccioni* (1) in the court below ([1943] 1 All E.R. 262) in a passage which was cited by SCOTT, L.J., in the same case on appeal (*ibid.*, 385) :

. . . the court, before dispensing with service, should require to be satisfied that the respondent spouse has become aware of the fact that the petition is being prosecuted, or, at the very least, of the intention to prosecute it, and in either case has had time and opportunity to indicate whether he or she desires to defend.

In my view, there are special facts in the present case which FINNEMORE, J., did not consider sufficiently. In view of the terms of the husband's letter of July 7, 1943, and of the facts that he had been away for twenty years and that in 1943 he intimated his intention never to return to his wife, the husband, in my opinion, must have known that he had deserted his wife and that that desertion had continued for more than three years. It is, therefore, in my opinion, a fair inference that he knew that the wife would take proceedings for divorce. In these circumstances I think the conditions laid down by LORD MERRIMAN, P., were fulfilled, the appeal should be allowed, and service of the petition on the husband dispensed with.

COHEN, L.J. : I agree. I should be very loth to interfere with the exercise of the learned judge's discretion if it had been exercised with due regard to all the relevant matters. Indeed, I could not do so. The learned judge applied the right principle in not treating *Luccioni v. Luccioni* (1) as a complete fetter, but, in my opinion, he did not give sufficient weight to the special facts. I agree that mere want of means would not be enough in the absence of facts from which knowledge by the husband of at least the likelihood of proceedings might be inferred.

Appeal allowed.

Solicitor : J. A. H. Powell (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re DUKE OF WELLINGTON, GLENTANAR *v.*
WELLINGTON AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), April 16, 17, 18, 23, 24, 25, May 7, 1947. COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), December 3, 4, 5, 8, 9, 1947.]

Conflict of Laws—Succession—Immovables—Renvoi—Gift by English testator of property in Spain—Provision in Spanish Civil Code for succession to be governed by national law of deceased, whatever the nature of the property—Exclusion of doctrine of renvoi—Devolution under English law.

Wills—Construction—Gift by testator's Spanish will—Gift to person fulfilling two qualifications—Failure of gift—Effect of failure—Gift excepted out of property given by English will—Whether passing under residuary bequest in English will.

In 1812 the first Duke of Wellington (then Viscount Wellington) was created a grandee of Spain with the title of Duke of Ciudad Rodrigo, and it was decreed that the dukedom should be enjoyed by him and his issue, successors male and female, in perpetuity. In 1813 certain lands were given to him "for himself his heirs and successors" to be held "in conformity with and subject to the constitution and the laws." On the death of each of the first five Dukes of Wellington, the Spanish estates passed under his will to his successor in the dukedoms of Wellington and Ciudad Rodrigo. By a will, made on May 6, 1942 (his Spanish will), the sixth duke left the Spanish estates assigned to the first duke, together with arrears of rent and all chattels thereon, to the person who would at his death become Duke of Wellington and Ciudad Rodrigo, for his absolute benefit. By his English will, made on Dec. 6, 1942, after declaring that the property disposed of by his Spanish will was not intended to be disposed of or dealt with by this will, the sixth duke appointed trustees and executors of his English will and gave them (by cl. 3) all moneys and movable property in Spain which did not pass under his Spanish will. By cl. 5 he gave all his property not otherwise specifically disposed of to his trustees on the administration trusts contained in Form 8 of the Statutory Will Forms, 1925, and, by cl. 6, he directed his trustees to hold his residuary estate on trust for the person who would at his death become Duke of Wellington, absolutely if he was 21 years of age, but, if he was under 21, then on trust for the first duke to become 21 within 21 years of the testator's death or, if no person should be duke and 21 years of age within that time, for the person who was duke immediately before the expiration of that period absolutely. On Sept. 16, 1943, the sixth duke died a bachelor and domiciled in England, leaving his mother and one sister, but no brothers. He was succeeded in the English dukedom by his uncle, who was over 21, but the Spanish dukedom vested in his sister. The question to be determined was who was entitled to the property comprised in the Spanish will. Article 10 of the Spanish Civil Code, after providing that movables are governed by the law of the country of their owner and immovables by the law of the country where they are situate, continues: "However, intestate successions as well as testamentary successions shall be governed as regards the order of succession inheritance rights and intrinsic validity of the dispositions by the national law of the person whose succession it is, whatever be the nature of the property and the country in which it is situate." There had, up to the present time, been no declaration of the Supreme Court of Spain in regard to the applicability of the doctrine of *renvoi* in Spanish law and there was a profound cleavage of legal opinion in Spain in regard to the matter.

HELD: (i) since the testator died domiciled in England, succession to the movable property comprised in his Spanish will was to be determined by English law.

(ii) it would be against the spirit and intendment of the Spanish Civil Code to hold that in questions of succession Spanish law would accept the *renvoi* which the English law made to it as the *lex situs*, and, therefore, according to Spanish law, the question of the devolution of

the testator's immovable property in Spain was to be resolved by reference to English law.

(iii) on the true construction of the Spanish will, the gift was to the person, if there were one, who was both Duke of Wellington and Duke of Ciudad Rodrigo, and, since no one person existed who fulfilled both qualifications, the gift under that will failed.

(iv) the opening words of the English will carried the implication that the Spanish property was excluded from the English will only because the testator thought that he had effectively disposed of it, and, therefore, since the Spanish will was ineffective to dispose of the property comprised therein, this property passed under cl. 3 and 5 of the English will and was not undisposed of.

(v) since the present duke was over 21 at the testator's death and, therefore, under cl. 6 of the English will absolutely entitled to the residue subject to the administration trusts contained in cl. 5 thereof, he was entitled to the Spanish immovable property, notwithstanding the fact that Spanish law did not recognise the law of trusts as understood in English law, and he was, accordingly, entitled to all the property, movable and immovable, comprised in the Spanish will, but ineffectually disposed of thereby.

[AS TO WILLS OF IMMOVABLES, see HALSBURY, Hailsham Edn., Vol. 6, pp. 241, 242, para. 295; and FOR CASES, see DIGEST, Vol. 11, pp. 363, 364, Nos. 440-446.

AS TO THE DOCTRINE OF *Renvoi*, see HALSBURY, Hailsham Edn., Vol. 6, pp. 244, 245, para. 297.

AS TO EFFECT OF FAILURE OF GIFT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 146, 147, paras. 191, 192; and FOR CASES, see DIGEST, Vol. 44, pp. 417-422, Nos. 2479-2524, and pp. 426, 427, Nos. 2564-2574.]

Cases referred to :

- (1) *Jaber Elias Kotia v. Katr Bint Jiryas Nahas*, [1941] 3 All E.R. 20; [1941] A.C. 403; 165 L.T. 401; Digest Supp.
- (2) *Collier v. Rivaz*, (1841), 2 Curt. 855; 11 Digest 381, 594.
- (3) *Casdagli v. Casdagli*, [1919] A.C. 145; 88 L.J.P. 49; 120 L.T. 52; 11 Digest 323, 115.
- (4) *Re Ross, Ross v. Waterfield*, [1930] 1 Ch. 377; 99 L.J.Ch. 67; 142 L.T. 189; Digest Supp.
- (5) *Re Askew, Marjoribanks v. Askew*, [1930] 2 Ch. 259; 99 L.J.Ch. 466; 143 L.T. 616; Digest Supp.
- (6) *Green v. Dunn*, (1855), 20 Beav. 6; 24 L.J.Ch. 577; 25 L.T.O.S. 154; 44 Digest 419, 2497.
- (7) *De Trafford v. Tempest*, (1856), 21 Beav. 564; 44 Digest 421, 2515.
- (8) *Blight v. Hartnoll*, (1883), 23 Ch.D. 218; 52 L.J.Ch. 672; 48 L.T. 543; 44 Digest 427, 2573.
- (9) *Mason v. Ogden*, [1903] A.C. 1; 72 L.J.Ch. 152; 87 L.T. 622; *offg.*, S.C., *sub nom.*, *Re Mason, Ogden v. Mason*, [1901] 1 Ch. 619; 44 Digest 420, 2510.

ADJOURNED SUMMONS to determine who was entitled to certain property in Spain given by the Spanish will of the testator, the sixth Duke of Wellington and Ciudad Rodrigo, to the person who should on his death become Duke of Wellington and Ciudad Rodrigo, the two dukedoms having, on the testator's death, vested in two different persons.

The testator died a bachelor, domiciled in England, and leaving him surviving his mother and one sister, but no brothers. The sister, Lady Anne Rhys, succeeded to the Spanish dukedom and an uncle of the testator became seventh Duke of Wellington. Under the testator's English will, which comprised all property in Spain which did not pass under his Spanish will, the seventh Duke was absolutely entitled to the residuary estate. WYNN-PARRY, J., held that, according to Spanish law, the devolution of the testator's immovable property in Spain comprised in the Spanish will must be resolved by reference to English law, and, in the event that had happened (*i.e.*, the two dukedoms having vested in two different persons), the gift under the Spanish will failed, and, the Spanish will being ineffective to dispose of the property comprised therein, this property (both movable and immovable) passed under the English will to the present duke, as part of the testator's residue. From this judgment the personal representative of the testator's mother (who had died after the proceedings started) appealed, and the testator's sister cross-appealed, but the Court of Appeal upheld the judgment of WYNN-PARRY, J., subject to a slight variation in the

form of the order. The facts and the relevant clauses of the testator's Spanish and English wills appear in the judgment of WYNN-PARRY, J.

Rawlence for the executors.

Jennings, K.C., and *Jopling* for the seventh Duke of Wellington.

Winterbotham for the testator's sister, Lady Anne Rhys.

Gray, K.C., and *Wilfred Hunt* for Edith Unwin, personal representative of the testator's mother.

Cur. adv. vult. A

May 7. WYNN-PARRY, J., read the following judgment. In January, 1812, following the storming of the fortress of Ciudad Rodrigo, the first Duke of Wellington, then Viscount Wellington, was created a grandee of Spain of the first class for himself and his successors, free of nobility duties and fees, with the title of Duke of Ciudad Rodrigo. The deed of Feb. 5, 1812, carrying into effect the Royal Decree of Jan. 30, 1812, providing that the grandeeship of Spain and the dukedom of Ciudad Rodrigo should be enjoyed by him and his issue, successors male and female, each in his time in perpetuity. By a deed of July 22, 1813, it was provided that :

... there be adjudicated to the Duke of Ciudad Rodrigo for himself his heirs and successors the royal site and possession known in the plain of Granada as the Soto de Roma including therein the lands called the Chauchinas which are found situated within the same boundaries of the Soto in order that they may hold and enjoy it in conformity with and subject to the Constitution and the laws.

The first Duke of Wellington was created Duke of Wellington in the peerage of the United Kingdom in 1814. He died in 1852 and was succeeded both in the British and the Spanish dukedoms by his son Arthur Richard second Duke of Wellington. The second duke died in 1884 and was succeeded in both dukedoms by his nephew Henry third Duke of Wellington. The third duke died in 1900 and was succeeded in both dukedoms by his brother Arthur Charles fourth Duke of Wellington. The fourth duke died in 1934 and was succeeded in both dukedoms by his son Arthur Charles fifth Duke of Wellington. The fifth duke died in 1941 and was succeeded in both dukedoms by his son, the sixth Duke of Wellington, whose testamentary dispositions are in question and whom I will refer to as the testator. On the death of each of the first five Dukes of Wellington the Spanish estates passed to his successor in the dukedoms under his testamentary dispositions, as each of them gave these estates to his successor either by name or by a gift to the person who should on his death become Duke of Wellington and Ciudad Rodrigo. Until the death of the testator, the sixth Duke of Wellington, this form of gift caused no difficulty as there could never have been any suggestion that the Spanish dukedom passed to a person other than the person who succeeded to the dukedom of Wellington.

The testator made a will, dated May 6, 1942 (to which, for convenience, I will refer as the Spanish will) in the following terms :

I, the most noble Henry Valerian George Duke of Wellington and Duke of Ciudad Rodrigo a grandee of the first class in Spain hereby revoke all my wills and codicils so far as the same relate to the place and royal possession known in the Vega de Granada as the "Soto de Roma" inclusive of the lands called respectively the "Dehes-a-baja of Illora" and "Las Chauchinas" assigned to my late great-great-grandfather by the decree published by the General and Extraordinary Cortes on July 22, 1813, and all arrears of rent due at my death in respect thereof and all chattels of every kind on the said estate at my death and I give devise and bequeath all the said estate called the "Soto de Roma" inclusive of the lands called respectively the "Dehes-a-baja of Illora" and "Las Chauchinas" with the rights members and appurtenances thereunto belonging and all arrears of rent due at my decease in respect thereof and all chattels of every kind which shall be on the said estate at my death belonging to me unto the person who being of the issue of the late most noble Arthur Duke of Wellington and Ciudad Rodrigo my great-great-grandfather will on my decease become Duke of Wellington and Ciudad Rodrigo for his absolute benefit And I appoint Lord George Wellesley and Thomas Lord Glentnar executors of this my will and testament so far as the same relates to my real and personal property in Spain.

The testator made a further will dated Dec. 6, 1942, to which, for convenience, I will refer as the English will. This will opens as follows :

I the most noble Henry Valerian sixth Duke of Wellington hereby revoke all testamentary dispositions heretofore made by me except my will dated May 6, 1942, relating

to certain property in Spain (hereinafter called "my Spanish will") and declare this to be my last will save as regards the property which is disposed of by my Spanish will which property so disposed of is not intended to be disposed of or dealt with by this my will which I make this Dec. 6, 1942.

He then appointed his uncles, Lord Glentanar and Lord George Wellesley, the plaintiffs in this summons, to be the executors and trustees of the English will and, after making certain other bequests, bequeathed to them, amongst certain other items :

A Thirdly all if any moneys and other personal or movable property in Spain belonging to me at my death which does not pass under my Spanish will.

By cl. 5 of the English will the testator provided as follows :

B I devise and bequeath all my property real as well as personal not hereby or by any codicil hereto otherwise specifically disposed of and of which I can dispose in any manner I think proper either as beneficially entitled thereto or under any general power to my trustees upon the administration trusts contained in Form 8 of the Statutory Will Forms, 1925, and that form is incorporated herein.

By cl. 6 he provided as follows :

C My trustees shall stand possessed of the investments and property hereinbefore by reference directed to be made or authorised to be retained including any part of my residuary estate for the time being unconverted and the investments and property for the time being representing the same and the income thereof upon trust for the person who upon my death shall become Duke of Wellington absolutely if he shall be of the age of 21 years but if he is under the age of 21 years then upon trust for such person as within the period of 21 years from my death first is Duke of Wellington and of the age of 21 years absolutely but if no person is Duke of Wellington and of the age of 21 years within the said period then upon trust for the person who immediately prior to the expiration of the said period is Duke of Wellington absolutely.

D The testator was killed in action on Sept. 16, 1943, being at his death a bachelor and domiciled in England and leaving him surviving his mother, the defendant Lilian Maud, Duchess of Wellington, and an only sister, the defendant Lady Anne Maud Rhys. He never had any brothers. The testator's two wills were proved by the plaintiffs on Oct. 13, 1944. The testator was at his death entitled to the estates in Spain referred to in the Spanish will and also to the proceeds of sale of parts of such estates, bank balances, cash in hand and arrears of rent in respect of such estates and to certain chattels thereon. On his death, the testator was succeeded in the dukedom of Wellington by his uncle Gerald, as seventh duke, to whom I will refer as "the present duke." The expert evidence before me established—and on this point there is no dispute—that, on the testator's death, the dukedom of Ciudad Rodrigo vested in his sister, the defendant Lady Anne Rhys.

F In these circumstances doubts have arisen about the destination of the movable and immovable property in Spain comprised in the Spanish will, and, accordingly, this summons has been issued by which it is asked (i) whether, on the true construction of the Spanish will and the English will, and in the events which have happened, the present duke and the defendant Lady Anne Rhys, or either, and if so which of them, is entitled to (a) the movable property, and (b) the immovable property comprised in the Spanish will, or whether the testator died intestate as to the whole or any part of such property ; and (ii) if there is to any extent an intestacy, who is entitled under such intestacy. The expert property with which I am concerned consists of foreign movables and immovable property situate abroad, the first point which arises for consideration is the choice of law to be applied in the determination of the questions of succession to which I have referred. As regards the movable property in Spain, no difficulty arises. The testator died domiciled in England, and it is the clear rule of English law, for which at this date no authority need be cited, that the distribution of the distributable residue of the movables of a deceased is, in general, governed by the law of his domicile at the time of his death. As there are present in this case no circumstances to take it out of that general rule, it follows that the questions of succession to the movable property of the testator comprised in the Spanish will must be determined by English law.

H I turn now to the question by what law are those questions of succession to be determined so far as concerns the immovable property of the deceased. This point presents more difficulty. The first step, it is true, is easy. According

to English law, the devolution of the immovable property situated in Spain comprised in the Spanish will is to be governed by Spanish law as the *lex situs*. The second step also appears to me to present no difficulty. For when it is asked whether by the phrase "Spanish law" is meant only the internal law of Spain or the whole of the law of Spain, including therein the body of rules of private international law recognised and administered by its courts, the answer is, in my judgment—at any rate so far as this court is concerned—conclusively provided by the following passage ([1941] 3 All E.R. 25, 26) from the judgment of the Privy Council in *Jaber Elias Kotia v. Katr Bint Jiryes Nahas* (1):

In the English courts, phrases which refer to the national law of a *propositus* are *prima facie* to be construed, not as referring to the law which the courts of that country would apply in the case of its own national domiciled in its own country in regard (where the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the *propositus*, having regard to what, in their view, is his domicile (if they consider that to be relevant), and having regard to the situation of the property in question (if they consider that to be relevant).

The judgment in question was that of a very strong Board, and, although it may be urged that so far as the case before the Board was concerned the observation was *obiter dictum*, it was put forward as a statement of the law of England on this point, and it is supported by an impressive body of judicial authority, of which reference may be made to *Collier v. Rivaz* (2), *Casdagli v. Casdagli* (3), in which the dissenting judgment of SCRUTTON, L.J., in the Court of Appeal was approved by the House of Lords in the same case, *Re Ross, Ross v. Waterfield* (4) and *Re Askew, Marjoribanks v. Askew* (5).

It is at this point that the real difficulty on this part of the matter arises. What is the law which would be applied by the Spanish court, if, on the facts which I have stated, the questions as to the devolution of the Spanish property which I have to decide were being decided by that court? As will emerge later in this judgment, the question comes down to this: Does Spanish law recognise and apply the doctrine of *renvoi*? It is not a difficult question to state, but it is not easy to answer. It is clear from the expert evidence that in Spain the only court whose decisions are binding in other cases is the Supreme Court. The decisions of lower courts may be cited in other courts, but do not bind such courts. In these circumstances, I must address myself to the question: What is the law on the matter in question which would be expounded by the Supreme Court of Spain if it were before that court? I have had the assistance of the evidence of three Spanish lawyers—Mr. Valls, who is a practising member of both the Spanish and English Bars and legal adviser to the Spanish Embassy and the Spanish Consulate-General in London; the Illustrisimo Senor Don Juan de Callejon, a practising member of both the Spanish and English Bars and Mr. Valls' predecessor as legal advisor to the Spanish Embassy in London; and Dr. Colas, again a member of both the Spanish and English Bars, but who does not now practice in the Spanish courts though he did so for many years—he is also a doctor of law in the University of Madrid. Affidavit evidence was given by Mr. Valls on behalf of the plaintiffs, by Senor Callejon on behalf of the present duke and by Dr. Colas on behalf of the last defendant, the Dowager Duchess of Wellington. Mr. Valls and Dr. Colas were cross-examined before me on their affidavits. Senor Callejon unfortunately died before the hearing, but no objection was taken to his affidavit being read and relied on on behalf of the present duke. As regards Mr. Valls and Dr. Colas, they were most satisfactory as witnesses. Each made plain his conclusions and the reasons for them. The difficulty arises from the circumstances, first, that, as they both agreed, there is no express provision in the Spanish Civil Code, nor any express decision of the Supreme Court, on the question of the applicability of the doctrine of *renvoi* in Spanish law, and, secondly, that on this matter they arrived at diametrically opposed conclusions. In a case involving the application of foreign law as it would be expounded in the foreign court the task of an English judge, who is faced with the duty of finding as a fact what is the relevant foreign law and who is for that purpose notionally sitting in that court, is frequently a hard one. But it would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either in this country or in Spain the relevant law of Spain as it would be expounded by the Supreme

Court of Spain which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain, and two conflicting decisions of courts of inferior jurisdiction.

The relevant articles of the Spanish Civil Code provide as follows :

Article 9. Laws relating to family rights and duties or to the status, condition or legal capacity of persons, bind Spaniards though resident in a foreign country.

A Article 10. Movables are governed by the law of the country of their owner ; immovables by the law of the country where they are situate. However, intestate succession as well as testamentary successions shall be governed as regards the order of succession inheritance rights and intrinsic validity of the dispositions by the national law of the person whose succession it is, whatever be the nature of the property and the country in which it is situate.

Article 659. The estate comprises all the rights property and liabilities of a person which are not extinguished by his death.

B Article 661. The heirs succeed to the whole of the rights and obligations of the deceased by the mere fact of his death.

The phrase "national law" in art. 10 is not defined in that article or elsewhere in the Civil Code. It appears to me, as a matter of construction of the language of the article, that it would be possible to interpret the phrase either as meaning the internal law of the nationality, or as meaning the whole of the law of the

C nationality including its rules of private international law. It is to be observed that the phrase occurs in the second paragraph of the article in a provision which constitutes an exception to the general rule contained in the first paragraph, and which appears to have as its object the establishment of the rule that, as regards succession, all forms of property shall be governed by the same set of rules. This provides a context on the face of the article leaning in favour of the view that by "national law" is meant the internal law of the

D nationality. It is not, however, decisive of the matter. It appears to me to be established by the evidence that in its development Spanish law was much influenced by the continental doctrine of the statutes—in Spanish the *doctrina de los estatutos*—under which a foreigner was accompanied by his civil status and capacity, and the laws of his country had to be applied to him when those laws were not opposed to the principles of public order and the interests of the

E nation in which his claims were formulated. This rule was recognised by the Supreme Court of Spain in two decisions of Jan. 13 and May 12, 1885, and by a subsequent decision of May 26, 1887—*i.e.*, before the Civil Code was promulgated in 1889. I am further satisfied that the only law recognised by that

F doctrine was the internal law of the *lex patriae*. It is also established by the evidence that under Spanish law the estate of a deceased person is one and universal wherever the assets are situate and whatever be their nature. This view was advanced by Mr. Valls, who further stated that it is precisely in order to preserve this principle that art. 10 of the Civil Code expressly excludes the *lex domicilii* and the *lex situs* from all questions of succession and establishes the *lex patriae*. Mr. Valls in support of his view referred to the works of certain eminent Spanish lawyers.

G The first reference was to SENOR CASTAN, who is the President of the Supreme Court of Spain. In SPANISH CIVIL LAW—COMMON AND REGIONAL (1936) vol. 1, pp. 70-71, he writes as follows :

H Rights of Succession. By virtue of the rule laid down by the second paragraph of art. 10, intestate and testamentary successions shall, as regards the order of succession and nature of succession rights and intrinsic validity of the dispositions, be governed by the law of origin of the person whose succession is in question, whatever be the nature of the property and the country in which it is situate. The personal law of the deceased applies, therefore, to all questions appertaining to the material rights in the succession or (as is the same) to the fundamental rules thereof, even if the forms and formalities of the acts referring to the same are governed, as we shall see, by the law of the place where such acts take place. The withdrawal of successions from the real statute is a novelty of the Civil Code taken from the Italian Civil Code and is based on the necessity of maintaining the unity of the succession and of preventing the estate from being divided into so many different portions as there may be territories in which the assets may be situate.

Secondly, Mr. Valls refers to PROFESSOR TRIAS DE BES, a professor of International Law at Barcelona University, who, in his work, PRIVATE INTERNATIONAL

LAW—POSITIVE SYSTEM OF SPANISH LAW, 2nd ed. (1939), p. 31, deals with the same point thus :

Succession. Paragraph 2 of the said art. 10 contains, commencing with the word "However" which implies an exception to the statutory distinction—the literal transcription of art. 8 of the Italian Civil Code . . . This principle is beyond reproach because the whole matter of succession in its widest sense is governed wholly in Spain by the national law of the deceased, adopting the principle of the unity and universality of the succession.

Lastly, Mr. Valls refers to ALCUBILLA, who in his work, THE DICTIONARY OF THE SPANISH ADMINISTRATION, 6th ed., vol. 3, p. 676, summarises the question thus:

The solutions and opinions of authors who write on international law in regard to the statute to be applied in questions of succession can be condensed into these three : (i) to apply either the law of the last domicile or the national law of the testator ; (ii) to follow the rule of the *lex rei sitae* both for moveables and immovables, and (iii) or mixed, that is to say, to govern immovables by the real statute and the movables either by the law of domicile or by the law of the nation of the testator. The Spanish Code, taking its inspiration from the principle of unity of succession and the principle of the statutes, accepts the solution of the Italian Code, thus avoiding, where there is only one deceased involved, the difficulty and absurdity of dividing the unity of the succession and the possibility that within a universality of succession there should arise a plurality of estates because possibly the territories in which the assets are situate may be several.

As I understood his evidence, Dr. Colas did not challenge the view that under Spanish law the estate of a deceased person is one and universal, or, putting it another way, that the principle of the unity and universality of the succession applies to such an estate, but he did challenge the conclusion which Mr. Valls and the writers to whom I have referred seek to draw as to the effect, having regard to that principle, of art. 10 of the Civil Code. Dr. Colas maintained that :

Mr. Valls here falls into the error of confusing the Roman doctrine of *hereditas* from which these articles clearly derive the doctrine of the continuity of the legal personality of the deceased in his heirs (that is, the fact of the succession of the estate as a universal whole) with the quite distinct question of the procedural manner or form by which that estate may pass. In other words, the estate may pass as a universal whole to several persons, who may be heirs according to several systems of laws without destroying the integrity of the estate in the sense in which it is defined in art. 659, because all the rights, property and liabilities legally subsisting on the death of the person still survive collectively in his heirs.

The reasoning of Mr. Valls and the writers to whom he referred appeals to my mind. In my view, the object of the second paragraph of art. 10 of the Spanish Civil Code is to preserve the principle of the unity and universality of the succession, and it is for that reason that in case of succession the *lex patriae* is substituted for the *lex domicilii* and the *lex situs*. Again, I say that that does not conclude the matter, but, if I am correct in my reasoning so far, I have ascertained a circumstance which may well assist in answering the question which I have to answer. Indeed, if the matter rested there, I would say that it would be contrary to the spirit and intendment of the Spanish Civil Code to hold that in questions of succession Spanish law should recognise and apply the doctrine of *renvoi*.

I must, however, refer to the only two Spanish cases on this subject. The first is a case decided on June 30, 1900, by the Juzgado de Hospital, Barcelona—that is what would correspond in this country to a court of first instance. For the report of this case I have to rely on a translation from CLUNET, JOURNAL DU DROIT INTERNATIONAL PRIVE, vol. 28 (1901), pp. 905, 911:

D.T.A., a Scotchman domiciled in Barcelona, died there, possessor of an important industrial concern ; his estate consisted of the said business, real estate in Barcelona, securities and movables. The distribution of the estate between his legatees gave rise to the question as to what law should be applied in the matter. Article 10 of the Civil Code prescribes the applicability of the law of the nationality of the *cujus* ; that is, in the case in question, Scottish law. But Scottish law in this instance refers to Spanish law as applicable in Barcelona, with reference to movables of the deceased under the law of domicile, and with reference to immovables in accordance with the *lex rei sitae*.

At p. 911, the judge's decision is transcribed in the following words:

Juge de l'Hospital, Barcelona, Aug. 3, 1900. According to the ruling of art. 10 of the Civil Code, as to which the succession on intestacy and on testacy the order of succession, with reference to the rights of the successors; and the validity of the dispositions, are governed by the law of nationality of the deceased person, whatever the nature of the property is and of the country in which it might be situated. The law of Scotland should be applicable in view of the fact that the deceased D.T.A. was a Scottish subject. Scottish law does not, however, accept the jurisdiction which Spanish law gives to it, according to art. 10 of the Civil Code, and refers again to the latter, by reason of the deceased having left the movable and immovable property at Barcelona where territorial law should rule the succession. Considering that there is not any ruling in Spain which can settle this conflict, one ought therefore, according to art. 10 of the Civil Code, to refer to established custom or to the general principles of law, and in this case, following the opinion of the different jurists and according to the advice of Professor D. Juan de Dios Trias, Professor of International Law of the University, there is not the slightest doubt that the succession of D.T.A. ought to be governed by the law of Catalonia, as the property left by him was situated in Barcelona.

I cannot consider the reasoning in the last paragraph of this report as at all satisfactory. In the first place, I find in art. 10 no direction to refer to established custom or the general principles of law, whatever the latter phrase may mean. In the second place, no custom or general principles of law are referred to. In the third place, the evidence before me showed that the weight of juristic opinion at the present time is not in favour of applying the doctrine of *renvoi*, and I am quite unable to assume that in 1900 juristic opinion was unanimous or anything like unanimous in favour of its application. In the fourth place, it is clear that the court was really influenced by the particular opinion referred to, namely, that of PROFESSOR TRIAS DE BES, Professor of International Law at the University of Barcelona. The decision is not one which binds any other Spanish court, and *a fortiori* not the Supreme Court. I am free, in my endeavour to expound the law as I consider it would be expounded by the Supreme Court of Spain, to decline to follow that decision, and, finding it unsatisfactory for the reasons which I have given, I do not propose to follow it.

The other decision to which I must refer is that of the Court of Appeal of Granada of Feb. 7, 1925, affirming the judgment of a lower court. In that case the facts were as follows:

A.L. had died leaving immovable property in Spain. The plaintiff's case was that the devolution of the estate should be governed by Spanish law because A.L. was a Spaniard, but if he were English (his nationality was in dispute) Spanish law should likewise apply to all questions appertaining to his said immovables on the application of the doctrine of *renvoi*. The defendant relied on the English nationality of the deceased and submitted that *renvoi* was not applicable. The court found as a fact that the deceased was an English national and ruled that the doctrine of *renvoi* was not relevant because in the words of the judgment "the theory of *renvoi* . . . has been recognised and accepted exceedingly rarely as in reality it has acquired no status in law which nations recognise or incorporate in their respective legislations and in the present case such is the clarity and precision of para. 2 of art. 10 of the Civil Code that there is no need to search apart from it and seek a solution other than that given by the said article itself."

This judgment was reviewed by the Supreme Court of Spain on Feb. 10, 1926, when it was held that the nationality of the deceased was Spanish and not English. Considerable discussion took place before me on the question whether or not the Supreme Court had expressly or by implication expressed its disapproval of the conclusion of the Court of Appeal of Granada that Spanish law rejects the doctrine of *renvoi*. I do not intend to go into this matter in detail. My conclusion is that it did not do so. I arrive at this after very carefully considering the translation of the relevant parts of the judgment. On the other hand, sitting as the Supreme Court of Spain, I have now to consider the judgment of the Court of Appeal of Granada, and with all respect, on the extract from the report which is before me, I find it as unsatisfactory as that of the Court of Barcelona. I cannot accept that in 1925 "the theory of *renvoi* has been accepted exceedingly rarely." To take but two examples, it is clear that by that year it had been embodied in the statutory law of Germany and had been recognised by the courts of France. It is true that the doctrine has been assailed in no uncertain terms by the jurists of all nations and epithets of varying

intensity have been used in the attack, but the statement that it has been "recognised and accepted exceedingly rarely as in reality it has acquired no status in law which nations recognise or incorporate in their respective legislations" is a statement made in the teeth of the facts as they existed in 1925. Therefore, on the basis of the extract of the judgment in that case with which I have been furnished, I am of opinion that it provides me with no reliable guide to the solution of the problem before me.

In this state of the evidence I am thrown back on the wording of art. 10 of the Civil Code, containing in its language the pointers to which I have referred—the insistence of the Spanish law of succession on the principle of the unity and universality of the succession: the extent to which before the introduction of the Civil Code in 1889 Spanish private international law had been influenced by the *doctrina de los estatutos* with its insistence on the internal law of the *lex patriae*: the circumstance that, to put it no higher, there exists a strong cleavage of opinion among Spanish jurists of whose views the Spanish judges will take cognisance for the purpose of making up their minds on a question such as this in regard to which no binding authority exists: and that, of those who were cited before me, the majority consider that Spanish law would not apply the doctrine of *renvoi*, and include in their number the President of the Supreme Court. Basing myself on this material, I come to the conclusion that it would be against the spirit and intendment of the Spanish Civil Code to hold that, in a case such as this, Spanish law would accept the *renvoi* which the English law makes to it as the *lex situs*. I therefore hold that, according to Spanish law, the questions raised by this summons as to the devolution of the immoveable property in Spain of the testator must be resolved by reference to English law.

I turn, therefore, to the Spanish will. The vital provision is the devise and bequest of the Spanish immovables and movables:

... unto the person who being of the issue of the late most noble Arthur Duke of Wellington and Ciudad Rodrigo my great-great-grandfather will on my decease become Duke of Wellington and Ciudad Rodrigo for his absolute benefit.

I treat this as a devise and bequest in favour of the person who becomes "Duke of Wellington and Duke of Ciudad Rodrigo," a reading in favour of the present duke. But read even so, this appears to me to be a devise and bequest to the person, if there be one, who shall fulfill both requirements. In other words, it is a gift subject to a double qualification. In my view, there is no room for the application of the maxim *falsa demonstratio non nocet*. No one person exists who fulfils both qualifications, and therefore the gift fails. The question then arises whether the Spanish movable and immoveable property is disposed of by the English will or is undisposed of. The English will is described by the testator as:

... my last will save as regards the property which is disposed of by my Spanish will which property so disposed of is not intended to be disposed of or dealt with by this my will.

Apart from this provision, the effect of which I shall have to consider, the will contains language apt and sufficient to dispose of both the Spanish movables and the Spanish immovables. By cl. 3 the testator bequeaths to his trustees:

Thirdly all if any moneys and other personal or movable property in Spain belonging to me at my death which does not pass under my Spanish will.

By cl. 5 he devises and bequeaths "all my property real as well as personal not hereby or by any codicil hereto otherwise specifically disposed of" in each case for the same person, in the events which have happened, the present duke. The question, therefore, is what is the effect of the words at the beginning of the English will which I have quoted, read in the light of the rest of the will and in the light of the circumstance that, as I have held, the Spanish will is ineffective to dispose of the Spanish movable and immoveable property comprised therein.

It is quite clear on the authorities that, had the relevant provisions of the Spanish will been incorporated in the English will, the Spanish property would have passed as regards the movable property under cl. 3 and as regards the immoveable property under cl. 5 of the English will and would not have been

undisposed of: *Green v. Dunn* (6); *De Trafford v. Tempest* (7); *Blight v. Hartnoll* (8); and *Mason v. Ogden* (9). To such a state of circumstances the reasoning of SIR GEORGE JESSEL, M.R., (23 Ch.D. 222) in *Blight v. Hartnoll* (8) would have applied. There would have been a true residue and the Spanish property, ineffectively disposed of by the words "to the person . . . who will on my decease become Duke of Wellington and Ciudad Rodrigo," would pass under cl. 3 and 5 of the English will. Does it make any difference that the

- A opening words of the English will state that the Spanish property is not intended to be dealt with by that will? Is the effect of that provision that there is not a true residuary gift in the English will? I think not. The provision in question states on its face the reason why the testator does not intend to dispose of or deal with the Spanish property by the English will, namely, because in his words it "is disposed of by my Spanish will." Those words to my mind carry with them the implication that the Spanish property is excluded from the English
- B will solely because the testator had designed to dispose of it by his Spanish will, and, therefore, that the words "disposed of by my Spanish will" mean "effectively disposed of by my Spanish will." I do not find in any other part of the English will any language which would indicate a contrary intention. In my judgment, therefore, the Spanish property, movable and immovable, which is comprised in, but ineffectually disposed of by the Spanish will, passes to the
- C present duke under the English will, the movable property under cl. 3 and the immovable property under cl. 5 and 6.

- I must now consider the submission on behalf of the defendant the Dowager Duchess of Wellington that the English will is ineffectual to pass the immovable property in Spain because by that will it is subjected to certain trusts: that Spanish law does not recognise trusts: that, consequently, the present duke could not make a title to the Spanish immovable property under the English
- D will: and that, therefore, the defendant the Dowager Duchess takes the whole of the Spanish immovables as on an intestacy. It appears from the expert evidence that, so far as immovable property in Spain is concerned, there is a system of compulsory registration, and that, in order to perfect title to immovable property or to any interest therein, such as a usufruct, it is necessary to obtain registration. The experts agree that Spanish law does not recognise the doctrine
- E of trusts as understood in English law, and that it is not possible in Spanish law to obtain registration of a trust. They are also agreed, however, that the mere presence in a document of title, including a will, of the word "trust" would not of itself be fatal to registration, and that, assuming English law to be applicable in the case in question, the registrar and, if necessary, the Spanish court would seek competent English opinion as to the effect of the document in question. Further, they agree that if the English opinion were that the
- F effect, for instance, of a devise to A. in trust for B. was to confer on B. an immediate beneficial interest, the document would confer a good title on B., notwithstanding the presence of the word "trust." It further appears that the powers of what corresponds to the executor in Spanish law last only for one year from the death of the deceased, and that at the end of that period he becomes *functus officio*, but that in such a case, where the administration of the estate is not complete, the Spanish court would appoint an administrator.
- G In this case the testator by cl. 5 of the English will devised and bequeathed his residuary estate:

. . . to my trustees upon the administration trusts contained in Form 8 of the Statutory Will Forms, 1925.

By cl. 6 of the English will the testator provided as follows:

- H My trustees shall stand possessed of the investments and property hereinbefore by reference directed to be made or authorised to be retained including any part of my residuary estate for the time being unconverted and the investments and property for the time being representing the same and the income thereof upon trust for the person who upon my death shall become Duke of Wellington absolutely if he shall be of the age of 21 years but if he is under the age of 21 years then upon trust for such person as within the period of 21 years from my death first is Duke of Wellington and of the age of 21 years absolutely but if no person is Duke of Wellington and of the age of 21 years within the said period then upon trust for the person who immediately prior to the expiration of the said period is Duke of Wellington absolutely.

In the events which have happened, namely, the circumstance that the present duke was of the age of 21 years at the death of the testator, the effect of cll. 5 and 6 of the English will is that the plaintiffs as trustees hold the Spanish immovable property for the present duke absolutely, subject to such of the administration trusts contained in Form 8 of the Statutory Will Forms, 1925, as, in the circumstances, including the fact that the present duke was of the age of 21 years at the death of the testator, are applicable—that is, that the trustees hold the Spanish immovable property for the limited purpose of due administration, and subject thereto for the present duke absolutely. A

In my judgment, on the true view of the expert evidence, the interposition of the administration trusts before the absolute gift to the present duke does not make the English will ineffectual to pass the Spanish property, and the land registrar in Spain, or, if necessary, the Spanish courts upon reference to them, on being informed of the above circumstances and that administration was complete, would be bound to register or to order registration of the present duke as the absolute owner of the Spanish immovable property. For these reasons, in my judgment, the present duke is entitled to the Spanish movable and immovable property comprised in, but ineffectually disposed of by, the Spanish will. B

Declaration accordingly. Costs of all parties as between solicitor and client to be taxed and paid out of the estate.

The defendant, Edith Unwin, personal representative of the testator's mother (who was interested in an intestacy), appealed, and the defendant, Lady Anne Maud Rhys, the testator's sister, who succeeded to the Spanish dukedom, cross-appealed. C

Neville Gray, K.C., and Wilfrid Hunt for Edith Unwin.

Winterbotham for Lady Anne Maud Rhys.

Raymond Jennings, K.C., and Jopling for the seventh Duke of Wellington. D
Rawlence for the trustees.

Dec. 9. The Court of Appeal dismissed the appeal and cross-appeal.

LORD GREENE, M.R. [delivering the judgment of the court]: Construing the wills of May 6, 1942, and Dec. 6, 1942, in accordance with the principles of interpretation observed by English courts, we are unanimously of opinion that the decision of **WYNN-PARRY, J.**, was right. E

Counsel for the defendant, Lady Anne Maud Rhys, argued that under the will of May 6, 1942, she and the seventh Duke of Wellington were entitled to the movable and immovable property in question as joint tenants. This argument is plainly wrong. The gift contained in that will is a gift to one person who must possess both the qualities of Duke of Wellington and Duke of Ciudad Rodrigo. As there was no such person, that gift failed, as **WYNN-PARRY, J.**, held. The gift is not, as the argument claimed, a gift to two persons, one of them the Duke of Wellington, and the other the Duchess of Ciudad Rodrigo. Counsel for the defendant, Edith Unwin, argued that, although the gift of the property in question contained in the will of May 6, 1942, failed, as already stated, it was not caught by the gift in favour of the seventh Duke of Wellington contained in the will of Dec. 6, 1942, as **WYNN-PARRY, J.**, had held. This argument also fails on the grounds correctly stated by **WYNN-PARRY, J.** Although we agree with the conclusions of **WYNN-PARRY, J.**, and with the reasons which he gives, we think that the formal judgment would be more conveniently expressed if a small variation in its wording were made, and we, accordingly, direct that the following order shall be substituted for it: F

Declare that upon the true construction according to the law of England of the said wills the property in Spain expressed to be disposed of by the said will dated May 6, 1942, was given to the defendant, the most noble Gerald seventh Duke of Wellington. G

Appeal and cross-appeal dismissed. Costs of the executors and of the seventh duke, as between solicitor and client, out of the estate. H

Solicitors: *E. F. Turner & Sons* (for the testator's sister and the personal representative of the testator's mother); *Theodore Goddard & Co.* (for the seventh duke); *Farrer & Co.* (for the executors).

[Reported by **R. D. H. OSBORNE, ESQ., and F. GUTTMAN, ESQ., Barristers-at-Law.**]

ECCLES v. BRYANT AND ANOTHER.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.J.J.), December 2, 3, 1947.]

Sale of Land—Contract—Duplicate contracts—Need of actual physical exchange.

The vendors proposed to sell to the purchaser a house, and the terms set out in the preliminary correspondence were stated to be subject to contract. On June 11, 1946, the vendors' solicitors wrote to the purchaser's solicitors: "Our clients have now signed their part of the contract herein and we are ready to exchange and shall be glad to hear from you." On June 18, 1946, the purchaser's solicitors wrote to the vendors' solicitors: "We accordingly enclose herewith the contract signed by our client and shall be glad to receive in exchange the part signed by your client." The vendors changed their minds and did not send their part in exchange. On appeal by the vendors against a decree of specific performance granted to the purchaser,

Held: the customary method by which a contract of the kind envisaged is brought into existence is by the exchange of the two parts of the contract, and until such exchange took place, notwithstanding that both parts were signed, there was no contract. It was clear from the correspondence that the usual method of contracting was contemplated, and, therefore, as no exchange did in fact take place, there was no contract of which specific performance could be decreed.

Decision of VAISEY, J. (ante., p. 63), reversed.

[AS TO REQUISITES FOR EXISTENCE OF CONTRACT FOR SALE OF LAND, see HALSBURY, Hailsham Edn., Vol. 29, pp. 237-239, paras. 319-322; and FOR CASES, see DIGEST, Vol. 40, pp. 12-18, Nos. 1-54, and Vol. 12, p. 79-89, Nos. 471-546.]

D Cases referred to:

- (1) *Chillingworth v. Esche*, [1924] 1 Ch. 97; 93 L.J.Ch. 129; 129 L.T. 808; Digest Supp.
- (2) *Trollope (George) & Sons v. Martyn Bros.*, [1934] 2 K.B. 436; 103 L.J.K.B. 634; 152 L.T. 88; Digest Supp.
- (3) *Winn v. Bull*, (1877), 7 Ch.D. 29; 47 L.J.Ch. 139; 42 J.P. 230; 12 Digest 86, 511.
- (4) *Keppel v. Wheeler*, [1927] 1 K.B. 577; 96 L.J.K.B. 433; 136 L.T. 203; Digest Supp.
- (5) *Lockett v. Norman-Wright*, [1925] Ch. 56; 94 L.J.Ch. 123; 132 L.T. 532; Digest Supp.

APPEAL by the vendors against a decree of specific performance granted to the purchaser (*ante.*, p. 63) by VAISEY, J., who held that the exchange of the two parts of a contract for the sale of land was usual but not essential and that in this case the contract was concluded without exchange. The Court of Appeal now reversed that decision. The facts appear in the judgment of LORD GREENE, M.R.

Neville Gray, K.C., and *H. A. Rose* for the vendors.

Fox-Andrews, K.C., and *Ronald E. Hopkins* for the purchaser.

LORD GREENE, M.R.: This is one of that long series of cases which, no doubt, will go on as long as contracts take place, in which one party to a transaction, which was intended to produce a contract and was conducted on the usual condition that it was to be subject to contract, says that a contract came into existence at a date on which the other party says that negotiations had not yet been completed and that no binding contract had come into existence.

The parties were minded to enter into a contract for the sale and purchase of a house. The matter was put into the hands of their respective solicitors in the ordinary way. The basis on which the negotiations were being conducted was that the terms set out in the preliminary correspondence were to be subject to contract and survey. We are not troubled with the survey. The important words are "subject to contract." Admittedly no contract came into existence in the earlier correspondence. It is common ground that the parties contemplated a definitive binding contract which was to come into existence in the future. It is clear that both firms of solicitors, when they were instructed to carry this matter through by their clients, intended to do so in the customary way which is familiar to every firm of solicitors in the country, namely, by preparing the engrossment of the draft contract when agreed in

duplicate and exchanging the two parts when signed by their clients. Anyone, I think, would have understood from the language of the earlier correspondence and the words "subject to contract" that the contract would be brought about by an exchange of the two parts signed by the parties. VAISEY, J., pointed out that what he called the ceremonial form of exchange, namely, the meeting of solicitors in the offices of one of them—usually the vendor's solicitor's office—and the passing of the two engrossments signed over the table may be taken to have fallen, and, indeed, no doubt it has, into disuse to a certain extent, particularly when the solicitors are in different parts of the country. He recognised that an exchange by post would in many cases take the place of the old more ceremonial exchange, but that an exchange was contemplated by both firms of solicitors appears to me to be clear. I am prepared to assume that their intention was that the exchange should take place by post. When an exchange takes place by post and a contract comes into existence through the act of exchange, the earliest date at which such a contract can come into existence would be the date when the later of the two documents to be put in the post is actually put in the post. Another view might be that the exchange takes place and the contract thereby comes into existence when, and not before, the parties or their solicitors receive from their opposite numbers their parts of the contract. It is not necessary here to choose between those two views. I mention them particularly because counsel for the purchaser tried to suggest an intermediate stage, that where the parties contemplate an exchange by post the contract is completed, not when an exchange takes place, but when one of the parties puts his part into the post. I am afraid I cannot accept that. It seems to me to be a contradiction in terms to speak of that as an exchange.

To justify my statement that the parties, or, at any rate, their solicitors, throughout were contemplating nothing short of exchange, I will refer to some of the correspondence. In a letter of June 4 from the vendors' solicitors to the purchaser's solicitors reference is made to the vendors' requirement that the purchase be completed on or before June 24, and they say: "We await hearing from you when the contract has been signed by the purchaser." A little earlier on they refer to "our part of the contract which we are having engrossed." They were doing what is the ordinary thing in a case where a contract is to be in two parts. They were preparing their own part and they speak of the purchaser signing his part—the ordinary letter which one solicitor writes to another. It is no good making an arrangement for an exchange until you know that both parties have signed. That is a common form of enquiry that solicitors make. The decision of the learned judge appears to me, if I understand it aright, to turn entirely on a letter of June 11 from the vendors' solicitors to the purchaser's solicitors. In it they say:

Our clients have now signed their part of the contract herein and we are ready to exchange and shall be glad to hear from you.

Those last words mean nothing more than: "We shall be glad to hear from you when you are ready to exchange." That is the sort of observation that solicitors regularly make to one another for the purpose of arranging a convenient exchange. That letter clearly contemplates an exchange. It announces that they have signed their part of the contract and they are prepared to exchange. In a letter of June 14, the purchaser's solicitors say: "We are obtaining our client's signature. We will forward you our client's part of the contract in due course." On June 15 the vendors' solicitors reply: "We must repeat that, if the matter is to go through, contracts must be exchanged immediately and it must be completed by the 24th instant." On June 18 the purchaser's solicitors write: "We accordingly enclose herewith the contract signed by our client and shall be glad to receive in exchange the part signed by your clients." The vendors changed their mind and did not send their part in exchange.

It is said that a contract took place when, in response to an alleged invitation on behalf of the vendors, the purchaser signed his part of the contract and communicated the fact to the vendors. It was argued that there is no necessity in this class of case for an exchange of documents, and that the references which have been made in many judgments in this court and other courts to an exchange are either inaccurate or wrong. The answer to that seems to me to be simple. When parties are proposing to enter into a contract, the manner

in which the contract is to be created so as to bind them must be gathered from the intentions of the parties, express or implied. In such a contract as this, there is a well-known common and customary method of dealing, namely, by exchange, and anyone who contemplates that method cannot contemplate the coming into existence of a binding contract before the exchange takes place. It was argued that exchange is a mere matter of machinery, having in itself no particular importance or significance. So far as significance is concerned,

- A it appears to me that not only is it not right to say of exchange that it has no significance, but it is the crucial and vital fact which brings the contract into existence. As for importance, it is of the greatest importance, and that is why in past ages this procedure came to be adopted by everybody as the proper procedure. In dealing with contracts for the sale of land, it is of the greatest importance to the vendor that he should have a document signed by the purchaser and to the purchaser that he should have a document signed by the
- B vendor. It is of the greatest importance that there should be no dispute whether a contract has or has not been made, and that there should be no dispute as to the terms of it. This procedure of exchange ensures that none of those difficulties will arise. Each party has got a document of title, because directly a contract is entered into and that contract is in writing relating to land, it is document of title. That can be illustrated by the simple case where
- C a purchaser makes a sub-sale. The contract is a vital document for the purpose of the sub-sale. If he had not got the vendor's part, signed by the vendors, to show to the sub-purchaser, the purchaser would not be able to make a good title.

- If the argument for the purchaser is right and the contract comes into existence before exchange takes place, it would mean that neither party could call on the other to hand over his part. The non-exchanged part would remain the
- D property of the party who signed it, because exchange would be no element in the contract, and, therefore, should the purchaser wish to resell he would have no right to obtain from the vendor the vendor's signed part. Counsel for the purchaser brushes that sort of difficulty aside, and also the difficulty of ascertaining the exact terms of the contract which would be involved where there was no exchange. He says we are dealing here with honourable people.
- E I have not the faintest doubt that is the case, but a little experience in these courts leads one to suppose that that is not always the case in dealing with land. The vendor who likes to keep and refuse to hand over a document of title when he is under no obligation to hand it over is a very common creature. That is why in conveyances there is always an undertaking to produce documents and so on. The parties were clearly contemplating that an exchange should take place. I am prepared to assume that the exchange they were contemplating was an exchange by post, but the great thing was that it was an exchange.
- F

- Reverting to the argument that all references to exchange in earlier authorities are wrong, I would call attention just to one or two. I purposely quote in this context the language of two Lords Justices very experienced, if I may say so, in matters of this kind, and particularly in conveyancing matters. One was SARGANT, L.J., in *Chillingworth v. Esche* (1) where the question was whether a purchaser, who, on a proposal to enter into negotiations "subject to contract,"
- G had paid a deposit, or, rather, what was analogous to a deposit, was entitled to get it back if no contract was ever entered into. SARGANT, L.J., having found that no contract had come into existence under the original letters which were all subject to contract, said ([1924] 1 Ch. 114):

- Then on the basis that the contract is conditional, what is the result of the payment of the deposit? One obvious object of such payment was that it should form a deposit in the ordinary way if and when the contemplated definite contract was subsequently
- H signed and exchanged.

MAUGHAM, L.J., in *George Trollope & Sons v. Martyn Brothers* (2), no doubt by way of *dictum*, because it was not the actual point that was before the court, said ([1934] 2 K.B. 455):

In my opinion the fact that there was an offer and acceptance "subject to contract" presents no difficulty in this case and, properly considered, is an irrelevant circumstance. Ever since the case of *Winn v. Bull* (3), if not long before, it has been well settled that the result of an offer "subject to contract," means that the matter remains in negotiation until a formal contract is executed, that is, if the contract is recorded

in two parts, until the formal contracts are exchanged. The cases are referred to in *Keppel v. Wheeler* (4) and see *per BANKES, L.J.* ([1927] 1 K.B. 584). Taught by experience in these courts it is every-day practice for intending purchasers of property who are making an offer to make their offer in the form of "subject to contract," with the result that they are not at that time bound and have a *locus penitentiae* until the formal contracts are exchanged.

I pick out those references to exchange because the judges who uttered them might be thought to have particular experience in this branch of the law, but there are many other references in other cases to the same thing, and, indeed, it is common knowledge, if I may say so, among people who are familiar with conveyancing practice that that is the ordinary method of dealing in the case of contracts for the sale of land by private treaty. VAISEY, J., as I read his judgment, took the same view. He took the view that, if something had not happened in the course of the correspondence, the general rule would have applied, that the contract would not have come into existence until the ordinary time as contemplated by the parties, namely, exchange. I have never heard it suggested that in a case where the parties contemplated exchange as being the vital thing which bound them contractually to one another, they were not entitled down to the very last moment to change their minds and refuse to exchange. That is what took place here, and, if it had not been for the event to which I am now going to refer, I think VAISEY, J., would have taken the same view as this court.

Both parties did, in fact, sign their respective parts of the contract. The purchaser put his part in the post and it duly arrived. The vendors did not put their part in the post. Instead, they wrote to repudiate the proposed bargain and declined to go on. There was no exchange. The vendors were doing exactly what they would have been entitled to do if the exchange was to take place over a table. If the purchaser had handed his document to the vendors across the table, but the vendors had said: "we change our mind" and refused to hand their part over, no contract would have come into existence. That, in my opinion, is elementary and it is exactly what happened here, except that the post was used to hand over the purchaser's part of the contract and there was no manual delivery over the table.

The event which the judge thought decisive in this case was the sending of the letter of June 11 which he construed in a particular way. Before I explain his point, I ought to say that the principals in this case, in instructing their solicitors, must, in my opinion, be assumed to have given them authority to carry the business through in the ordinary way recognised as customary for dealing with conveyancing matters of this kind in the absence of any evidence to the contrary. It would be impossible to carry through business unless one made some such assumption like that when a principal puts a matter into the hands of a solicitor. I go further than that and say that, if the vendors' solicitors in this case had taken on themselves without authority to agree to a method of making the contract other than the customary method, by dispensing with exchange, they would have been committing a breach of duty to their client and might have found themselves liable for heavy damages for negligence. It is argued, and the judge found, that, although in his view, as I read his judgment, the making of the contract by exchange was contemplated, there was a change of intention on June 11, 1946, and by that letter an offer was made to adopt a method of creating the contractual relationship different from the normal method of exchange. That method was to be the communication by the vendors' solicitors to the purchaser's solicitors that the vendors had signed and an invitation to the purchaser's solicitors to put the copy signed by their client into the post, and that the intention was, therefore, that that should be the method of contracting. In my respectful opinion, the judge placed on the letter a construction that it will not bear. I pass over the vital point that there is no evidence that the solicitors were ever given authority to alter what must have been intended, the normal method of procedure in these cases, and to accept a method of contracting which, besides being quite unusual, had serious disadvantages from the point of view of the client, namely, dispensing with exchange, but I will assume, for the sake of argument, that there was evidence that the vendors and the purchaser had both given their solicitors instructions to depart from the ordinary method. Assuming that such an authority was to be

inferred, no such departure ever took place, as I read this correspondence. There is nothing in the correspondence to suggest that the procedure of contracting by means of exchange was to be departed from. VAISEY, J., said (*ibid.*, 68):

A The circumstances of the case are unusual, but, on the whole, I think that it did become binding when the plaintiff, in response to the defendants' invitation, put his signed part of the contract into the post on the afternoon of June 18, 1946.

I cannot find anything which justifies the idea that any such invitation was ever made, quite apart from the question of authority to make it. If the vendors had delayed in sending their part of the contract to the purchaser's solicitors, the purchaser's solicitors could have cried off, just as much as the purchaser's solicitors in an exchange over a table can cry off at any moment before the vendors hand over their part of the contract.

B It is of the greatest importance, it appears to me, that these principles should be upheld. The inconvenience and chaos into which these matters would be thrown by the adoption of any other rules appear to me to be very great, but ultimately the matter comes down to this. Parties become bound by contract when and in the manner in which they intend and contemplate becoming bound. That is a question of the facts of each case, but in this case the manner
C of becoming bound which the parties and their solicitors must have contemplated from the very beginning was the ordinary customary convenient method of exchange. From that contemplation neither side and neither of the solicitors ever resiled, and there is no justification for taking the view that some new method of making the contract was ever contemplated by anybody. In my opinion, the action must be dismissed.

D **COHEN, L.J.:** I agree. As we are differing from the court below, I will state shortly my reasons for my conclusion.

As LORD GREENE, M.R., pointed out, this is one more of the many cases arising out of preliminary agreements, if they can be so called, subject to contract. This case differs from the reported cases in that both parties had signed their respective parts of what might have become the final agreement, but I think
E the principles applicable are the same. As I understand the judgment of the judge in the court below, he states three propositions of law, or principles of construction, whichever be the right term to apply to them. The first is that where a document or preliminary agreement is expressed to be subject to contract, it means and implies that the parties do not intend to be bound until another document embodying all the terms of the agreement between them is signed by them and becomes binding on them. That, I think, is common
F ground between the parties to this case. The second proposition is that, normally, that time will be when the contracts—i.e., the further documents—are exchanged, since that is the date on which contracts normally become binding in accordance with the usual conveyancing practice. That proposition is, of course, supported by the passages from the judgments of MAUGHAM, L.J., and SARGANT, L.J., which my Lord has already read. I can find no
G passage in any judgment in any of the cases to which our attention has been called which is inconsistent with them. It is true that in *Keppel v. Wheeler* (4), while BANKES, L.J., and SARGANT, L.J., in plain and unmistakable terms express the view that the matter remains in negotiation until the formal contract is settled and the formal contracts are exchanged, ATKIN, L.J. ([1927] 1 K.B. 589, 590) leaves open the question whether the date at which a concluded contract comes into being is the date when both parties sign or the date when the contracts are exchanged, but he certainly expresses no view in favour of the earlier date, and I respectfully adopt the observations, *dicta* though they may be, of MAUGHAM, L.J., and SARGANT, L.J., who were extremely versed in questions of this kind, as correctly stating the law on that subject. The third proposition is that it is not part of the law of the Medes and Persians that the contract must become binding at the date on which the parts are exchanged and at no other time, for, if the parties so express themselves that it is plain that they intend to become bound at some earlier, or, for that matter, later time, that time will be substituted for the time of exchange.

With those propositions (which I think are substantially the propositions on which the judge decided the case and, indeed, which counsel for the purchaser asked us to adopt) I entirely agree, but where I differ from the judge is in the application of those propositions to the facts of this case. The judge took the view that he could spell out of the letter of June 11, coupled with the vendors' signature on the draft contract, an offer which was accepted by the purchaser's signature and his solicitors' letter of June 18. This, he said, was an offer and an acceptance and accordingly the contract became binding when that letter of June 18 was put into the post. In my view, this is placing an impossible construction on the words used by the solicitors in the letter of June 11. In my view, as the MASTER OF THE ROLLS has said, that letter was the ordinary letter which any solicitor familiar with this kind of thing would be expected to write and was purely maintaining the view that an exchange was necessary, not merely as a matter of procedure, but in order that a binding contract should be made. They say: "We are ready to exchange," and I think counsel for the vendors was right in saying that the letter of June 18 accepted that view, because the purchaser's solicitors say: "We accordingly enclose herewith the contract signed by our client and shall be glad to receive in exchange the part signed by your clients," thus implying, I think, that the receipt of the part in exchange was an essential part of the arrangements between them.

In my view, therefore, there was no offer and nothing which could be accepted by the letter of June 18, but, if there was an offer, what authority had the solicitors to make it? It seems to me to be plain from the cases which were cited to us, including *Lockett v. Norman-Wright* (5) that the solicitors would have no authority to make any such bargain. In that case, TOMLIN, J., said ([1925] Ch. 62): "Solicitors are not, in the absence of specific authority, agents of their clients to conclude a contract for them, and I do not think that I can read this letter as making the solicitors agents to conclude the bargain or arbitrators to settle its terms." In the present case there was no evidence whatever of any such authority being conferred on the solicitors to make such a bargain, and I think that fact is perhaps an additional reason why we should place the natural construction on the letter of June 11 and not impute to the solicitors an intention to make a bargain which they had in fact no authority to make.

There is only one other matter to which I wish to refer. The MASTER OF THE ROLLS said, and I entirely agree, that probably in this case what the parties contemplated was exchange by post. On that basis, counsel for the purchaser asked us to take the view that exchange was completed when the first document was put into the post. That seems to me to be an impossible argument, because that would be not exchange but a unilateral transaction. I think, without deciding what is unnecessary, that in all probability the correct view as to the effect of an arrangement to exchange by post is that which was put by the MASTER OF THE ROLLS in the course of the argument, namely, that the earliest date on which on that basis an exchange could be effected would be the date on which the latter of the two documents was put into the post. For these reasons, I agree with the MASTER OF THE ROLLS that the appeal must be allowed and the action dismissed.

ASQUITH, L.J.: I agree. It appears to me, with the greatest respect to the judge, that he has founded his entire judgment on an impossible construction of the letter of June 11. Until that letter there was a transaction for the sale of land "subject to contract," and, if there had been no letter of June 11, I think the judge would have agreed that the parties should be taken not to have intended to be bound until exchange of the contracts, but he held that the letter of June 11 constituted a new offer on behalf of the vendors, an offer to be bound by something short of a complete exchange, whether physical or postal. The effect of that letter, according to him, is that the vendors' solicitors are saying: "We have signed our part of the contract, so that if you sign your part and post it to us, the matter will be in order," meaning by that "the vendors will be bound." Treating the letter as amounting to an offer and an offer of that tenor, the judge concludes quite logically that when on the afternoon of June 18 the buyer posted his signed copy of the contract to the vendors, that was an

acceptance, the vendors were bound from that moment, and the vendors' withdrawal, which was not communicated until the next morning, came too late. I agree, however, with my Lords that the judge was mistaken in regarding the letter of June 11 as a new offer or as an offer at all, let alone an offer to dispense with the requirements of exchange. Apart from a routine enquiry, that letter, it seems to me, re-affirms the pre-existing position under which the parties would not be bound until contracts were exchanged. Oddly enough, I think it is the first document in the correspondence which expressly alludes to this statement.

A It was accepted in that meaning. It was so understood, quite clearly, by the purchaser's solicitors, who, as has been pointed out, in their letter of June 18 enclosing the contract signed by their client, say: "We shall be glad to receive in exchange the part signed by your clients." If this is so, the major premise on which the judgment proceeds is erroneous and the conclusions founded on it do not follow. Counsel for the purchaser has argued that it has never

B been expressly decided that, in a contract for sale of land "subject to contract," exchange is a pre-condition of the birth of a binding bargain. This is, I think, literally true, but the explanation may well be that the proposition was thought to be beyond challenge. Its truth is asserted in a number of *dicta* in this court by judges of the greatest experience, which *dicta*, so far as I know, have never been questioned by higher authority, and the practical inconveniences of rejecting the proposition are formidable. If counsel is right, a seller on a "subject to

C contract" transaction might find himself bound if the buyer simply informed him that he, the buyer, had signed his copy of the contract. The seller might have no means of telling whether the buyer's assertion was true. If it was, he would find himself bound, but not possessed of the tangible proof of the buyer's obligation in the form of a copy of the contract signed by the buyer. It seems to me a plain (though, of course, a rebuttable) presumption that neither

D party would normally wish to be bound to the other in the absence of such a vital security as is afforded by physical possession of a copy of the contract signed by the other. I would only add that a passage was cited by counsel for the purchaser from WILLIAMS' VENDOR AND PURCHASER, p. 4, in support of his argument that exchange was not necessary, but in this passage it seems to me the author is directing his mind, not to the question whether exchange is or is not necessary to the formation of the contract, but merely to the difference

E in the character of the documents employed where land is sold by private treaty, on the one hand, and where it is sold by auction, on the other. For these reasons and for those given by my Lords, I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Nisbet, Drew & Loughborough*, agents for *Pearless, de Rougemont & Co.*, East Grinstead (for the vendors); *Godfrey Warr & Co.* (for the purchaser).
[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

HORTON v. HORTON.

[HOUSE OF LORDS (Lord Jowitt, L.C., Lord Wright, Lord Simonds, Lord Normand, Lord MacDermott), December 1, 17, 1947.]

Divorce—Nullity—"Wilful refusal to consummate"—Definite decision arrived at without just excuse—Duty of judge—Matrimonial Causes Act, 1937 (c. 57), s. 7 (1) (a).

The words "wilful refusal to consummate a marriage" in the Matrimonial Causes Act, 1937, s. 7 (1) (a) connote a settled and definite decision arrived at without just excuse, and, in determining whether there has been such a refusal, the judge should have regard to the whole history of the marriage.

On the evidence in the present case, *held*, that the husband had failed to prove that the marriage had not been consummated owing to the wilful refusal of the wife as required by s. 7 (1) (a).

[AS TO GROUNDS FOR DECREE OF NULLITY OF MARRIAGE, see HALSBURY, Halsbury's Laws of England, Vol. 10, pp. 634-645, paras. 934-945; and FOR CASES, see DIGEST, Vol. 27, pp. 265-272, Nos. 2326-2407.]

APPEAL by the husband against the dismissal by the Court of Appeal of his appeal against an order of LYNKEY, J., made at Leeds Assizes in July, 1946, dismissing his petition for a decree of nullity of marriage. The

House of Lords now held that on the evidence adduced the husband failed to prove the wilful refusal of the wife to consummate the marriage. The facts appear in the opinion of LORD JOWITT, L.C.

Drabble for the husband.

Karminski, K.C., and *Colin Duncan* for the King's Proctor.

The House took time for consideration.

LORD JOWITT, L.C. : My Lords, in this case the petitioner, the husband, sought a decree of nullity of marriage on the ground that the marriage had never been consummated. He alleged that such non-consummation was due to the wilful refusal of the respondent wife, and sought relief under the Matrimonial Causes Act, 1937, s. 7, which provides: "(1) . . . a marriage shall be voidable on the ground (a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage." The case was undefended and was heard before LYNKEY, J., at the Leeds Assizes in July, 1946. The husband had served in North Africa during the war and in February, 1942, had suffered severe wounds of the legs, but had sustained no other injuries. The marriage was solemnised on Oct. 7, 1944, according to the rites of the Roman Catholic Church of which the wife was a member. The husband was under instruction to become a member. The husband, at the time of the marriage, was still in the Army and was stationed in this country. His opportunities for intercourse with his wife were, therefore, limited to those occasions when he was on leave. The evidence does not show on how many occasions leave was granted, nor is it possible to fix any dates with precision. Immediately after the marriage the couple lived in a room in the house of the wife's parents. The husband stated that the desirability of having children was several times discussed between himself and his wife, and it was decided to allow the matter to stand over until they had a home of their own. They did not think it right to use contraceptives and decided, so he said, to abstain from intercourse. The first attempt to consummate the marriage appears to have been made in November, 1945, and this attempt was unsuccessful owing to the fact that the husband failed to penetrate. This was in no way due to the fault of the wife. No other attempt was ever made.

A letter from the wife to the husband written on Jan. 9, 1946, was produced at the trial and throws considerable light on the issues involved in this case. It was in the following terms:—

Dear Colin, Just a few lines in acknowledgement of your letter which I received yesterday afternoon. Under the circumstances, Colin, I find it very hard to write this letter for really there is very little I have to say considering you know my views on the subject. Yes, I agree I did say my pride had been hurt but can you blame me, Colin, when you come to think of it that I had to practically ask you for sexual intercourse three times, which as a married woman were my rights. Looking back on the last fifteen months I think I have had a very big injustice done to me, for any woman expects her rights when she marries without having to ask for them. You see, Colin, we had been married quite a time before you ever said anything about not wanting children until we had a home of our own. What other answer could I give but agree with you for if I had said otherwise it would have been like asking you for intercourse then, and naturally I didn't want to think I was going to have to be the first one to approach on that subject. Of course in the end as you already know I had to which was in August—ten months after I had been married. Also, Colin, you have recently said you didn't want to tie me down knowing I liked dancing etc. Surely if I had preferred dancing you know I would never have married you. In the end I had to write and tell you a deliberate lie about Dr. J. to see if that would take any effect. As you know it did and what happened—you couldn't even make me your wife then and really things were worse than before as there weren't any satisfaction at all as you yourself admitted by saying: "It must be my nerves." Oh, Colin, can you blame me for feeling like this knowing what I have gone through all this time? Yesterday I saw Fr. Grogan and he is getting in touch with Fr. T. so no doubt you will be hearing from him. I can't tell you anything more for I don't know what will happen as I have left the whole affair entirely in Fr. Grogan's hands. You mention in your letter that you are coming home a week to-day, I presume, Colin, you mean you will be staying at Gleadless Common. If there is anything of importance you wish to discuss with me you know where to find me and if by chance I shouldn't be in, no doubt Mother and Dad will be, although as you know it is very rare I go out unless to the pictures with Josie. I will close now for I have nothing more to say so cheerio Colin. Sincerely, Tess.

If the statements in this letter are correct, it is obvious that the wife's consent to non-consummation was reluctant and was given at a date some considerable time after the marriage, and it is further obvious that she did not resolutely adhere to any such agreement if, indeed, there ever was one. This is all the information that was given at the trial about the marriage before November, 1945, when the abortive attempt at consummation, to which I have already referred, took place. About a fortnight after this incident the husband again got leave and slept with his wife on that occasion. No attempt at intercourse then took place because she was having her periods. The husband came home again on leave at Christmas, 1945. We were not told how long this leave lasted. The husband gave evidence that on one night at any rate he spoke to her about having sexual intercourse and stated that she informed him that she had talked matters over with her mother and that on account of what had happened on the previous occasion the thought of further intercourse was obnoxious to her.

A He said that he tried to persuade her to alter her mind without success, and returned from his leave without anything having been settled about the future of their married life. Shortly after the conclusion of his Christmas leave the husband wrote to his wife saying that he had been granted two more days leave, and it was in answer to this letter from the husband that the wife wrote the letter of Jan. 9, 1946, which I have set out. The husband, when he next went on leave, did, in fact, stay at the home of his own parents and went over to see his wife. He stated in evidence that she told him she did not wish to live with him any longer, but he could not remember whether she said anything about what was to happen to the marriage. So far as we know, the spouses did not meet again until the petition was served, but on Mar. 13, 1946, a letter was written by the officials of the Roman Catholic Church in the district stating that they had heard of the trouble from Father Grogan (in whose hands it will be remembered the wife had left herself) and asking the husband to state the nature of the difficulty which had arisen in regard to the marriage and inquiring why that difficulty could not be remedied? The husband did not reply to that letter and did not avail himself of the offer contained therein. Instead of so doing he consulted his solicitor who replied on Mar. 25, 1946, asserting that the wife refused to consummate the marriage, and that, if the refusal persisted, he had received instructions in regard to a suit for nullity. Thereafter, the correspondence was conducted by the respective solicitors, each asserting that the failure was due to the other's client.

B C D E

I have now recounted all the material which the trial judge had available for the decision of the case. It would, of course, be wrong to regard the assertions of fact contained in the letter of Jan. 9, 1946, as though they had been given in evidence by the wife at the trial. None the less it was plainly right that the judge, whose attention had been called to the letter, should put these assertions to the husband to ascertain whether he agreed with them. The judge did so, and I have considered carefully the answers which the husband gave to the judge's questions. In the Court of Appeal the MASTER OF THE ROLLS characterised the husband's answers as evasive. I agree with the MASTER OF THE ROLLS, and I have no doubt that these answers impressed LYNKEY, J., as being unsatisfactory, for at the close of the husband's case the judge said: "I am not satisfied with the evidence." If the matter had rested there the case would never have come to any appellate court. The judge continued: "I do not believe him. I do not accept his evidence. I prefer the wife's letter. I think this is genuine, and he in evidence says so far as his wife refusing to consummate, that she was willing to do so, according to his own evidence."

H When he came to give his formal judgment the judge said:

I think this woman was anxious to consummate the marriage, and it would be quite futile for me to suggest, or for the petitioner to suggest, that the cause of the non-consummation of this marriage was wilful refusal of the wife who at all times and all other stages, was quite willing to consummate. A husband cannot, in my view, having refused his wife proper intercourse, suddenly turn round and say: "Now I want it, and, if you do not give it to me, I am going to ask for a decree of nullity on the ground of non-consummation." Non-consummation of this marriage, in my view, was the result of the husband [*sic.*] and not on the part of the wife. In those circumstances, the petition will be dismissed.

Counsel for the husband, who argued the case with ability, criticised this passage. He said, with some force, that, whatever may have been the earlier history of the marriage and whichever of the spouses may have been responsible for the non-consummation during that time, it was indisputable that at the later stage it was the wife who was unwilling to consummate, and that both the evidence of the husband and the statements in the letter supported this view. The evidence, he said, afforded no justification for the statement made by the judge in the course of his judgment that the wife was at all times and all other stages quite willing to consummate. I agree with this criticism, but it does not follow because the wife was not willing to consummate the marriage in January, 1946, that she was guilty of a wilful refusal within the meaning of the section.

My Lords, I do not think it desirable to attempt any definition of the phrase "wilful refusal to consummate the marriage." The words connote, I think, a settled and definite decision come to without just excuse, and, in determining whether there has been such a refusal, the judge should have regard to the whole history of the marriage. It must, I should suppose, not infrequently be the case, if consummation of the marriage has been delayed and thereafter an unsuccessful attempt at consummation has been made, that either of the spouses may be reluctant and hesitant about a new attempt. In the present case the wife sought the advice of her parents and her spiritual advisers as to the course she should take. It would appear from the correspondence that her parents advised that her husband should see a doctor, and that her spiritual advisers, by whose advice she was willing to be guided, were anxious to remedy the difficulty which had arisen. These facts, to my mind, afford ample evidence to justify the judge in declining to draw the inference that the wife had "wilfully refused to consummate the marriage."

That being enough to decide the case there is no need to determine whether the fact, if it be a fact, that the husband had for some months refused to consummate the marriage necessarily prevented him, if he changed his mind, from obtaining relief if the wife at a later date wilfully refused to allow consummation. The judgment of LYNKEY, J., which I have already quoted, contained a passage which might be read as meaning that, if the husband had at any time refused to consummate the marriage, he was for ever afterwards barred from obtaining relief under the relevant section. I find a somewhat similar passage in the judgment of the MASTER OF THE ROLLS where he says :

It surely cannot be the law that a husband who has been unwilling to consummate the marriage although his wife was willing can afterwards turn round and say : "I have now changed my mind. I am willing to consummate the marriage" and accuse his wife of wilful refusal to consummate the marriage because at that stage she too has changed her mind.

Such circumstances may be relevant to the question whether there has been a wilful refusal, but if these judgments are to be read as formulating some principle of law I am not disposed to express a final opinion on them in this appeal. So read, they involve questions as to the true construction of s. 7 (1) (a) which would, I think, be better settled in some suit requiring their determination. MORTON, L.J., briefly disposed of the present matter in his judgment which was as follows : "I think that on the judge's view of the evidence the husband failed to prove that the marriage had not been consummated owing to the wilful refusal of the wife to consummate the marriage, and that is what the section requires." With this view I find myself in complete agreement and, accordingly, I would dismiss the appeal.

My Lords, my noble and learned friend, LORD NORMAND, has expressed his concurrence in this opinion.

LORD WRIGHT : My Lords, I have had the opportunity of considering in print the opinion which has just been delivered by my noble and learned friend the LORD CHANCELLOR. I agree with it and have nothing to add.

LORD SIMONDS : My Lords, I, too, concur.

LORD MACDERMOTT : My Lords, I also agree.

Appeal dismissed.

Solicitors : Doyle, Devonshire & Co., agents for J. Hubert Dunk, Sheffield (for the husband) ; the Treasury Solicitor (for the King's Proctor).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

R. v. JORDAN. *Ex parte* LUTRING.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Atkinson, JJ.), December 10, 1947.]

Tithe and Tithe Rentcharge—Redemption—Annuity—Remission—Agricultural holding—"Annual value"—Inclusion of value of house—Income Tax Act, 1918 (c. 40), sched. B, r. 1 (a)—Tithe Act, 1936 (c. 43), s. 14 (2).

A Under s. 14 (1) of the Tithe Act, 1936, where the amount of a tithe redemption annuity charged on land comprised in an agricultural holding exceeds one third of the annual value of that land, the farmer is entitled to a remission of one half of the excess, and, by s. 14 (2), the expression "annual value" in sub-s. 1 means annual value for income tax purposes under sched. B, as specified in a certificate issued under sched. IV to the Act of 1936. By sched. IV, para. 2 (c), where the owner of land on which a tithe annuity is charged applies to the surveyor of taxes for a certificate of the annual value of the land and the land has not been assessed for the period in question, the surveyor is to make a notional assessment as if the land had been assessed under sched. B originally. By s. 47, "agricultural land" includes dwelling-houses occupied with such land.

B Under the Income Tax Act, 1918, sched. B, r. 1 (a), income tax is not to be charged under that schedule on "any dwelling-house . . . unless occupied, by virtue of one and the same demise, together with a farm of lands, or with a farm of tithes, for the purpose of farming the same."

C

On applying to the surveyor of taxes for a certificate for the purpose of a remission under s. 14 of the Act of 1936, the owner and occupier of a farm did not include the value of the farm-house in his return on the ground that the value of the farm-house was not to be included in the total annual value of the holding by reason of r. 1 (a) of sched. B to the Act of 1918:—

D

HELD: rule 1 of sched. B dealt, not with valuation, but with chargeability, while s. 14 (2) of the Tithe Act, 1936, dealt, not with chargeability, but with annual value, and, although the value of the dwelling-house would be omitted from the charge for income tax purposes where the farm was occupied by the owner, it must be included in assessing the annual value of a holding for the purpose of the Tithe Act, 1936, s. 14, because the remission was to be calculated on the total annual value of the holding assessed in accordance with the rules under sched. B, and not merely on that part of the total annual value of the holding which was chargeable for income tax under sched. B.

E

[FOR THE TITHE ACT, 1936, see HALSBURY'S STATUTES, Vol. 29, p. 923 *et seq.*]

F

MOTION for an order of *mandamus* directing a surveyor of taxes to issue a certificate under the Tithe Act, 1936.

The applicant, the owner and occupier of a farm charged with a tithe redemption annuity, applied to the surveyor for a certificate of the annual value of his land to secure a remission of tithe annuity under s. 14 of the Tithe Act, 1936. The value of the farm-house was omitted from the applicant's return and the surveyor refused to issue the certificate unless it was included. The Divisional Court held that the surveyor was right and dismissed the application.

G

R. D. L. Kelly for the applicant.

Diplock for the respondent.

H LORD GODDARD, C.J.: In this case counsel for the applicant has applied for an order of *mandamus* directed to David James Jordan, a surveyor of taxes, calling on him to issue a certificate which it is his duty to issue under the Tithe Act, 1936, to secure the remission of the tithe annuity provided in that Act to which the applicant is entitled as being the owner and occupier of a farm in the parish of Overton in the county of Southampton. In making the return which he was obliged to make in the application he put forward to enable him to obtain the certificate, the applicant left out of account the value of the farm-house which he occupies for the purpose of farming. The surveyor of taxes has refused to issue his certificate until the value of

the farm-house is included in the return because he contends that the remission is to be calculated on the total annual value of the holding and not merely on that part of the total annual value of the holding which is chargeable to income tax under sched. B. The matter depends entirely on the construction of a few sections in the Tithe Act, 1936, and the Income Tax Act, 1918.

The Tithe Act, 1936, s. 3, substituted a redemption annuity, as it is called, for the tithe rentcharge which had hitherto existed, and s. 14 provided for remission of part of the excess of the annuity if it was more than one-third of the annual value of agricultural land. Section 14 (1) and (2) provide :

(1) Where one or more annuities is or are charged in respect of land wholly comprised in an agricultural holding, then, if the amount of the annuity, or the aggregate of the amounts of the annuities, as the case may be, exceeds one-third of the annual value, for the 12 months ending on Apr. 5 in any year, of the holding exclusive of any part thereof in respect of which no annuity is charged, payment of an amount equal to one-half of the excess shall, subject to the provisions of this section, be remitted, in proportion where there are two or more annuities to the amounts thereof respectively, in the case of each instalment payable in that year. (2) In this section the expression "annual value" means annual value for income tax purposes under sched. B as specified in a certificate issued in accordance with the provisions of sched. IV to this Act . . .

By sched. IV, para. 2 :

If the owner of any charged land makes before Mar. 1 in any year to the surveyor of taxes for the parish in which the land is assessed or situate an application in the prescribed form for a certificate of the annual value of the charged land for the period of 12 months ending on Apr. 5 in that year, the surveyor shall . . .

Then follow three provisions. The first [sub-para. (a)] deals with the case where the land is assessed under sched. B by reference to annual value for that period apart from other land. The second is :

(b) if the charged land is so assessed for that period together with other land, apportion the annual value in the assessment between the charged land and the other land and furnish as aforesaid a statement in writing of the annual value as ascertained for the purposes of the assessment and of the apportioned amounts.

The third provision, which is the material one for the purpose of this case, reads :

(c) if the charged land is not so assessed for that period, estimate what, if it had been so assessed for that period apart from other land, would have been the annual value as ascertained for the purposes of the assessment and furnish as aforesaid a statement in writing of his estimate.

In other words, he is to make a notional assessment as if the land had been assessed under sched. B originally. The only other section of the Act to which it is necessary to refer is s. 47, which provides :

(1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say : "agricultural land" means agricultural land as defined in the Rating and Valuation (Apportionment) Act, 1928, s. 2, and buildings (including dwelling-houses) occupied together with such land and used primarily in connection with agricultural operations thereon . . .

The contention of counsel for the applicant is that s. 14 (2) makes the whole matter depend on sched. B to the Income Tax Act, 1918. In one sense, that is perfectly true. Therefore, he says, when you refer to the Income Tax Act, 1918, and to the rules applicable to sched. B, in the case of an owner-occupier the value of the house has to be omitted altogether because, under sched. B, r. 1, it is provided :

Tax under this schedule shall be charged in addition to the tax to be charged under sched. A on all properties in this Act directed to be charged to the said tax according to the general rule of No. 1 of sched. A : Provided that there shall not be charged under this schedule—(a) any dwelling-house or the domestic offices thereunto belonging, unless occupied, by virtue of one and the same demise, together with a farm of lands, or with a farm of tithes, for the purpose of farming the same . . .

By r. 2, the rules for ascertaining annual value are the same as those under sched. A, subject to certain modifications. Under sched. B, therefore, if both the land and the farm-house are occupied by a tenant farmer, he is charged on the whole value ascertained in accordance with the rules for valuation in

this schedule. If, however, the land is occupied by a freeholder and owner, then for the purpose of charge the dwelling-house is omitted. The reason is that the owner has to pay under sched. A on the dwelling-house, and, if he also had to pay under sched. B, he would be paying in respect of it twice over. For the purpose of this case a distinction must be drawn between the annual value of the whole of the farm, in which I include the dwelling, and that part of the annual value which is chargeable to tax.

- A Proviso (a) to sched. B, r. 1, deals, not with valuation, but with chargeability. It says: "Provided that there shall not be charged under this schedule—(a) any dwelling-house" unless occupied by a tenant farmer. Chargeability and valuation are two different things. The farm has to be valued in accordance with the rules under sched. B. The chargeability to tax may not be—and, in the case of an owner-occupier, will be—not on the whole of that valuation, but only on a part thereof, that is to say, the total valuation less that part of the valuation which is applicable to the dwelling-house. The Tithe Act, s. 14 (2) does not deal with chargeability. It deals with annual value, and annual value means the annual value for income tax purposes under sched. B. The surveyor of taxes was, therefore, right when he stated, that the total valuation of the farm, estimated in accordance with the rules under sched. B, must be included, which would include the value of the dwelling-house, although the value of the dwelling-house would be omitted from the charge for the purpose of income tax. Consequently, this application for *mandamus* fails.

HUMPHREYS, J. : I agree.

- D ATKINSON, J. : I agree. Clearly, to ascertain the annual value of a holding covered by s. 14 of the Tithe Act, 1936, reference has to be made to the rules for valuation under sched. B. There is no difficulty about applying those rules, and the suggestion that r. 1, which deals with chargeability, has any relevance to the method of valuation is without foundation. Reference is made to the rules simply to establish a method of ascertaining the annual value.

Application dismissed.

- E Solicitors: *Ellis & Fairbairn* (for the applicant); *Official Solicitor, Tithe Redemption Commission* (for the respondent).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

ABERDARE URBAN DISTRICT COUNCIL v. PONTYPRIDD AREA ASSESSMENT COMMITTEE AND ANOTHER.

- F [KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Atkinson, JJ.), December 10, 11, 1947.]

Rates and Rating—Assessment—Club—Members' club—Factors not to be taken into account—Profits from sale of liquor—Absence of alternative accommodation—Monopoly of club facilities.

- G A members' club owned and occupied certain premises which it had purchased and adapted in 1936, when they were valued for rating purposes at £120 gross. In 1946, in proposing an amendment to the valuation list by increasing the rateable value of the premises to £363, gross the rating authority urged that there should be taken into consideration (i) that profits were made by the club in trading in alcoholic liquors (*i.e.*, by sales in the bar to club members); (ii) that it was not, and would not be for some considerable time, possible for the club to find alternative accommodation; and (iii) that existing clubs in the district had a virtual monopoly of providing club facilities. The valuers advising the assessment committee and the rating authority respectively agreed that apart from those considerations the proper valuation would be £265 gross.

H HELD: (i) rent, not profit, was the measure of rateable value, and, while anticipated profits might in certain circumstances be relevant in fixing the rent, the profits from the sale of liquor in the present case was personal to the club and could be made wherever it was housed, and would not, therefore, affect the rent.

(ii) it would be unfair to take into consideration the fact that there were no other similar premises available without also taking into consideration the fact that there was only one hypothetical tenant likely to take the premises, and that, therefore, the club would not be at the mercy of the hypothetical owner, who could not, on that ground, increase the rent payable.

(iii) there was no reason to assume that the absence of any probability of other clubs being formed in the district would cause the club, being a members', and not a proprietary, club, to pay a higher hypothetical rent, and the consideration was irrelevant.

[AS TO THE BASIS OF ASSESSMENT OF RATEABLE HEREDITAMENTS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 390-391; and FOR CASES, see DIGEST, Vol. 38, pp. 518-531, Nos. 695-771.]

Cases referred to :

- (1) *Cartwright v. Scolcoates Union*, [1899] 1 Q.B. 667; affirmed [1900] A.C. 150 69 L.J.Q.B. 403; 82 L.T. 157; 64 J.P. 229; 38 Digest 564, 1025.
- (2) *Ladies Hosiery & Underwear, Ltd. v. West Middlesex Assessment Committee*, [1932] 2 K.B. 679; 101 L.J.K.B. 632; 147 L.T. 390; 96 J.P. 336; Digest Supp.
- (3) *Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-le-Street Assessment Committee*, [1937] 2 All E.R. 298; [1937] 2 K.B. 445; 106 L.J.K.B. 835; 157 L.T. 147; 101 J.P. 321; Digest Supp.; affirmed [1938] 2 All E.R. 79; 107 L.J.K.B. 369; sub nom. *Robinson Bros (Brewers), Ltd. v. Durham County Assessment Committee (Area No. 7)*, [1938] A.C. 321; 158 L.T. 498; 102 J.P. 313; Digest Supp.
- (4) *Barry West End Labour Club, Ltd. v. Barry Assessment Committee*, (1932), 16 R. & I.T. 166.
- (5) *R. v. London School Board*, (1886), 17 Q.B.D. 738; 55 L.J.M.C. 169; 55 L.T. 384; 50 J.P. 419; 38 Digest 522, 713.
- (6) *Trebanog Working Men's Club & Institute, Ltd. v. MacDonald, Monkmouth Conservative Club, Ltd. v. Smith*, [1940] 1 All E.R. 454; [1940] 1 K.B. 576; 109 L.J.K.B. 288; 162 L.T. 305; 104 J.P. 171; Digest Supp.
- (7) *Inland Revenue Comrs. v. Eccentric Club*, [1924] 1 K.B. 390.

CASE STATED by the Rating Appeals Committee of Glamorgan Quarter Sessions.

On Mar. 26, 1946, a proposal was made on behalf of the Aberaman Ex-Servicemen's Social Club and Institute for the amendment of the valuation list for the Aberdare Urban District in respect of the premises which it owned and occupied by reducing the assessment, which stood at £316 gross value and £260 rateable value, to £124 gross value and £100 rateable value. On Mar. 28, 1946, the rating authority made a proposal to increase the assessment to £475 gross value and £392 rateable value. At the hearing of the proposals on July 15, 1946, and Oct. 21, 1946, the Pontypridd Assessment Committee reduced the assessment to £265 gross value and £217 rateable value. The rating authority appealed to quarter sessions who allowed the appeal and fixed the gross value at £363 and the rateable value at £299. The assessment committee and the club now appealed to the Divisional Court who held that the profit from the sale of liquor in the bar, the absence of alternative accommodation for the club, and the virtual monopoly of club facilities enjoyed for the time being by this and other clubs in the district were all considerations irrelevant in the circumstances to the fixing of the hypothetical rent, and, therefore, should not be taken into account in arriving at the rateable value of the club premises.

Harold Williams, K.C., and *Roskin* for the club.

Edmund Davies, K.C., and *Corley* for the rating authority.

LORD GODDARD, C.J. : I will ask ATKINSON, J., to give judgment first.

ATKINSON, J. : This is a Case stated by justices sitting on the Rating Appeals Committee of Glamorgan Quarter Sessions, and it raises the question whether certain matters are to be considered in valuing for rating purposes premises adapted for and used as a club. The facts as found in the case are these. The premises were purchased for adaptation to their present use in 1936, when they were a bakehouse which had been derelict for about

10 years. The purchase price was £295, and the cost of the adaptation was about £400. The premises consist of a cellar, a large bar and billiards room combined, a concert room, a library, an office, and an attic room. The premises are well adapted and are suitable for use as a club. Alcoholic liquor is supplied on the premises to the members. For the year ending Dec. 31, 1940, the bar takings amounted to £7,490. For the year ending Dec. 31, 1945, the bar takings, including receipts for tobacco, amounted to £17,498 15s. The membership in 1940 was 778, and in 1945 was 742. The weekly quota of barrels of beer supplied to the club is $23\frac{1}{2}$ barrels. The maximum number of barrels of beer sold per week in any licensed house in the area is 15. The assessment of licensed houses in the area is calculated on weekly barrelage at £16 per barrel. The Case finds that there was no alternative accommodation for the club at present available in the district, and that, by reason of shortage of accommodation and for other reasons, no other premises in the area were likely to be available for adaptation for use as club premises for some considerable time. The club, with seven other clubs in the area, had at the material time and are likely to enjoy for some time to come a virtual monopoly of providing club facilities.

The assessment of £265 gross value, which was fixed by the assessment committee, was based on the valuation of a Mr. Powell, who had been appointed by the committee to advise them, and, in preparing his valuation, he disregarded as irrelevant the following three factors: (1) that profits were made by the club from trading in alcoholic liquors; (2) that it was not, and would not for some considerable time be, possible for the club to find alternative accommodation; and (3) that existing clubs in the district had a virtual monopoly of providing club facilities. The valuer who gave evidence at the hearing of the appeal on behalf of the then appellants, the rating authority, gave a valuation of £363 gross, and in preparing his valuation he took into account those three factors. He stated that, if he were wrong in taking into account those three factors, his valuation would be similar to that of Mr. Powell. Therefore, the question was raised whether these three factors were relevant factors. The present appellants, the club, say they were not, and the respondent rating authority say they were.

In *Cartwright v. Scolcoates Union* (1) LORD HALSBURY, L.C., said ([1899] 1 Q.B. 673):

The problem is to ascertain, according to the statute, what a tenant from year to year might reasonably be expected to give as rent. For the solution of that problem it appears to me that apart from the decisions, as to which I will say a word presently, all that could reasonably affect the mind of the intending tenant ought to be considered.

As to the first factor, it must be remembered that rent, not profit, is the measure of rateable value. The gross annual value means the rent at which the hereditament might reasonably be expected to let from year to year, the tenant paying all usual tenant's rates, taxes and charges. The property must be assumed to be let, and the fact that it is occupied by the owner is immaterial. All possible occupiers, including the actual occupier, must be taken into account as possible tenants from year to year. It is not easy to lay down any precise rule regarding when or to what extent the possible amount of profits which it is anticipated may be made by occupation of premises will affect the rental value. If the motive or object of the tenant who is most likely to take the premises is to make a profit, the amount of profit which he is likely to make may very materially affect the rent which he would be willing to give. Speaking generally, however, if the profits depend on the personal skill of the tenant and can be made in any other premises quite as well as in the premises in question, the expected amount of profits will not affect the rent which a tenant will give, but, if the profits can be earned only on the premises to be rated and can be earned there by any ordinary tenant, the expected profit will affect the rent which a tenant will give. In the present case the class of possible tenants is very small. It is limited to clubs of a particular type—social or working men's clubs. It is not the motive or object of such clubs, certainly not of the appellants, to make a profit. It may be that the bar was profitable, but that is but one activity of the club. It does not follow that the club as a whole received more than it spent, and, if a profit was made

in the bar, it was made by sales to members of the club only. These sales would be the same wherever the club was housed. They did not come about from any goodwill attached to the premises or from any inherent quality of the premises. Why should the amount of takings at the bar affect the rent which a club would pay when those takings come from members of the occupying club only and would have come to the club from any bar in any premises? Further, if anticipated profits are to affect the hypothetical rent, the relevant profits must be the profits of the undertaking as a whole. The profit from one activity may be wiped out by the loss or the expenses incurred by other activities of the club. In our view, the first factor ought to have been disregarded as irrelevant. It certainly would not affect the amount of rent which any other club would pay, nor could it affect the rent which the appellants would pay, as the profit was personal to the club and could be made wherever the club was housed.

The second factor, that it was not and would not for some considerable time be possible for the club to find alternative accommodation, seems to suggest that the hypothetical landlord would be in a position to force the tenant to pay more than he would be willing to pay if he had a choice of premises, but, in truth, the club was not at the mercy of the hypothetical owner. There is no suggestion that there was any other social club or working men's club ready and willing to take the premises. There was no evidence of any competition for the premises, or, indeed, of any other possible tenant. The appellant club was the only available, or, at any rate, the only likely, tenant, and as such was in at least as strong a position for refusing to pay a rent increased because of there being no alternative accommodation as was the landlord in seeking on that ground to get a higher rent. It would be unfair to take into consideration the fact of there being no other similar premises available without also taking into consideration the fact that there was only one hypothetical tenant available, or, at any rate, likely to take the premises.

The third ground means much the same as the second ground—because the appellant club would, in all probability, not be faced with any new rival clubs, therefore, it would be ready to pay a higher rent than it would be ready to pay if there were other premises available for clubs. But why? If the club was a proprietary club making a profit, that might be true, but I cannot see why a club with 742 members, which we are told was the maximum fixed, not making a profit, should be willing to pay a higher rent because there is no probability of other clubs being formed in the district.

Applying the principle laid down by LORD HALSBURY, L.C., in my view, these factors were not relevant to the determination of the rent which any tenant of the premises would pay, and I would allow the appeal.

LORD GODDARD C.J.: I agree. Counsel for the rating authority conceded in this case that this was a members' club and not a proprietary club. The case has been argued before us and decided on that footing, and our decision must not, therefore, be taken as necessarily applying to a proprietary club. I do not say one way or the other whether the considerations which are the subject of the judgment my Brother has just delivered, apply in the case of a proprietary club. That may hereafter have to be determined. I emphasise that we are dealing with this case on the footing that this is a members' club.

HUMPHREYS, J.: I agree.

Appeal allowed. Case remitted to quarter sessions.

Solicitors: *Wrentmore & Son*, agents for *Edward T. Davies & Son*, Pontyclun (for the appellants); *Theodore Goddard & Co.*, agents for *E. J. Hughes*, town clerk, Aberdare (for the respondents).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

MALCOLM v. CHEEK.

[KING'S BENCH DIVISION (Lord Goddard C.J., Atkinson and Hilbery, JJ.), December 8, 1947].

Food and Drugs—Adulteration and Impoverishment—Proceedings against offenders—Public house—Watered gin—Licensee prosecuted—Defence of employee's default—Information laid against employee—Summons not served—Availability of defence—Time at which information must be laid—Food and Drugs Act, 1938 (c. 56), s. 83 (1).

The licensee of a public house was prosecuted for selling through his employee gin containing an excessive quantity of water contrary to the Food and Drugs Act, 1938, s. 3. In pursuance of s. 83 (1) of the Act he gave the prosecution not less than three clear days' notice of his intention to have his employee, being the person to whose act or default he alleged that the contravention of the provisions in question was due, brought before the court in the proceedings, and laid an information against the employee. The summons on that information was never served because the whereabouts of the employee were unknown. At the hearing of the charge against himself, the licensee proved that the contravention of s. 3 was due to the act or default of his employee and that he (the licensee) had used all due diligence to secure that the provisions in question were complied with in accordance with s. 83 (1).

HELD: the defendant, having taken all steps open to him to have the employee brought before the court and having otherwise also complied with the requirements of s. 83 (1), was entitled to set up the defence afforded by that sub-section, although the employee had not been brought before the court owing to the inability of the police to serve the summons and so had not been convicted.

Walking, Ltd. v. Robinson, (1930), (99 L.J.K.B. 171), distinguished.

PER LORD GODDARD: The information which, under s. 83 (1), must be laid by the original defendant must be laid not less than three days before the proceedings are heard.

[FOR THE FOOD AND DRUGS ACT, 1938, SS. 3 AND 83, see HALSBURY'S STATUTES, Vol. 31, pp. 254 and 305.]

Case referred to:

(1) *Walking, Ltd. v. Robinson*, (1930), 99 L.J.K.B. 171; 143 L.T. 105; 94 J.P. 73; Digest Supp.

CASE STATED by a metropolitan magistrate.

An information was preferred at a metropolitan police court by the appellant, Malcolm, an inspector of food and drugs, charging the defendant, Cheek, with unlawfully selling to the prosecutor and to his prejudice gin which was not of the nature or the substance or the quality of the article of food demanded by the purchaser in that it contained 11.7 per cent. of added water, contrary to s. 3 of the Food and Drugs Act, 1938. The information was heard on Feb. 21, 1947, when the magistrate dismissed it. The Divisional Court now dismissed the appeal of the inspector. The facts appear in the judgment of LORD GODDARD, C.J.

Arthian Davies, K.C., and *Finer* for the appellant.

Edie for the respondent.

LORD GODDARD, C.J.: The magistrate found that at all material times the respondent was the licensee and manager of the Lord Palmerston public house, Kilburn High Road, London; a purchase was made by the appellant from the respondent, through an agent, of two "double gins," and the gin contained an excessive quantity of added water, constituting a sale to the appellant's prejudice; a customer of the respondent's, shortly before the purchase was made, saw a barman in the employ of the respondent, a man named McKee, pour water into the gin bottle; the respondent did not know that the gin had been watered and had used all due diligence to secure that the provisions of the Food and Drugs Act, 1938, s. 3, were complied with; and the contravention of the provisions of s. 3 was due to the act or default of McKee. The Case then finds that written notice had been duly given by

the respondent under s. 83 (1) of the Act of his intention to have McKee brought before the court in the proceedings as being the person to whose act or default he alleged that the contravention of the statute was due, and that information was laid on Feb. 5, 1947, by the respondent against McKee as being the person in default. The summons was never served because McKee's whereabouts were unknown and he was believed to have left the jurisdiction. On the part of the appellant it was contended that, as process had not been served on McKee, he could not be said to have been brought before the court in the proceedings, and, therefore, the respondent could not avail himself of the defence under s. 83 (1). The magistrate was of opinion that the Act could operate as a defence notwithstanding that the summons had not been served on the person sought to be brought before the court as the person to whose act or default the contravention alleged was due, and he held that the respondent, in pursuance of s. 83 (1) of the said Act, should be acquitted.

In my opinion, the magistrate was right. By s. 3 of the Food and Drugs Act, 1938, it is made an offence for a person to sell an article of food to the prejudice of a purchaser, and under that section for many years before 1938 a master was liable to be convicted although the sale was actually made by his servant and the master did not know that the offence had been actually committed or that the article in question was such that a sale of it would be to the prejudice of the purchaser. Section 83 (1) of the Act of 1938, however, provides :

(1) A person against whom proceedings are brought under this Act shall, upon information duly laid by him and on giving to the prosecution not less than three clear days' notice of his intention, be entitled to have any person to whose act or default he alleges that the contravention of the provisions in question was due brought before the court in the proceedings, and, if, after the contravention has been proved, the original defendant proves that the contravention was due to the act or default of that other person, that other person may be convicted of the offence, and, if the original defendant further proves that he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence.

In other words, he is given not merely an exemption from penalty but a defence. To enable him to set up that defence he has to give notice to the prosecution not less than three clear days before the information is heard, and he must duly lay an information, also not less, I think, than three clear days before the summons is heard. Having done that, he is entitled to have the other person brought before the court, but when the case is heard he will further have to prove that the contravention was due to the act or default of that other person and also that he used "due diligence to secure that the provisions in question were complied with." "The provisions in question" would seem to be the provisions of the Act in regard to the sale of food and drugs. In other words, the respondent in the present case must show that he had taken all due diligence that there was no added water put into the gin.

It is said that the defendant is deprived of that defence because the summons was not served on McKee, but all the Act says is that he is to be entitled to have the person brought before the court, not that he himself is to bring the person before the court. All he can do to secure that the person is brought before the court is to lay an information. When the information is laid, a summons may be issued by the magistrate, and it is for the magistrate to decide by whom the summons should be served. In the ordinary course, the summons would be served by a police officer, a warrant officer of the court. If, however, the summons is not issued, the defendant can say when the case comes on for hearing : "I was entitled to have the person brought before the court, and I have taken all the necessary steps to have that done so far as I can take any action in the matter. Having done that, I will now prove that the contravention was due to the act or default of the other person and that I have used all due diligence to secure that the provisions in question were complied with. If I satisfy the magistrates of those two circumstances, I am entitled to be acquitted of the offence."

Our attention has been called to *Walkling, Ltd. v. Robinson* (1), a case under the Sale of Food (Weights and Measures) Act, 1926, which contains

a similar provision. Under s. 12 (5) a person must give three days' notice of his intention to the prosecution, on information duly laid by him

... to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge, and, if after the commission of the offence has been proved, the employer or principal proves to the satisfaction of the court that he had used due diligence to enforce the execution of this Act, and that the said other person had committed the offence in question without his consent, connivance or wilful default, the said other person shall be summarily convicted of the offence and the employer or principal shall be exempt from any penalty.

That section differs in a great many respects from s. 83 (1). It does not afford a defence. It merely exempts the defendant from penalties, which is quite a different thing. Also, he has to show that he has used due diligence

to enforce the execution of the Act, although that is much the same as "to secure that the provisions in question were complied with." In my view, that sub-section aims at the same thing as do the words in s. 83 (1) of the Act of 1938. The decision in that case, however, turned on the fact that the principal defendant did not satisfy the court that the contravention was due to the act or default of the other person because the magistrates acquitted that other person. If the principal defendant fails to prove that the contravention was due to the act of the person against whom he has laid

the information, he obviously cannot avail himself of the defence provided by s. 83 (1) even though it may be that he himself was not actually guilty of the contravention. He is responsible for the contravention, unless he proves that it was due to the act of the person against whom he has laid

information, but it would be hard to say, if he has taken all the steps provided by the Act which give him a right to have the person produced before the court, that the fact that the person has not been brought before the court, through no fault of his, is to deprive him of the defence which otherwise the section gives him. It is also to be noted that it is not the conviction of the other person which is made a condition precedent to the defence being effective to the defendant. The section says: "that other person may be convicted of the offence." If the magistrate refused, under the provision of the Probation of Offenders Act, to proceed to conviction, there would be no conviction, but the defence provided by the sub-section would be available to the original defendant.

In my opinion, the respondent had done everything in this case which it was necessary for him to do to avail himself of the defence which the sub-section affords, and the magistrate, having come to the conclusion that the contravention was due to the act or default of the person against whom the information was laid and not to that of the respondent, and also that the respondent had used all due diligence to secure that the provisions of the Act were complied with, rightly held that the respondent was entitled to avail himself of the defence provided by the sub-section. For these reasons this appeal must be dismissed.

ATKINSON, J.: I agree. The point appears to me to be answered in this way. Section 83 (1) imposed on the respondent four obligations, it conferred on him a right, and it provided a defence. The obligations have been enumerated—he is to lay an information against the person who, he says, was the real culprit, he is to give the prosecution not less than three days' notice, at some stage he has to prove that this third party was, in truth, the person through whose default the offence had been committed, and he has to prove that he himself has used due diligence. Is it to be said that because the police have not served the summons he is to be deprived of the defence which the sub-section provides? I cannot think so. The prosecution knew the position. If they wanted to have this third person present, they had only to ask for a warrant to be issued or take some relevant step to secure his presence, or, at any rate, service on him. The prosecution made no such request, and I cannot think that the sub-section could mean that the person charged is to be deprived of the defence given to him because some step has not been taken by the police and not enforced by the prosecution. I agree that this appeal fails.

HILBERY, J. : I, too, have finally come to the same conclusion, though not without considerable hesitation.

Appeal dismissed.

Solicitors: *P. H. Harrold*, solicitor, Hampstead Metropolitan Borough Council (for the appellant); *Ludlow, Head and Walter* (for the respondent).

[Reported by F. A. AMES, ESQ., Barrister-at-Law.]

WILLIAMS v. GLASBROOK BROTHERS, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), December 9, 1947.]

Judgments—Judicial decisions as authorities—Court of Appeal—Earlier decision of House of Lords misinterpreted—Whether later Court of Appeal bound by decision of first Court of Appeal.

The fact that the Court of Appeal has misinterpreted a previous decision of the House of Lords cannot be established in a later case in the Court of Appeal, the House of Lords being the only court competent to rectify the mistake. Such a misinterpretation would not justify a later Court of Appeal in refusing to follow the earlier decision of that court.

Young v. Bristol Aeroplane Co., Ltd. ([1944] 2 All E.R. 293) distinguished.

[AS TO JUDICIAL DECISIONS OF THE COURT OF APPEAL AS AUTHORITIES, see HALSBURY, Hailsham Edn., Vol. 19, p. 254, para. 556; and FOR CASES, see DIGEST, Vol. 30, pp. 193-195, Nos. 615-630.]

Cases referred to :

- (1) *Wilds v. Amalgamated Anthracite Collieries, Ltd.*, [1947] 1 All E.R. 551; 177 L.T. 192; 40 B.W.C.C. 107.
- (2) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; 37 B.W.C.C. 51; Digest Supp.
- (3) *Jones v. Amalgamated Anthracite Collieries, Ltd.*, [1944] 1 All E.R. 1; [1944] A.C. 14; 113 L.J.K.B. 49; 170 L.T. 78; 36 B.W.C.C. 195; Digest Supp.

APPEAL by the workman from an award of DEPUTY JUDGE WILLIAMS, K.C., made at Swansea County Court and dated Jan. 11, 1947. The facts were indistinguishable in any relevant respect from those in *Wilds'* case (1). That decision of the Court of Appeal, it was contended by counsel for the employers, was inconsistent with the earlier decision of the House of Lords in *Jones'* case (3) which, it was alleged, the Court of Appeal had misunderstood. This report is confined to the question whether in those circumstances the present Court of Appeal was bound to follow the decision in *Wilds'* case (1). It was held that, even if the Court of Appeal in *Wilds'* case (1) had misunderstood the House of Lords decision in *Jones'* case (3), the present court was none the less bound to follow *Wilds'* case (1).

Paull, K.C., and *Gerwyn P. Thomas* for the workman.

Wallis-Jones for the employers.

LORD GREENE, M.R. : The position in this case is rather curious. This court has before it a decision of the Court of Appeal, given last February in *Wilds v. Amalgamated Anthracite Collieries, Ltd.* (1). The facts in that case are indistinguishable in any relevant respect from those in the present case.

As soon as it appeared that *Wilds'* case (1) covered the present matter, we stopped the argument of counsel for the workman and invited counsel for the employers to develop his argument why we should not consider ourselves bound by *Wilds'* case (1), (which we are told, is on its way to the House of Lords). He agreed that normally *Wilds'* case (1) would bind this court, but he argued that, on the principles laid down by this court in *Young v. Bristol Aeroplane Co., Ltd.* (2), it was open to us to disregard *Wilds'* case (1) as the decision in that case was inconsistent with an earlier decision of the House of Lords in *Jones v. Amalgamated Anthracite Collieries* (3). He said that in *Wilds'* case (1) this court had misunderstood *Jones'* case (3). In my opinion, even assuming that it were the fact that this court did misunderstand the decision of the House of Lords in *Jones'* case (3), that does not justify us in

refusing to follow *Wilds'* case (1) today. If in *Wilds'* case (1) this court thought that the House of Lords in *Jones'* case (3) decided something that it did not, nobody but the House of Lords can put that mistake right. There is all the difference in the world between such a case as that and the matters to which we referred in our judgment in *Young v. Bristol Aeroplane Co., Ltd.* (2), as, for instance, where a subsequent case in the House of Lords is found either expressly or by implication in effect to overrule an earlier decision of the Court of Appeal. No doubt, if *Jones'* case (3) had been subsequent to *Wilds'* case (1), it would have been open to counsel for the employers to argue that *Jones'* case (3) impliedly overruled *Wilds'* case (1) and we should have had to decide whether he was right or wrong. I am not saying whether he would have succeeded in that, but his position in that event would have opened for him an argument permissible under the law as laid down in *Young's* case (2). In the circumstances, however, it is inadmissible for him to argue before us now that in an earlier decision this court misinterpreted a previous decision of the House of Lords.

Counsel also said that *Wilds'* case (1) was decided *per incuriam* in that the court omitted to notice that they were deciding it under a wrong subsection. On examination of *Wilds'* case (1) that argument is seen to fall entirely to the ground. I am not going to enter into the question which was the right subsection, but, if there were any mistake as to the subsection, that mistake is only to be found in the judgment of one of the three Lords Justices. It is clear from the judgments that the other two Lords Justices, at any rate, were under no misapprehension as to which subsection was relevant to the point they were considering. Apart from that, counsel's indications of the points he wished to take made it clear to my mind that his real argument was that *Wilds'* case (1) was wrongly decided, and, in my opinion, he has completely failed to bring himself within the very limited class of case in which, under the decision in *Young's* case (2), this court is entitled to reconsider a previous decision of its own. The points he took may well form the foundation of a useful argument in the House of Lords, but in this court we cannot listen to them. In the circumstances we are bound to follow the decision in *Wilds'* case (1), and the result is that the appeal must be allowed.

COHEN, L.J. : I agree. I only desire to add one word on the reference by counsel for the employers to *Jones v. Amalgamated Anthracite Collieries, Ltd.* (3). That case certainly did not form the basis of, nor did it appear to have affected, the judgment of SCOTT, L.J., in *Wilds'* case (1). He did not refer to it. Neither, so far as I can see, did the other two Lords Justices in any way base their decision on that in *Jones'* case (3). Indeed, as I read their judgments, they said that, if the principle applicable in that case could have been extended to the case with which they were dealing, it would have led to a conclusion which counsel for the employers would have welcomed, but, having considered that case—which did not deal with the same subject-matter—they came to the conclusion that none the less they were bound by existing authority to reach the conclusion they did. In accordance with the principles to which my Lord has referred as laid down in *Young v. Bristol Aeroplane Co., Ltd.* (2), I see no ground on which we can say that they took a wrong view of the extent to which *Jones v. Amalgamated Anthracite Collieries, Ltd.* (3) was applicable to the case before them. I, therefore, agree that this appeal should be allowed.

ASQUITH, L.J. : I am of the same opinion.

Appeal allowed with costs.

Solicitors : *John T. Lewis & Woods*, agents for *Randell, Saunders & Randell*, Swansea (for the workman) ; *William A. Crump & Son*, agents for *Arthur J. Prosser & Co.*, Cardiff (for the employers).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BAXTER v. DUNCAN.

[HOUSE OF LORDS (Lord Jowitt, L.C., Lord Wright, Lord Merriman, P., Lord Simonds, Lord Normand), November 7, 10, December 17, 1947.]

Divorce—Nullity—Wilful refusal to consummate marriage—Insistence by wife on use of contraceptives by husband—Matrimonial Causes Act, 1937 (c. 57), s. 7 (1) (a).

The Matrimonial Causes Act, 1937, s. 7 (1) (a) provides that "a marriage shall be voidable on the ground that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage."

The parties went through a ceremony of marriage on Jan. 10, 1934, and lived together from that date until the husband left the wife in 1944. The husband gave evidence that the wife would not allow him to have sexual intercourse unless he used a contraceptive sheath with the result that the conception of children would be prevented. On a petition by the husband under the Matrimonial Causes Act, 1937, s. 7 (1) (a), for a decree of nullity on the ground that the marriage had not been consummated owing to the wilful refusal of the wife :—

HELD: the use of contraceptives did not prevent the consummation of the marriage.

Cowen v. Cowen ([1945] 2 All E.R. 197) *overruled*.

L. v. L. (otherwise *D.*) (1922), (38 T.L.R. 697) *approved*.

J. (otherwise S.) v. J. ([1946] 2 All E.R. 760) *not approved*.

Decision of the Court of Appeal, ([1947] 1 All E.R. 387) *affirmed on other grounds*.

[FOR THE MATRIMONIAL CAUSES ACT, 1937, s. 7 (1) (a), see HALSBURY'S STATUTES, Vol. 30, p. 339.]

Cases referred to :

- (1) *Cowen v. Cowen*, [1945] 2 All E.R. 197; [1946] P. 36; 114 L.J.P. 57; 173 L.T. 176; Digest Supp.
- (2) *G. v. M.*, (1885), 10 App. Cas. 171; 53 L.T. 398; 27 Digest 351, 3339.
- (3) *D—e v. A—g* (falsely calling herself *D—e*), (1845), 1 Rob. Eccl. 279; 27 Digest 267, 2350.
- (4) *Napier v. Napier*, [1915] P. 184; 84 L.J.P. 177; 113 L.T. 764; 27 Digest 268, 2370
- (5) *Hyde v. Hyde and Woodmansee*, (1866), L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188; 12 Jur. N.S. 414; 11 Digest 413, 800.
- (6) *Weatherley v. Weatherley*, [1947] 1 All E.R. 563; 176 L.T. 434.
- (7) *L. v. L.* (otherwise *D.*), (1922), 38 T.L.R. 697; 27 Digest 267, 2357.
- (8) *J. (otherwise S.) v. J.*, [1946] 2 All E.R. 760; Digest Supp.
- (9) *Firth v. Firth*, (1941) (unrep.)

APPEAL by the husband from a decision of the Court of Appeal (LORD GREENE, M.R., ASQUITH, L.J., and VAISEY, J.), dated Feb. 17, 1947, and reported ([1947] 1 All E.R. 387), affirming an order of HODSON, J., dismissing a petition for a decree of nullity under the Matrimonial Causes Act, 1937, s. 7 (1) (a), on the ground that the wife had wilfully refused to consummate the marriage in that she had refused to allow her husband to have sexual intercourse with her unless he used a contraceptive. Both HODSON, J., and the Court of Appeal considered themselves bound by the decision of the Court of Appeal in *Cowen v. Cowen* (1) to hold that the marriage had not been consummated, but as, in his opinion, the husband had acquiesced in the conditions imposed by the wife, HODSON, J., held that he was not entitled to a decree of nullity and the Court of Appeal upheld his decision. The husband appealed to the House of Lords who now held on the evidence that the husband had not acquiesced in the wife's refusal to have normal intercourse so as to debar himself from the relief (if any) which such refusal would give him, but that, on a true construction of the word "consummate" in the statute, the use of contraceptives did not prevent the consummation of the marriage.

Beufus, K.C., and *Samuel Lincoln* for the appellant.

Karminski, K.C., and *Colin Duncan* for the King's Proctor.

The wife was not represented.

The House took time for consideration.

LORD JOWITT, L.C. : My Lords, this is an appeal from a judgment of the Court of Appeal dismissing an appeal of the husband from an order of HODSON, J., dismissing his petition for a decree of nullity founded on the allegation that the wife had wilfully refused to consummate the marriage within the meaning of the Matrimonial Causes Act, 1937, s. 7 (1) (a). The difficulties of this case have not been diminished by the fact that it was an undefended suit, but, like the Court of Appeal, this House has had the advantage of hearing counsel for the King's Proctor. This ensured that any argument that could have been urged on behalf of the wife was before your Lordships.

The material facts are that the parties went through a ceremony of marriage on Jan. 10, 1934, and that they lived together at Hayes from that date until the husband left the wife in 1944. According to the husband's evidence, the marriage was unhappy because of the determination of the wife not to have a child, a determination in which, he said, she was supported by her family. Of this fact he gave some striking evidence. The husband said that the wife would never allow him to have intercourse unless he took the precaution of using a sheath, that he would have been unable to have sexual intercourse at all if he had refused to do so, but that he was constantly pleading with her throughout the ten years they were together to have intercourse in the natural way. This evidence was to some extent corroborated by the husband of the wife's sister who proved that the wife had said to him that she would not have anything to do with the husband unless he took precautions, that she did not want any children, and that her husband had to use a sheath. Both the trial judge and the Court of Appeal accepted the evidence as to what occurred while rejecting the inference that the husband was compelled to adopt the course described.

Section 7 (1) of the Matrimonial Causes Act, 1937, reads as follows :

In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground (a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage ; . . .

From this it follows that there are two distinct issues, first, whether the marriage has been consummated at all, and, secondly, if not, whether that is owing to the wilful refusal of the wife.

Both courts below regarded themselves, as indeed they were, as bound, by the decision of the Court of Appeal in *Cowen v. Cowen* (1), to hold that this marriage had not been consummated, and the second of the issues mentioned above alone remained for consideration. HODSON, J., held that, by wearing a sheath and continuing to do so against his better judgment, the husband was the author of his own wrong. The Court of Appeal held that the true conclusion from all the facts was that in order to obtain the desired gratification the husband acquiesced, though, no doubt, reluctantly, in the conditions imposed by his wife and did so for ten years, that a reluctant acquiescence was nevertheless an acquiescence, and that HODSON, J., was right in his decision. They added ([1947] 1 All E.R. 389) :

A petitioner who only succeeds in proving a refusal in which he has acquiesced does not, in our opinion, establish that non-consummation is due to a wilful refusal by the respondent within the meaning of the statute.

If your Lordships were able to accept this view it might be unnecessary to go further and to enquire whether *Cowen v. Cowen* (1) was rightly decided, but, in my opinion, in which I understand that your Lordships unanimously concur, the evidence does not justify the conclusion to which the learned judge and the Court of Appeal have come. I set out two questions put by the judge himself to the husband and his answers :

Q.—Why did you not refuse to use a sheath? A.—Because then I should not have been able to cohabit with her. Q.—But you did not try? A.—I have asked her ever so many times . . . and for years have pleaded with her.

I find it impossible to conclude from such evidence as this that the husband acquiesced in the wife's refusal to have normal intercourse so as to debar himself from the relief (if any) which such refusal would give him. Adopting an expression sometimes used in this branch of the law, I might say that the husband has shown no such lack of sincerity as to disentitle him from obtaining

any remedy to which he is otherwise lawfully entitled. Nor (to use the words of LORD SELBORNE, L.C., in *G. v. M.* (2) (10 App. Cas. 186)) can it be said of him that he acquiesced in a course of conduct with "knowledge of everything which it is material to know." In this connection it must be remembered that, while the marriage took place on Jan. 10, 1934, the Matrimonial Causes Act, 1937, did not come into force until Jan. 1, 1938, so that for almost four years the law, on any view of it, provided him with no remedy for that of which he now complains. Moreover, the judgment of the Court of Appeal in *Cowen v. Cowen* (1) was not given until July 16, 1945, and it may fairly be inferred that he did not foresee that the court would decide that in such a case as his the marriage had not been consummated. By that time he had already parted from his wife. In these circumstances I find myself unable to agree with the courts below in holding that anything in the husband's conduct prevented the wife's refusal to have normal intercourse from being the cause of the assumed non-consummation. Nor, on the assumption that the husband has established a ground for relief, can I hold that anything in his conduct has disentitled him, in the circumstances, from obtaining relief.

On this view of the matter your Lordships are obliged to consider whether *Cowen v. Cowen* (1) was rightly decided. If that decision was right, it would be impossible to distinguish this case from it. The facts in *Cowen v. Cowen* (1) are sufficiently summarised in the judgment of the Court of Appeal as follows ([1945] 2 All E.R. 198) :

The parties were married in 1932. They were both young. At first they lived in Persia, and the danger of childbearing for a European woman in Persia was then so grave that they agreed to take steps to prevent conception while they were in that country. The husband habitually used a rubber sheath when intercourse took place. In May, 1937, the spouses came to England on leave and the wife pressed her husband to abandon this precaution against conception, in order that she might have a child. He refused. From the end of 1937 until the spring of 1939 they were in Persia, and, although conditions had improved there and she was willing to have a child, her husband persisted in his habitual practice. In the spring of 1939 the wife came to England, and wrote a letter to her husband in which she begged him, to use her own words, to live "a normal married life" with her. He ignored this request. She returned to Persia, and the only change in their relations which took place was that, after the outbreak of war, and owing to the difficulty of obtaining such articles as the husband had previously used, he had recourse to the practice of withdrawal before emission, or *coitus interruptus*. This occurred on but a few occasions. Relations between the spouses became strained. The husband's reiterated refusal to give his wife an opportunity of becoming a mother led to disputes. Finally, in 1944, she left him and began the present proceedings.

Before examining this case I wish to make an observation upon one practice referred to in this summary of facts, *viz.*, that of withdrawal before emission, or *coitus interruptus*. This practice, as distinct from artificial methods of contraception, does not arise in the case before the House and I prefer to express no opinion about it. I desire also to reserve the question what bearing the employment of force or fraud may have on the issue of consummation. Leaving aside the question of withdrawal it will be seen that the spouses from the date of the marriage in 1932 to 1939 invariably used a rubber sheath. This was not only so during the early years of the marriage, when the practice was adopted by mutual consent because of the dangers to a European woman of childbirth in Persia, but during a joint visit to England in 1937 and on return to Persia when the conditions in that country had improved. During these two latter periods the wife, like the husband in the case before the House, was continually pressing the husband to abandon this precaution in order that she might have a child. In other words, from 1937 onwards the wife was ready and willing, but the husband was not, to have sexual intercourse in the natural way. The main ground of the decision is as follows. After saying that the Matrimonial Causes Act, 1937, contains no definition of the word "consummate" and that Parliament, no doubt, intended it to be understood in the sense in which it had hitherto been employed by judges dealing with matrimonial causes in this country and pointing out that before the Act the question whether a marriage had been consummated usually arose in connection with the particular question whether one of the parties was lacking in capacity to consummate, the judgment proceeds (*ibid.*, 199) :

Thus, it is no doubt true to say that normally the question was whether penetration by the male organ could be, and had been, effected. Before 1937, the question whether the emission of semen into the body of the female was necessary in order to constitute such complete penetration as would amount to a consummation of the marriage could only arise if, through some malformation of the husband's organs of generation, such emission was rendered impossible. In such a case we have no doubt that an ecclesiastical court would have held that a husband suffering from such malformation was impotent, and that the marriage to which he was a party was voidable at the wife's instance. This, we think, necessarily follows from the generally recognised truth that one of the chief ends of marriage is the procreation of children.

After reference to certain text writers the judgment proceeds (*ibid.*):

It is true that sterility in man or woman has never been a ground for avoiding a marriage. Apart from the fact that in many cases it would even now be impossible to prove that a spouse is incurably sterile and that in earlier days such proof would almost always have been impossible, there are obvious reasons of a religious and social character why sterility should not of itself be a sufficient reason for a decree of nullity. But in order that intercourse should be complete, it is well established that there must be what DR. LUSHINGTON referred to as *vera copula*.

He said, in *D—e v. A—g* (3) (1 Rob. Eccl. 298):

“Sexual intercourse in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse . . .” We are of opinion that sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination, or when he artificially prevents that natural termination, which is the passage of the male seed into the body of the woman. To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principal ends, if not the principal end, of marriage is intentionally frustrated.

It is necessary, first of all, to consider what is involved in saying that Parliament must have intended the word “consummate” to be understood in the sense in which it had hitherto been employed by judges dealing with matrimonial causes in this country. By s. 22 of the Matrimonial Causes Act, 1857, which set up the “Court for Divorce and Matrimonial Causes” it is enacted that:

In all suits and proceedings, other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act.

Manifestly, this section applies, among other things, to suits for nullity on the ground of incapacity, while proceedings to dissolve any marriage were expressly excepted because the old ecclesiastical courts had no jurisdiction in this respect. The same jurisdiction is inherited by the High Court and the Court of Appeal respectively by virtue of the provisions of s. 32 of the Judicature Act, 1925. The practical importance of this provision is illustrated, *e.g.*, by the fact that mandatory orders for medical inspection are still made in suits for nullity on the ground of incapacity since it was the practice of the ecclesiastical courts to make such orders (and in earlier days to enforce them by commitment) while in the case of suits for nullity on the ground of wilful refusal to consummate medical inspection is permissive only. It is necessary, however, to beware of applying too literally to suits for nullity under the section in question in this case principles and rules relating to suits for nullity on the ground of incapacity under the old jurisdiction. In such a suit it was, and still is, necessary to prove that at the time of the marriage the particular wife or husband was incapable of consummating the marriage with the other spouse, whereas the section has introduced as a ground of nullity a cause necessarily arising after the marriage which, as PICKFORD, L.J., said in *Napier v. Napier* (otherwise *Goodban*) (4), ([1915] P. 189), was “contrary to the principles of the ecclesiastical law as administered in the ecclesiastical courts.” The particular question with which this House is concerned could only have arisen in the case of a husband who was proved only to be capable of having sexual intercourse at all if some such method of contraception as in question here were adopted. Such a condition of things may be possible in a medical sense, but I think that it is so unlikely in real life that it is not surprising that counsel

were unable to cite any case in which incapacity took such a form. It is clear, therefore, that in relation to the meaning of the word "consummate" the common area covered by suits for nullity on the grounds respectively of incapacity and of wilful refusal to consummate is very small.

Again, the insistence on the procreation of children as one of the principal ends, if not the principal end, of marriage requires examination. It is indisputable that the institution of marriage generally is not necessary for the procreation of children, nor does it appear to be a principal end of marriage as understood in Christendom, which, as LORD PENZANCE said in *Hyde v. Hyde* (5) (1 P. & D. 133) "may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." As regards the phraseology of the marriage service in the Prayer Book this House in the recent case of *Weatherley v. Weatherley* (6) pointed out the dangers of too strict a reliance on these words. In any view of Christian marriage the essence of the matter, as it seems to me, is that the children, if there be any, should be born into a family, as that word is understood in Christendom generally, and in the case of a marriage between spouses of a particular faith that they should be brought up and nurtured in that faith, but this is not the same thing as saying that a marriage is not consummated unless children are procreated or that procreation of children is the principal end of marriage. Counsel were unable to cite any authority where the procreation of children was held to be the test in a nullity suit. On the contrary, it was admitted that the sterility of the husband or the barrenness of the wife was irrelevant. This was laid down as an accepted principle in *D—e v. A—g* (3), in which case DR. LUSHINGTON said (1 Rob. Eccl. 296) :

Mere incapability, however, of conception is not a sufficient ground whereon to found a decree of nullity, and alone so clearly insufficient, that it would be a waste of time to discuss an admitted point. The only question is, whether the lady is or is not capable of sexual intercourse, or, if at present incapable, whether that incapacity can be removed.

As this case formed the basis of the decision of the Court of Appeal in *Coven v. Coven* (1) it will be necessary to examine it closely. When DR. LUSHINGTON said that he apprehended all were agreed that to constitute the marriage bond between young persons there must be the power, present or to come, of sexual intercourse, but that the difficulty lay in the meaning of the term sexual intercourse, and said that sexual intercourse, in the proper meaning of the term, was ordinary and complete intercourse, that it did not mean partial and imperfect intercourse yet he could not go to the length of saying that every degree of imperfection would deprive it of its essential character, he was speaking of a case in which the wife had no uterus at all, and, therefore, no power of conception—hence the reference to mere incapability of conception not being a sufficient ground. But the vagina itself was so malformed as to be a mere *cul-de-sac* measuring, at the extreme, two inches in depth as against the natural depth of four to four and a half inches (1 Rob. Eccl. 301). Evidence also showed (*ibid.*, 303) that it was just possible that a further improvement, though only to a very slight degree, might take place by continual frequent sexual intercourse or by mechanical means, but that no improvement would or could arise to any but a very trifling extent. It was in relation to this state of things thus ascertained or to be ascertained (for, in his judgment, DR. LUSHINGTON said that there was some ambiguity in the evidence and ordered the further enquiry resulting in the precise information quoted above) that DR. LUSHINGTON says, (*ibid.*, 299) :

In one sense of the term, there can be no doubt, namely, that as relates to conception, the malformation is incurable ; but it is to me doubtful whether they mean that it is incurable as to the mere *coitus*. In this difference, I think, lies the true distinction. If there be a reasonable probability that the lady can be made capable of a *vera copula*—of the natural sort of *coitus*, though without power of conception, I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect, and unnatural *coitus*, I would pronounce the marriage void.

That means that had DR. LUSHINGTON been satisfied that the vagina could by natural or artificial means have been extended by two inches or thereabouts he would have been obliged to refuse a decree on the ground that the wife was capable of *vera copula*, the complete absence of the uterus notwithstanding.

A The submission based on *D—e v. A—g* (3) is neatly summarised in the last sentence in the report of counsel's argument in *Cowen v. Cowen* (1) ([1946] P. 37) in these words: "Man has created a malformation by the device and practice of using a sheath," but nothing is left of the argument when it is understood that the key to DR. LUSHINGTON's judgment is that he thought the true distinction lay in the answer to the question whether the malformation was incurable, not as related to conception, but "as to mere *coitus*." He held that a natural malformation having precisely the same result in relation to conception as a sheath would not be a ground of nullity provided the vagina could be penetrated to the usual depth before encountering the malformation.

B The case of *D—e v. A—g* (3) was considered by HORRIDGE, J., in *L. v. L.* (7). This was a case in which before marriage the respondent underwent an operation entailing the removal of the right ovary and of the right fallopian tube and the almost entire removal of the left ovary and of the left fallopian tube which rendered her quite incapable of impregnation, but complete penetration was not impossible. After referring to SHELFORD'S TREATISE OF THE LAW OF MARRIAGE AND DIVORCE, to which we have been referred and on which the Court of Appeal relied in *Cowen v. Cowen* (1), HORRIDGE, J., continued (38 T.L.R. 698):

C Does "a capacity of consummation" mean penetration merely or penetration followed by fertility? The authorities cited in the footnote certainly speak of the procreation of children as being essential to marriage, but the question is whether they refer merely to the capacity to procreate, or to the capacity to do an act which usually results in procreation. The question would be of greater difficulty if it were not for the decision of DR. LUSHINGTON in *D—e v. A—g* (3). In that case the respondent had no uterus and the vagina was very short. If Mr. Bayford's argument were correct, counsel for the petitioner in that case would merely have had to prove that the respondent had no uterus; but the question whether the possibility of partial penetration was a ground for refusing relief was there exhaustively considered, and the decision turned on the impossibility of complete penetration. All that enquiry would have been unnecessary if Mr. Bayford's argument were sound, and in that sense the question was directly involved in the case, and I cannot regard DR. LUSHINGTON's opinion on this point as *obiter*.

D The learned judge then said that the passages to which I have already referred disposed of the husband's case. I am in complete agreement with this judgment. *L. v. L.* (7) was not cited to the Court of Appeal in *Cowen v. Cowen* (1), nor was it cited to the Court of Appeal in *J. v. J.* (8). The facts in the last-named case are indistinguishable from those in *L. v. L.* (7). Both were cases of sterility artificially produced before marriage, but the operation had left the husband in *J. v. J.* (8) able to achieve penetration and emission. I do not think that the decision in that case can be supported. It seems to me that the true view of the matter is expressed in LORD STAIR'S INSTITUTIONS, 1832, 1, tit. 4, para. 6. That learned and distinguished author put the matter thus:

E So then it is not the consent to marriage, as it relateth to the procreation of children, that is requisite; for it may consist, though the woman be far beyond that date: but it is the consent, whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds; as the general end of the constitution of marriage is the solace and satisfaction of man . . .

F I am content to adopt these words as my own.

G The argument of this appeal exposed the morass of difficulties in which the courts must necessarily become involved in applying the principles laid down in *Cowen v. Cowen* (1). It is well known that the use of a sheath is by no means the only method of contraception in common use. I desire to avoid unnecessary detail on this topic. Suffice it to say that the use of the corresponding device of a mechanical pessary was at one point of the argument said to be indistinguishable from the use of a sheath, but at another point was likened to the employment of a douche, which, it was said, would not negative consummation because both were intended to operate after the sexual act was completed, so, it was suggested, was the pessary in the form of a spermatozoal drug inserted before, but operating after, the sexual act. The procurement of sterility, whether temporary or permanent, by a drug taken orally was left in doubt. It was, however, admitted that a rupture of a sheath in the course

of the sexual act on a single occasion would involve that the marriage had been consummated, though unwittingly and unintentionally. That these illustrations are not fanciful is shown by the fact that, during the current sittings, in a suit resembling the present, the decision turned on the fact that the judge accepted the husband's admission that on an isolated occasion there had been a hole in the sheath and the wife's evidence that she herself had not prevented the possibility of conception on that occasion, as the husband alleged, either by wearing a mechanical pessary or inserting some contraceptive jelly.

I am unable to believe that Parliament, by using the word "consummate" in connection with this new ground of nullity, intended that the courts should be involved in enquiries of this sort. Long before the passing of the Matrimonial Causes Act, 1937, it was a matter of common knowledge that reputable clinics had come into existence for the purpose of advising spouses on what is popularly called birth control, and (with all respect to a dictum to the opposite effect by the late LANGTON, J., in the unreported case of *Firth v. Firth* (9)) it is also a matter of common knowledge that many young married couples agree to take contraceptive precautions in the early days of married life. I take the view that in this legislation Parliament used the word "consummate" as that word is understood in common parlance and in the light of social conditions known to exist, and that the proper occasion for considering the subjects raised by this appeal is when the sexual life of the spouses, and the responsibility of either or both for a childless home, form the background to some other claim for relief. On this basis I am constrained to say that, in my opinion, there is no warrant for the decision in *Cowen v. Cowen* (1). The result is that I would dismiss this appeal.

I have to say that my noble and learned friends, **LORD MERRIMAN** and **LORD NORMAND**, concur in this opinion.

LORD WRIGHT: My Lords, I have had the opportunity of considering in print the speech which has just been delivered by my noble and learned friend, the **LORD CHANCELLOR**. I completely concur in it and have nothing to add.

LORD SIMONDS: My Lords, I also concur.

Appeal dismissed.

Solicitors: *William P. Webb* (for the husband); *Treasury Solicitor* (for the King's Proctor).

[*Reported by C. St.J. NICHOLSON, ESQ., Barrister-at-Law.*]

END OF VOLUME TWO

(and of this series of reports for 1947.)



